IN THE HIGH COURT OF LESOTHO

HELD IN MASERU **CRI/T/0010/19**

In the matter between:

REX

vs

MOFEREFERE TEBELLO SENATLA LEJONE **ACCUSED**

JUDGMENT

CORAM: **HUNGWE AJ**

DATES OF HEARING: **3, 8 & 29 June 2020;**
8, 17, 24, 27 & 30 August 2020
3 September 2020

DATE OF JUDGEMENT: **29 OCTOBER 2020**

SUMMARY

Criminal law – Fraud – elements of - what constitutes misrepresentation.

Money laundering - whether proof of predicate offence required- incidence of burden of proof in money laundering - reverse onus - presumption of innocence- impact of – international approach – evidential burden-whether applicable under laws of Lesotho

Expert opinion evidence- what is- admissibility of - whether relevance necessarily qualifies admission of – approach by the court.

Right to remain silent – impact thereof in finding of fact – circumstantial evidence – whether inference of guilt permissible from silence.

ANNOTATIONS

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Holtzhauzen v Roodt 1997 (4) SA 766 (W)

Menday v Protea Assurance Co Ltd 1976 (1) SA 565

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HUNGWE AJ

Introduction

[1] The accused faced two charges, firstly fraud (one count) in contravention of section 68(1) as read with section 109 of the Penal Code Act, 6 of 2010 ("the Code"), alternatively, theft, in contravention of section 57 (2) of the Penal Code Act as read with section 109 of the Code. Secondly, he was charged with contravening section 25 (1) of the Money Laundering and Proceeds of Crime Act, 4 of 2008, as read with section 2 of the same Act, ("the Act"), (eight counts).

[2] At the commencement of trial the evidence of the following Crown witnesses' evidence was admitted into the record by consent.

(a) Paulina Mohlotsane Taoana;
(b) Aliciah Mamolibeli Motsoane;
(c) Motlatsi Kuena;
(d) Nthabeleng Kekana;
(e) Mahlape Malefane; and, later on during the trial, that of the following;
(f) Lehlohonolo Kholoki;
(g) Moselantja Lehana, and;
(i) Bakuena Chopo.

[3] Attached to the admitted statement by Mahlape Malefane was an addendum showing the following information. The first column showed the dates on which sums of cash amounts in the second column were dispatched for banking. The third column shows the actual cash deposits as reflected in the bank statements of the complainant company, Sentebale Gap Holdings and Funeral Services. The fourth column is the difference between what was dispatched for banking and what was ultimately banked, that is the amount lost by virtue of the under-banking. The final column shows who made each deposit on each occasion.

[4] After the witnesses' statements were produced by consent, Ms *Baasi,* for the Crown, moved for the production of the deposit slips from which the amounts in the addendum were extracted. This drew strong objection from Mr *Letompa,* for the accused who indicated that he had not been favoured with the exhibits in advance for him to decide whether or not to oppose their production. The matter was accordingly postponed to 8 June 2020 in order for him to peruse the same and take instructions from his client. On that date, the defence asked for a further postponement arguing that the documentation in issue were too bulky. This was in spite of the fact that parties had ample time, before the date of trial, to exchange all the relevant information in preparation of trial. The Crown opposed the application for postponement. The record shows that at the pre-trial management meeting held in March 2020, the defence indicated that they were ready for trial. The application was duly dismissed.

[5] At the resumed trial the defence opposed the production of copies of bank deposit slips. The court observed that in terms of section 242 of the Criminal Procedure and Evidence Act, 1981, certified copies of bank records were admissible. Crown counsel indicated that the bank official through which they intended to produce certain copies of bank deposit slips was not in attendance. The matter proceeded on the basis that this would be tendered in evidence through the bank official. Mr *Letompa* decided to withdraw from the proceedings. The Court took note of the withdrawal.

[6] After defence counsel's unceremonious withdrawal, the first available witness Seipati Makhele ("Makhele"), testified. She was, at the time of these allegations, employed as an accountant for the complainant company. She described how cash collections were dealt with at her company as follows. At the end of the day, the day's collections would be balanced in the cash books for banking the next day. A bank deposit slip book for the appropriate account to be credited would be

completed. There were two active accounts, Gap Funeral Services account and Gap Holdings account. She produced the deposit slips batches for these two accounts as exhibit 7 and 8 respectively. Both are domiciled at Standard Lesotho Bank, Mafeteng Branch.

[7] She described the standard procedure in place at the office as follows. Cash collection made throughout the day are cashed in and prepared for banking by the clerk, Mahlape, or someone in that office on her behalf. The following day, she would prepare and complete the deposit slips giving a breakdown of the amount making up the cash deposit for that day in respect of each account. She would balance the books of entries in the cash books to the deposit slips. Cash would be counted in the messenger's or the accused's presence. The accused, as the messenger, would take the money for banking on behalf of the company. Upon his return the accused would bring to the office the bank-stamped copies of deposit slips as well as the machine printed cash deposit slip. At times he would, instead, bring only the stamped cash deposit slips stating that the printer at the bank was out of service. His supervisor would confirm that the correct amount had been banked by appending her signature to the bank-stamped deposit slips.

[8] After the witness had given her evidence, the court asked the accused whether he was comfortable to conduct his defence in light of the sudden and unexpected withdrawal of his counsel. The accused indicated that he has always wished to be legally represented and did not know why his legal representative had left him at the deep end. The matter was postponed for the registrar to arrange *pro deo* representation for the accused. On 29 June 2020, trial resumed. Both Mr *Mokobori* and Mr *Letompa* appeared *pro deo* on behalf of the accused.

[9] Under cross-examination Makhele testified that accused's duties as messenger at the complainant company was taking cash for banking. When she joined the company, she found him already engaged in this capacity. She confirmed that the exhibits were the true copies of the actual cash deposit slips prepared by Mahlape. The originals are always left with the bank. The messenger brings the stamped duplicate original copies indicating that the bank had duly processed the deposit. The investigators from the Directorate for Corruption and Economic Offences ("the DCEO") took the duplicate originals cash deposit slip books during investigations.

[10] The witness told the court that because she found the accused in this position of trust, she had no reason not to trust him with the handling of cash. The matter came to light when cheques bounced. An audit firm was called to check the company's financial systems. That company recommended that cash and bank reconciliations be enhanced. This was her remit as the accountant. She was not adhering to this basic book-keeping at this company. When she got down to do the banking reconciliation, serious discrepancies surfaced. She established that the daily collections were not deposited in the same amounts reflected in the cash books. Much lower amounts were deposited. She confronted the accused with her findings before she made a report to her supervisors. Accused was solely responsible for banking daily cash collections. As such no one else was responsible for the under-banking besides the accused. It was up to him to account for the missing money.

[11] Asked to explain further, she told the court that the shortfalls were a result of an elaborate and deliberate scheme to syphon cash out of the company financial system. Mahlape would prepare the cash deposit slips for banking. The accused would cancel these and prepare a fresh one for exactly the same amount. According to her, on the face of it, one would think there was nothing wrong in

the cancellation but on further scrutiny, the reasons for the cancellation would be obvious. A pattern that emerged showed that on each occasion where there was a cancellation, the bank deposit reflected that a much smaller amount than the expected cash deposit had actually been deposited. The cancelled slips were taken by the DCEO.

[12] Quizzed as to why the cancelled deposit slips were not part of the exhibits, the witness explained that they had not photocopied them as they had been asked to photocopy only those deposit slips which reflected shortfalls and not the cancelled slips. She pointed to the fact that the accused, instead of reporting back to Mahlape upon returning from the bank for her to endorse the banking, routinely avoided Mahlape or anyone in her position. He signed for the money and was expected to have the banking slips signed for. The accused avoided this.

[13] The witness fairly conceded that one entry in her schedule dated 27 June 2017 for the sum of M8465-00 signed for by Mahlape had in fact been banked and ought not to have been included in the schedule of the stolen money. The defence took issue with another entry which showed that on 13 April 2017 a sum of M4 875-00 was collected. The defence produced for her comment a document they called "document 3" that they contented reflected that the full amount was deposited. As such it could not be said that there was a misappropriation of M4 000-00 as claimed. The witness explained that the cash deposit slips in their office was not proof of deposit. They had to check that against the bank statements which statements confirmed that in fact only M875-00 had been deposited. She denied that the absence of the bank statement meant that there was no proof of under-banking as she had confronted the accused with the evidence. This document 3 upon which the witness was cross-examined was not produced by the defence. It was difficult to follow the contention in its absence. I had expected that the defence would produce it in the defence case. It was not produced. When

the bank official testified, he was not challenged on this transaction either. Clearly, the defence was satisfied by the explanation given by Makhele. The argument was not persisted with in the closing submissions. The accused did not dispute this evidence.

[14] This witness, Makhele, gave her evidence well. She testified to a straight-forward accounting process. She described how the under-banking was discovered and the basis of the calculation. In the process, she conceded that had she regularly carried out bank and cash reconciliations, as it was her duty to do, the anomalies upon which the allegations of fraud are based would have been discovered much earlier than they actually were. In my assessment she was a credible witness. She had no reason to fabricate or falsely implicate someone in who she had reposed trust as a workmate. Her evidence was well given. Cross-examination did nothing to discredit her testimony.

[15] Lehlohonolo Maseane ("Maseane") is a banker by profession. He is employed by Standard Lesotho Bank where the complainant company's bank accounts are domiciled. He was the Account Executive. Among his portfolio of clients was the Sentebale Gap Holdings and Funeral Services accounts. He testified that a company's representative contacted him by phone over certain discrepancies between the cash deposits and the cash balances on bank statements. He asked the client to put the query in writing. Following upon this advice client provided him with an excel spreadsheet covering the period between April 2017 and July 2018. That excel spreadsheet reflected the dates when specified amounts of cash were expected to be banked and what the bank in fact acknowledged receiving on those dates. He observed that on each occasion, smaller amounts were banked. On each occasion the client's banking was handled by one Lejone. Two bank accounts were involved.

[16] He took it upon himself to respond accurately to the query. He went into the bank's records on the client's accounts and pored over the figures. The records reflected that the amounts banked were far lower than those the client had hoped to be posted by the messenger to its credit. He made a compilation of the confirmation of cash deposit slips to demonstrate how he came to those findings. Gap Holdings account number 9080001692492 slips are exhibit 9 and Gap Funeral Services account number 9080003877155 slips are exhibit 10. He gave a run-down of the amounts deposited into the accounts. He confirmed that the excel spreadsheet prepared by the client coincided with his findings in that the smaller or lower amounts of cash than expected by client were in fact deposited by the same person.

[17] Under cross-examination, the witness explained that the confirmation of cash deposit would not, normally, carry a signature unless a client requested that it be signed. He opined that the client's cash deposit slips must have been altered to conceal the true picture after the cash deposit slip had been issued by the teller. His view was that if the client had been diligent early enough to check the daily deposits against the bank statements, it would have easily picked these discrepancies early because it is not possible to alter the machine-generated confirmation of cash deposit slips that are issued upon completion of the banking transaction. His evidence confirmed the correctness of the under-banking discovered at the complainant company's operations. There was no suggestion that the witness was unreliable or unsure of his testimony. In fact, the defence could not challenge this evidence. Like the previous witness, he gave his evidence well. He was not shaken by cross-examination. There is no reason to doubt the credibility of his testimony. He impressed the court as a candid professional assisting the court in unravelling the truth.

[18] Lejone Morake was a bartender at Josysy Public Bar, a liquor outlet operated by the accused. His evidence was to the effect that sales netted an average of M300-00 per day except on those good days which were weekends coinciding with month end when he could collect between M1000-00 and M1 500-00 a day. He would surrender the cash to Thabo Lejone, the manager, for banking. Thabo Lejone also testified. His evidence was meant to corroborate that of the previous witness in respect of the income commanded by accused's businesses. In addition to that he listed six other businesses that belonged to the accused which he managed on accused's behalf; viz: - Senatla Poultry, Josysy General Dealer; Greenside Tavern; City Brothers food outlet; City Brothers Hair Salon and Lekop Mini Plaza. He was responsible for all corporate banking and securing all trading stock and payment of salaries and wages as well as payment of all sundries due from the business enterprise.

[19] The witness gave detailed estimates of the daily takings for each business unit, each unit's running expenses including overheads and the cost of sales. If one were to calculate the average income for each unit and contrast the figures against the expenses the picture that emerges is that these were small enterprises unable to generate five-digit figures as daily deposits even on the best day, let alone support the revenue streams reflected in the cash deposit slip books. This was the nub of his evidence. He produced the business enterprise confirmation of cash deposit slips as exhibit 11. It was his evidence that the highest cash deposit he made from the daily cash collections was no more than M5 000-00. Consequently, he was unable to confirm that the deposits reflected in exhibit 11 were purely earnings from the operations of the business units.

[20] Under cross-examination the witness admitted that he could not recall every detail of all the deposits he handled and agreed that he had made a deposit of M6 150-00 on 27 March 2018 which he identified by his signature. When he was

shown two other deposits of M7 700-00 and M8 400-00 made on 8 November 2018 and 26 May 2018 respectively, he identified the depositor as the accused, not him. Counsel for the accused put it to this witness that the accused will dispute making these two deposits. In fact the accused never came around to dispute this fact stated by his brother at all. Nor did he dispute the assertion by his manager brother that the deposits in the exhibit 11 series could not be proceeds of the business he managed on behalf of the accused. I will revert to the relevance of this in due course.

[21] The DCEO investigating officer, Mathale Motseko ("Matseko"), described how she and her team received a report. Acting upon it, they sought and obtained a search and seizure warrant which they would execute at accused's business premises. She described how they acted in the search and seize operation and secured certain documents comprising cash deposit slip books as well as Confirmation of Cash Deposit slips used in connection with the accused's business operations. She produced these as exhibits 15(a); 15 (b) and 15 (c). She analysed these at her offices and later called upon the accused to explain certain observations she had made. The accused failed to give her a satisfactory explanation and she charged him with the present charges.

[22] The defence cross-examination was aimed at establishing the legal deficiency of the search and seizure warrant used to seize the exhibits. The defence sought to establish the formal invalidity by suggesting to the witness that whilst the law required the search and seizure warrant to be accompanied by an affidavit setting out the basis of the reasonable suspicion of the commission of a crime and the targeted objects of seizure, the warrant used was not accompanied by such a supporting affidavit. As such, the documents so seized were not admissible as they were unlawfully accessed. The problem the defence faced was that the warrant was not before the court. Therefore, when she maintained that in

fact the warrant complied with the requirements of the law, the defence could not demonstrate that their assertion, rather than that of the DCEO officer was correct. He who asserts has the onus to prove. They failed to tender proof of their assertion. Beyond this, the defence failed to challenge the officer's evidence in any material manner. Her evidence is therefore accepted.
The Crown rested its case.

The defence case

[23] At the close of the Crown case, the defence applied for the release of motor vehicles subject of the money-laundering charge. When this application was dismissed on the turn, another application followed. This second application was for the discharge at the close of the Crown case in terms of section 175 (3) of the Criminal Procedure and Evidence Act. This was dismissed on the turn with the court indicating that the reasons thereof will appear in the main judgement.

[24] The accused elected not to testify in his defence. He, however, called two witnesses in support of his plea of not guilty. Three defence witnesses, Moeketsi Nkunyane, a former manager of his businesses, Moseli Mohanoe, a bartender as well as a director of an accounting firm, one Lebohang Pitso testified. Moeketsi told the court that together with Thabo, he co-managed the accused's businesses. He added important detail to the nature of the accused's businesses, especially Senatla Poultry which he said ran a farm where broiler chickens were farmed and eggs sold. They would sell baby chicken to hotels and lodges. He listed the Avani Hotel group among the customers for eggs and baby chicken. They could sell around 50 crates of eggs at a time. Two schools were counted among their clients as well as other established institutions.

[25] According to him, each business operated its own bank account except for Josysy Public Bar which shared the same account with the general dealer and the hair salon. There were four bank accounts at Standard Lesotho Bank, Mafeteng Branch and two accounts at Nedbank. Josysy Public Bar could, on a good day clock M25 000-00 in sales. He disputed Thabo's assertion that the businesses could not make M15 000-00 on any day. He demonstrated the falsity of this claim by producing cash deposit books for Josysy Public Bar and Senatla Poultry. He pointed to a deposit made on 25 July 2017 of M15 209-00 made into account number 9080004242463 held at Standard Lesotho Bank. It is in exhibit 16(a). He also pointed to the deposit of M17 830-00 made on 24 August 2017 made into account number 90800056309399 also held at Standard Lesotho Bank, Mafeteng. This is in exhibit 16 (b). His last throw of the dice was the cash deposit of M20 000-00 made into account number 9080004242463 domiciled at Standard Lesotho Bank, Mafeteng. He confirmed the depositor of the two deposits into Senatla Poultry account number 9080004242463 in Exh 16(a) as the accused. He was unable to say who deposited the M20 000-00 into the Josysy Public Bar account. It is in Exh 16 (b) which covers the period 3 May 2017 to 16 October 2017.

[26] Ms *Baasi*, for the Crown, subjected this witness to thorough and searching cross-examination. He agreed under cross-examination that although they did roaring business in the sale of eggs and baby chicken with reputable institutions like Avani Hotels, Palace Hotel and such establishments like schools, he had not substantiated these claims with an invoice, delivery note, receipt or any such document. This was in spite of his admission that these institutions do not transact in cash. Although his expertise lay in general agriculture, he remained adamant that he could differentiate between handwriting specimen. He could tell the signatures on the cash deposit slips. However, when he was confronted by evidence that only the accused and his brother Thabo transacted in the business

accounts of the company, he conceded that he in fact had no authority to transact on the accounts. As such he would have no knowledge of the balances held in these accounts. When he was quizzed as to whether he would know the source of the deposits into these accounts made by other persons, initially the witness insisted that it would be from the business operations but later conceded that unless he made those deposits, he had no way through which he could vouch for the origin of the deposits. This witness was clearly partial to the accused, his employer, to the extent that he was prepared to vouch for matters beyond his remit as a manager. I will treat his evidence with caution and skepticism where it is contradicted by other more reliable evidence.

[27] The witness painted a picture of a flourishing and roaring business enterprise where five-digit figure deposits were not unusual. He relied on three deposits where such five-digit figure deposits were made Exh 16(a) and 16 (b) into the accounts held at Standard Lesotho bank. A closer scrutiny of these three will reveal that rather than exculpate the accused, these deposits are a classical example of highly incriminating evidence against the accused. I make this observation in light of the fact that these five-digit deposits were made by the accused on dates very close to the dates he had made a huge under-banking of his employer's money. I demonstrate this fact in the following paragraph.

[28] On 23 August 2017 the accused signed for M31 000-00 which he was assigned to bank into Gap Funeral Services account number 9080003877155. Instead, he only banked M1 000-00. This sum was accepted by teller 2 on 23 August 2017. There is a confirmation of deposit slip that he signed for this deposit as reflected in Exh 7 and 8 produced by Seipati Makhele. Clearly, the M17 830-00 into his Senatla Poultry account is so closely connected to the proven under-banking by the accused of the sum of M30 000-00 of the money due to Sentebale

Gap Funeral Services. The irresistible inference is that this is, in all probability, part of the money stolen from his employer.

[29] I will demonstrate the validity of this conclusion with reference to the other two deposits which this witness claimed to be genuine proceeds of the business run by the accused. The deposit of M15 209-00 into Senatla Poultry account number 9080004242463 on 25 July 2017, we now know, was made by Lejone, the accused. On 14 July 2017 and 21 July 2017, the accused had signed for M68 440-00 and M16 600-00 respectively for banking into account number 9080003877155 on behalf of his employer. Instead, he banked only M440-00 and M600-00 respectively into that account on the same respective dates as shown in Exh 8 series from the bank. Clearly, the accused had sufficient cash to make the deposits adverted to by his witness. This was money due to his employer not him.

[30] I have meticulously analysed the various exhibits in the same manner, collating the information compiled by the complainant company in exhibit 7 with that provided by the bank in exhibit 8 and assiduously compared it with that seized from the accused by the investigating officer in exhibit 15 (a), (b) and (c), exhibit 16 (a) (b) and (c); exhibit 17 and 18. The following pattern clearly emerges. The total cash deposits which would have been made in favour of Sentebale Gap Funeral Services between 13 April 2017 and 19 December 2017 per Exhibit 7 is M1 219 521-00. Instead, the accused banked only M48 841-00. He therefore pocketed M1 170 680-00. From 10 April 2018 and 22 July 2018 accused took a total of M207 871-00 for the purposes of banking into the Gap Funeral Services account number 9080003877155. Instead he banked only M9 694-00 thereby prejudicing his employer of M198 177-00. This account suffered a total prejudice of M1 368 857-00.

[31] In respect of Gap Holdings account number 9080001692492 between April 2017 and March 2018 the accused signed and took a total of M839 870-00 for the purpose of banking. He, instead, only banked M48 580-00 thereby prejudicing his employer of M791 290-00. Taken together with the amounts in para 29 above, the total amount by which the accused defrauded his employer, on the basis of the simple mathematical calculations employed by the court on the available documentary evidence, comes to M2 160 147-00. It is my finding that the difference of M167 853-00 represents what Makhele said was established by a comparison of the company's receipts and the bank statements whose deposit slip books could not be found. As such these could not be tendered in evidence.

[32] The method by which this amount of money was defrauded from the complainant company was suggested by the bank official as a matter of common sense. From the evidence before the bank official, the accused presented deposit slips reflecting the actual amount that he intended to bank on each transaction. After the bank teller has issued the confirmation of cash deposit, the accused would alter the client's cash deposit slip by inserting the figures such as would be consistent with the amount he would have signed for at the company office.

[33] The defence quizzed the bank official on this point, suggesting in effect that his evidence was mere speculation on his part which the court ought not to accept. Clearly, there is no sound basis for attacking this inference in light of the evidence before the court. A close examination of the actual cash deposit slips confirmed the witness' suggestion. I will demonstrate this with an example.

[34] In exhibit 7 (b), the Gap Holdings account number 908000169492, there is a cash deposit slip dated 12 September 2017. The total cash deposited to the account's credit is given as M130-00. Teller 2 confirmed receipt of this amount and date-stamped it. Just next to the bank teller's date-stamp, the numerals "6"

and "3" appear one above the other. This changes the amounts banked to M6 100-00 and M3 000-00 respectively. Clearly, the original figures were 20-00; 100-00 and 10 to give the total of M130-00 accepted by the bank teller. In this instance, the following alterations were effected after the bank teller had issued the deposit slip. "6" was added to "100" and "3 000" was added so that the total sum the accused signed for, M9 130-00, is reflected on that slip which he would take back to the office for endorsement by his supervisors. No rocket science is required to make this inference.

[35] The accused, in this instance clearly forgot to bring down the "9" on the total banked, which is the amount he signed for at the office, for banking. He did not bank M9 000-00 in this case. His sloppy craftmanship is also reflected in the deposit he made two days later on 14 September 2017. He entered an amount of M9 850-00 broken down on the deposit slip as M10; M40 and M9 800-00. The total banked is however given as M9 855-00. From this demonstration, a pattern by which he defrauded his employer emerges. It was easier to pocket only thousands, which were easier to fit into the scheme, rather than hundreds, tens or units.

[36] Notwithstanding the force of this evidence, the defence called Lebohang Pitso, a director from an accounting firm that prepared cash-flow projections for the purposes of making loan applications to the bank on behalf of the businesses. The defence relied on him as an "expert" whose opinion would be tendered to the court to show that the accused's businesses were capable of generating the cash volumes reflected in the deposit slips and would have acquired assets forming the money laundering charges. For this reason, the court must examine the issue whether his evidence is admissible and decide whether indeed this witness is qualified to express the opinion on an issue which the court is unable to determine without the assistance of an expert.

Whether the evidence of the expert witness is admissible

[37] Generally, the relevance of an item refers to its logical tendency to show the material fact for which the evidence is offered.[1] Logical relevance is the *sine qua non* of admissibility and therefore, no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.[2] This rule was stated positively in *S v Gopal* [3] where the court said:

> *"The law of evidence is foundationally based on the principle that evidence is admissible if it is relevant to an issue in the case."*

Relevant evidence is defined in Rule 401 of the Federal Rules of Evidence of the United States of America as follows:

> *"Evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."*[4]

Even if evidence is found to be logically relevant, it does not follow that it will be admissible because the question still remains whether it is sufficiently relevant to be admitted.[5] When evidence is said to be totally irrelevant, it means either that as a matter of common sense it is totally irrelevant, or that for the purpose of trial it is not sufficiently relevant.[6] However, not all evidence found to be sufficiently relevant is necessarily admissible, as there may be some other rule of evidence which excludes it.[7]

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[1] E Du Toit, FJ de Jager, A Paizes, A St Q Skeen and S Van der Merwe *Commentary on the Criminal Procedure Act,* (1997) 24-12.
[2] Section 224 of the Criminal Procedure and Evidence Act, 7 of 1981.
[3] 1965 (3) SA 461 (N) at 475G.
[4] As cited in PJ Schwikkard, ASt Q Skeen and SE van der Merwe, *Principles of Evidence* (1997) 43.
[5] Du Toit *et al* note 1 supra at 24-12.
[6] LH Hoffmann and D Zeffert *The South African Law of Evidence* (1988) 23.
[7] See R v Schaube-Kuffler 1969 (2) SA 40 (R; AD).

[38] An example of evidence that is usually excluded is opinion evidence. Any opinion, whether expert or not, which is expressed on an issue which the court can decide for itself without receiving such an opinion is in principle inadmissible because it is irrelevant. In *Holtzhauzen v Roodt*[8] it was held that the court has to determine whether the subject of the enquiry does raise issues calling for specialized skill or knowledge, since evidence of opinion on matters which do not call for expertise is excluded. The admission of expert evidence should be guarded, as it is open to abuse.[9] The witness claiming to be an expert has to establish and prove her credentials in order for opinion to be admitted.[10]

[39] The expert testimony should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. It should, therefore, only be introduced if there is a possibility of it assisting the court in (i) understanding a scientific or technical issue, or (ii) in establishing a fact either directly or by using inferential as opposed to speculative reasoning. Testimony that falls outside the scope of either of the two is superfluous. In other words, there is no need for an expert's opinion if the court can come to its own conclusions from the proven facts. In such a case the expert's opinion should be disallowed:

> *"If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour with the limits of normality any*

[8] 1997 (4) SA 766 (W) at 772C-D.
[9] Kozak v Funk 1995 CanLII 5847 (SK QB) at 3.
[10] Menday v Protea Assurance Co. Ltd 1976 (1) SA 565 E at 569B-C; Holtzhauzen v Roodt 1997 (4) SA766 (W) at 772G-H.

> *more helpful than that of the jurors themselves; but there is a danger that they may think it does."*[11]

The expert witness should bring specialized knowledge to the court.[12] The specialized knowledge could be either experience, training, or study-based and the testimony must be entirely or substantially based on the specialized knowledge of the expert. Even where such expert knowledge is placed before the court, a court is not bound by, nor is it obliged to accept, the evidence of an expert witness:

> *"It is for (the presiding officer) to base his findings upon opinions properly brought forward and based upon foundations which justified the formation of the opinion."*[13]
>
> *And:*
>
> *"(A) court should not blindly accept and act upon the evidence of an expert witness, even of a finger-print expert, but must decide for itself whether it can safely accept the expert's opinion."*[14]

[40] The court should actively evaluate the evidence. The cogency of the evidence should be weighed "in the contextual matrix of the case with which (the Court) is seized."[15] Should the subject of the assessment not testify, it would render the views of the expert meaningless as it was based on the untested hearsay of the subject of the assessment. In **Shivute** the court, confronted with exactly this situation, held that *"[t]he accused failure to testify stripped the opinion evidence of the expert witness of almost all relevance and weight*."[16] The principle was re-stated in Mngomezulu, where the Court said that unless the psychiatric or psychological evidence is linked to facts before court, it is just "abstract theory."[17]

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[11] R v Turner [1975] 1 All ER 70 at 74d-e.
[12] Holtzhauzen, n9 at 772C.
[13] R v Theunissen 1948 (4) SA 43 (C).
[14] R v Nksatlala 1960 (3) SA at 548C-D.
[15] S v M 1991 (1) SACR 91 at 100a.
[16] S v Shivute 1991 (1) SACR 656 (Nm) at 661H.
[17] S v Mngomezulu 1972 (1) SA 797 (A) at 798 F- 799 *in fin.*

[41] Applying the above principles, which are not exhaustive, I find that the evidence of accounting firm director fails to meet the requirements of admissibility for lack of relevance. First, the issue before the court namely, whether the accused committed fraud at his workplace and used the proceeds of that crime to fund his businesses, are matters which the court is well-able to determine without the assistance of the expert. In respect of the fraud charge, there was no suggestion that his evidence was aimed at refuting the Crown's case. In respect of the money laundering charge, he could not testify to the crucial issue of the status of the origin of the funds in the business whose cash-flow he prepared. Secondly, assuming in accused's favour that his evidence was directed solely at establishing the licit origin of the property subject of the money laundering charges, the explanation of the origins of the property could only be given by the accused to the witness. Third, the evidence he tendered took the form of statements of financial position or cash-flow projections. These were prepared for the purposes of securing bank loans. They were not forensic audit statement seeking to establish an issue in contention at this trial. Fourth, his qualifications were not proven such as to give credibility to the professed status of an expert nor was his area of expertise given. Fifth, the statements do not bear the standard acknowledgement of authorship associated with professional presentations of this nature. Finally, and most importantly, the source documents used to prepare the statements were not made available to the Crown for it to be able to satisfy itself of the basis of the opinion expressed by the witness. On that basis, among other reasons, I find that his evidence is inadmissible.

[42] I turn to deal with the fraud charges preferred against the accused. The facts of the present case require that the court adopt a globular approach in assessing the evidence led in proof of the offences charged. I first have to determine whether on the evidence before the court the first charge on the indictment has been proved beyond reasonable doubt, and if so, determine, whether the second

charge is proved beyond reasonable doubt as well. This approach is appropriate in light of the fact that where money laundering offences are proceeded with on the same indictment as the underlying crimes, the underlying criminal conduct will be generally proved as part of the proceedings to the requisite standard. It would be the basis upon which the inference of the commission of one or other of the money laundering offences will be based.

Whether the crime of fraud, alternatively, theft, has been proved.

[43] The accused faces a charge of fraud in contravention of section 68 (1) of the Penal Code Act, 6 of 2012. That section provides:

> ***Fraud***
>
> *68 (1) A person who deliberately makes to another person a false representation, or conceals from another a fact which in the circumstances he or she has a duty to reveal, with the intention that such a person should act upon the representation to his or her detriment, and thereby causes him or her so to act, commits the offence of fraud.*

At common law, fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual or which is potentially prejudicial to another.[18] The codified offence of fraud expressly includes misrepresentation by conduct as an element. It is necessary therefore to prove that the accused (a) unlawfully; (b) made a false representation or conceals from another a fact which in the circumstances he or she had a duty to reveal; (c) which causes; (d) prejudice to another; (e) with intent to defraud. It is a basic principle of our criminal law that, for it to secure a conviction, the Crown is required to prove all the elements of the offence beyond reasonable doubt.[19]

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[18] JR Milton *South African Law and Procedure – Common Law Crimes* 3rd ed, vol 2 at 707. See also CR Synman *Criminal Law,* 5th ed at 531

[19] S v Smit 2007 (2) SACR 335 (T) at 374i.

[44] The elements of misrepresentation and intent to defraud were dealt with in *S v Mbokazi*.[20] In that case the evidence led made no mention that the accused made an express representation which made it possible for him to withdraw a specific sum of money. THIRION J said the following at 77i – 78a about representation:

> *"Misrepresentation may however take a variety of forms. They may be made by entries in books or records (R v Heyne and others 1956 (3) SA 604 (A)) or by conduct or even by silence when there is a duty to speak. It would seem to me that the remarks of Lord Halsbury in Aaron's Reefs Ltd v Twiss [1896] AC 273 (HL) which are quoted with approval in S v Ressel 1968 (4) SA 224 (AD) are also apposite in the present case:*
>
> *'It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed – by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.'"*

[45] In respect to the fraud charge, the defence did not offer a known defence to a criminal charge beside a bare denial of that charge. In his closing argument on behalf of the accused, Mr *Letompa* criticized the reliability of Crown witnesses' evidence. He pointed to apparent contradictions in certain of the Crown witnesses and invited this court to reject the evidence on that basis. The question for consideration is whether the contradiction is material in nature when consideration is had to the totality of the evidence presented, and not considering the contradictions in isolation. In *S v Mkhole*[21] it was pointed out that

> "The contradictions *per se* do not lead to the rejection of witness' evidence; they may simply be indicative of an error. Not every error by a witness affects his credibility; in

[20] S v Mbokazi [1998] 2 All SA 72 (N)
[21] 1990 (1) SACR 95 (A).

> each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence."

[46] In light of the strength of the case against the accused on this charge, Mr *Letompa*'s predicament is understandable. Besides the testimony of the accused's fellow workers, the defence had to content with an avalanche of highly incriminating documentary evidence authored by the accused himself in the form of cash deposit slips. As pointed out elsewhere in this judgment, the accused misrepresented to his employer that the bank confirmation of cash deposits he made on the employer's behalf reflected that he had deposited the correct amounts of cash that he had signed for. The evidence placed before the court established beyond doubt that on each occasion of his making a cash deposit, the accused was required to present the date-stamped cash deposit slip to either Mahlape or Makhele or anyone in authority in that office. That person would endorse the correctness of the transaction by signing the slips. It matters not that not all the cash deposit slips were endorsed by the employer's representative.

[47] As pointed out in Mbokazi, it does not matter by what means a misrepresentation is made or conveyed or by what trick or device or ambiguous language it is achieved. All those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by devising a strategy by which complainant's agents were deprived of an opportunity to execute their lawful mandate or were misrepresented to, in the sense that they failed or neglected to sign the false deposit slips, that does not detract from the fact that the filing of the altered or forged deposit slip constituted a false representation of facts which the accused intended his employer to act upon.

[48] Thus, taken on a case by case basis, it may well be difficult to establish that any specific deposit slip filed constituted a false statement. However, that is not the proper approach to assess evidence in a given case. In order to decide an evidential issue, a court must look at the totality of the evidence placed before it and decide what picture emerges from the mosaic of that evidence. The circumstances of this case demonstrate that the accused was under a duty to disclose the deposits he made which would be endorsed as correct by the supervisor available on each occasion. Instead, the accused induced them to either endorse false deposits or not to endorse anything by devising a scheme through which he prevented oversight of the banking processes.

[49] The accused clearly knew the difference between the amounts he deposited to the credit of his employer on each occasion and the amounts by which he underbanked, thereby defrauding his employer. It cannot be argued that the accused did not intend to deceive or mislead his employer as to the true facts regarding his nefarious activities. He deliberately underbanked by huge amounts those cash deposits he had signed for and was entrusted to bank. The irresistible inference is that he personally benefitted from this scheme. The prejudice suffered by his employer is that amount by which he underbanked represented by the sum of M2 328 000,00. Where did this money disappear to? The business assets in the money laundering charge provide an only inference in light of the evidence tendered in court.

[50] Like in S *v Mbokazi*, when the accused in this case made alterations to the cash deposit slips each time he under-banked and returned the forged slips to his employer, he impliedly represented to the complainant company, Sentebale Holdings or its representatives in the form of his supervisors to whom he was expected to report that he had correctly banked the full amount that he had signed

for. He knew that this was false as he had under-banked. The complainant suffered prejudice represented by those amounts by which he under-banked. The accused knew that that representation was false because it was made without the complainant's knowledge or consent. He accordingly misrepresented the situation to his employer with the intention to induce the employer to act to its detriment. Had he not misrepresented by altering the figures on the banked stamped cash deposit slips, the employer would have discovered the falsity of the deposits he made and prevented further loss. Thus, although there was no specific statement upon which the employer acted to its detriment it cannot be gainsaid that there was no misrepresentation. Just as Thirion J observed, the accused devised a method by which he perpetrated the fraud. I am satisfied that on the evidence as analysed above, the Crown has proved the main charge of fraud beyond reasonable doubt. I turn to deal with the money laundering charge.

The scope of Money Laundering and Proceeds of Crime Act, 4 of 2008 ("MPOCA").

[51] From the outset, the defence seemed more focused on the money laundering charges. They objected to that charge before a plea was taken. They applied for the release of the assets seized by the DCEO in terms of the Act. In their closing submissions, the defence persisted with the contention that the money laundering charges were defective and that no evidence of money laundering had been adduced during trial. They prayed for an acquittal in respect of both the fraud and the money laundering charges.

I turn to deal with the arguments advanced on behalf of the accused in this respect.

[52] Money laundering is the process by which criminal proceeds are sanitized to disguise their illicit origins. Criminal confiscation and money laundering offences are inter-linked. In investigating what has happened to the proceeds of crime, money laundering offences are likely to be disclosed. Acquisitive criminals will

attempt to distance themselves from their crimes by finding safe havens for their profits where they can avoid confiscation orders and where those proceeds can be made to appear legitimate. Money laundering schemes can be very simple or highly sophisticated. The most sophisticated money laundering schemes involve three stages:

- Placement – the process of getting criminal money into the financial system;
- Layering – the process of moving money into the financial systems through complex webs of transactions often via off-shore companies;
- Integration – the process by which criminal money ultimately becomes absorbed into the economy, such as through investment in real estate.

There are four types of money laundering prosecutions. These are, firstly, those "mixed" cases in which the money laundering can be charged or included on an indictment in which the underlying proceeds-creating predicate offence is included. The sub-sets of this are:

- "Own proceeds" or "self-laundering" where the accused in a money laundering case may also be the author of the predicate offence;
- Laundering by a person or persons other than the author of the predicate offence.

Secondly, there are those cases where money laundering is the sole charge capable of proof or the easiest charge to prove. Again, the sub-sets as indicated in the preceding paragraph subsist. I will not delve into the other two since they are irrelevant for the purpose of this judgement.

A Comparative Analysis of Applicable Legislative Frameworks

[53] Under the United Kingdom Proceeds of Crime Act, 2002, money laundering is defined as an act which constitutes an offence under sections 327, 328 and 329 of that Act or a conspiracy or attempt to commit such an offence. Before the 2002 Act, the UK law treated as separate, offences for drug money laundering under the Drug Trafficking Act, 1994 and non-drug offences under the Criminal Justice Act, 1998. The Crown sometimes had difficulties pin-pointing for the purposes of charging under the appropriate Act, the source of the criminal proceeds. See *R v Ali and Others*.[22] The 2002 Act removed the distinction between drug related criminal proceeds and non-drug related criminal proceeds. This difficulty was not restricted to just the United Kingdom but to South Africa[23] as it was in other jurisdictions around the rest of the world.

[54] Trafficking in narcotics and money laundering are crimes of international concern. The result has been that the United Nations Office on Drugs and Crime ("UNODC") has had to provide a coordinated response to the threat posed by this menace internationally. The United Nations Convention Against Corruption ("UNCAC") is one such international initiative. The Kingdom of Lesotho acceded to this convention in 2005. Regionally, the African Union in response, set up the African Peer Review Mechanism ("APRM") and the East and Southern Africa Anti-Money Laundering Group ("ESAAMLG") both to which the Kingdom of Lesotho has acceded. The literature generated by these important international and regional institutions provide an important yardstick with which to measure and interpret national legislation promulgated in fulfilment of Lesotho's regional and international treaty obligations.

[22] [2005] EWCA Crim 87

[23] The history of the South African Money Laundering and Proceeds of Crime Act, 1998, is similar to the UK Proceeds of Crime Act, 2002.

[55] The formulations of regional and international instruments do not explicitly tell us whether the evidential or persuasive presumption is envisaged in the laws formulated to fight these types of crimes. Nor do statutory laws of national jurisdictions squarely tell us whether one or the other is adopted. However, the UN Legislative Guide for the Implementation of the UNCAC makes it evident that only evidential presumptions that entails a shift of the evidential burden is envisaged.[24]

[56] It was submitted on behalf of the accused that the money laundering charge is defective in that it does not specify the amounts by which the accused allegedly financed his business. Section 127(1) of the Criminal Procedure and Evidence Act was cited for this submission. Despite the fact that this submission had been disposed of when it had timeously made prior to the taking of the plea, it was nevertheless persisted with in closing submissions. There is no substance in this submission. Section 127 (2) (a) of the Criminal Procedure and Evidence Act provides that a description of any statutory offence in the words of the law creating the offence or similar words, shall be sufficient. Section 127 (1) and (2) are relevant to the point regarding the incidence of evidential burden of proof. It provides:

> *"127. (1) Subject to this Act or any other law, each count of the charge shall set forth the offence with which the accused is charged in such a manner and with such particulars as to the alleged time and place of committing the offence and the person (if any) against who and the property (if any) in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.*
>
> *(2) The following provisions shall apply to proceedings in the High Court or any subordinate court –*

[24] The Legislative Guide provides (at 104) that the accused only bears the evidential burden of proof, available at https://www.unodc.org/pdf/corruption/CoC_Legislative Guide.pdf>: See also (2004) 'The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators' at 61 available at: https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

(a) the description of any statutory offence in the words of the law creating the offence or similar words shall be sufficient; and

(b) any exception, exemption, provision, excuse or qualification, whether it does or it does not accompany in the same section the description of the offence in the law creating the offence –

(i) ***may be proved by the accused*** *but need not be specified or negatived in the charge; and*

(ii) if specified or negatived in the charge ***need not be proved by the prosecution.*** *(My own emphasis).*

(3) Where any of the particulars referred to in this Act are unknown to the prosecutor it shall be sufficient to state that fact in the charge."

[57] The defence to a charge of money laundering appears from the wording of the law creating the offence. An accused who demonstrates that the origins of the alleged criminal property is lawful discharges the evidential burden on him to secure an acquittal. It would appear that section 127(2) (b) of the Criminal Procedure and Evidence Act specifically provides for this apparent reverse evidential onus. What the court however should be careful and guard against is to require an accused person to discharge the burden of proof on a standard of proof that is traditionally reserved for the Crown, i.e. beyond reasonable doubt. An accused discharges the evidential burden on him if he adduces evidence which, on a balance of probabilities, cast sufficient doubt on the question of guilt. This approach has been accepted as a reasonable limitation on the traditional presumption of innocence as it does not shift the legal burden of proof to the accused. I will demonstrate.

What is the incidence of the burden of proof in respect of Money laundering offences in Lesotho?

[58] Generally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defence. The prosecutor has to adduce evidence in support of the facts in issue, which pertain to the ingredients of the offence beyond reasonable doubt. The principle of presumption of innocence to which any criminally accused person is entitled compels prosecuting authorities to bear this initial evidential burden. After the prosecution closed its case, the accused is to enter into its defence. It is at this point that the accused will be required to shoulder and to discharge its burden by leading rebuttal or counter-evidence. This is the point whereupon there would be a "shift of burden of proof" also known as the evidential presumption.

[59] More appropriately, this is referred to as the 'placing of an evidential burden on an opponent' or, as 'a shift of the evidential burden of proof from the prosecutor to the accused. The evidential burden of proof would continue to shift in a criminal proceeding on the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side.

[60] In the instant case, once the prosecution is able to establish the ingredients of the offence beyond reasonable doubt having placed sufficient evidence on the guilt of the appellant either by direct or circumstantial or presumptive evidence beyond reasonable doubt required by law, the onus is on the accused to attack or rebut the evidence so presented by a contrary evidence to what the prosecution has laid out. The request of this obligation would not amount to shifting of the burden of proof on the accused to prove his innocence. It is compatible with the presumption of innocence as indicated in various jurisdictions such as the

European Court of Human Rights in *Salabiaku v France*[25] and the Court of Appeals in Hong Kong in *Attorney General v Hui Kin Hong*.[26] This same approach was confirmed in the Nigerian case of *Dauda v Federal Republic of Nigeria*[27] where the Court of Appeal rejected the argument that a shift of the evidential burden of proof to the accused in money laundering prosecutions breached the presumption of innocence under the Constitution of Nigeria.

[61] The Crown in these proceedings have established the following facts which the court has found to be uncontested:

- The accused was a messenger in the employ of the complainant company.
- An audit conducted at his place of work recommended that a daily cash collections and bank deposits be reconciled, (a bank reconciliation).
- This process revealed a huge discrepancy between daily cash collections and cash deposits at the bank. Far less cash than that given to the accused for banking was actually banked.
- The accused, as messenger was solely responsible for banking cash collections on behalf of his employer.
- The accused owned and ran not less than seven small business concerns. An amount of M2 328 000-00 was unaccounted for from the cash deposits with which he was entrusted for banking.

[62] From the above facts, the Crown urged the court to find that the accused is guilty of defrauding his employer. Having established that the accused committed the criminal proceeds-generating predicate offence, the Crown urged the court to find, by inferential reasoning, that the facts supporting the predicate offence

[25] [1998] ECHR 19.
[26] Court of Appeal no 52 of 1995.
[27] [2018] NWLR (Pt 1626) 169.

provide the basis upon which the only inference is that the accused laundered the proceeds of fraud by investing it in his businesses and vehicular assets.

[63] Where the money laundering proceedings are "standalone", there are two ways of proving criminal property, firstly, by proving the type of offending that gave rise to the criminal property and secondly by relying upon circumstantial evidence.[28] The case law of many jurisdictions also recognizes evidential presumption and this is supported by many scholars.[29] In *casu*, this does not arise as the predicate offence is proven beyond reasonable doubt to have been committed by the accused.

[64] The term "money laundering" in South African criminal law, as in Lesotho law, refers to a number of different offences that can be committed in terms of the Money Laundering and Proceeds of Crime Act 121 of 1998 . The concept also overlaps with certain common law (for instance fraud, forgery and uttering) and statutory offences (for instance corruption).

The preamble to the Money Laundering and Proceeds Of Crime Act, 2008 of Lesotho ("MLPOCA") reads as follows:

> *"An Act to establish an Anti-Money Laundering Authority and Financial Intelligence Unit; to enable the unlawful proceeds of all serious crime to be identified, traced, frozen seized and eventually confiscated; and to require accountable institutions to take prudential measures to help combat money laundering."*

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[28] R v Anwoir [2008] EWCA Crim 1354

[29] See Kofele-Kale, (2006), 'Presumed Guilty: Balancing Competing Rights and Interests', 40 Int'l Law, at 940; Betrand de Sperville (1997), 'Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights?' paper presented to the 8th International Anti-Corruption Conference, available at: https://8iacc.org/papers/desperville.html.< (last visited on 20 October 2020) at 4-6. Lilian Y.Y. Ma (1991), 'Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bill of Rights, 21 Hong Kong L.J. at 318: Pedro Gomes Pereira and Joao Carlos Trindade, (2012) 'Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique- Legal analysis at 33; available at >http://www.baselgovernance.org./fileadmin/...Mozambique _Legal_analysis.pdf> (last visited on 20 October 2020)

[65] The section relevant to this trial is sections 25(1) which reads:

> **Money-laundering offences**
>
> *"25. (1) A person commits the offence of money-laundering if the person –*
>
> *(a) acquires, possesses or uses property; or*
> *(b) converts or transfers property with the aim of concealing or disguising the illicit origin of that property or of aiding any person involved in the commission of an offence to evade the legal consequences thereof; or*
> *(c) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property,*
>
> *knowing or having reason to believe that such property is derived directly or indirectly from acts or omissions-*
>
> *(i) in Lesotho which constitute an offence against this Part, or another law of Lesotho which is punishable by imprisonment for not less than 24 months;*
> *(ii) outside Lesotho which, had they occurred in Lesotho, would have constituted an offence under Lesotho law, punishable by imprisonment for not less than 24 months.*

[66] MLPOCA creates three main general money laundering offences:
Firstly, a person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities, commits an offence in terms of section 25(1)(a) if he acquires, possesses or uses property knowing or having reason to believe that such property is derived directly or indirectly from acts or omissions which constitute an offence under this Part which is punishable by imprisonment for not less than 24 months.

Secondly, a person commits an offence in terms of section 25 (1) (b) of the Act if he converts or transfers property with the aim of concealing or disguising the illicit origin of that property or of aiding any person involved in the commission of an offence to evade the legal consequence thereof. Thirdly, a person commits the offence of money laundering in terms of section 25 (1) (c) of the Act if he or

she conceals or disguises the nature, source, location, disposition or movement of the property or the ownership of the property or any interest in the property knowing or having reason to believe that such property is derived directly or indirectly from acts or omissions which constitute a criminal offence within or outside of Lesotho.

[67] In terms of section 2 of the Act, money laundering means conduct which constitutes an offence as described under section 25. A serious offence is defined as an offence against a provision of any law in Lesotho, for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 24 months and includes money-laundering. Such an offence must attract imprisonment of not less than 24 months. In terms of section 25(1) of the Act, money-laundering is an offence that is predicated upon another offence which would have given access to property dealt with in contravention of the section. The Crown charged the accused with fraud, alternatively, theft of a princely sum of M2 328 000,00.

[68] In order to meet the threshold of proof beyond reasonable doubt for an offence under section 25 (1) (a) of the Act, the prosecution has to prove:

(a) acquisition, use or possession;
(b) of property;
(c) which was the benefit of criminal conduct; and
(d) which the accused had the necessary knowledge or suspicion that the property represented a benefit from criminal conduct.

In respect of proof of a crime under section 25 (1) (b) of the Act, the prosecution must prove:

(a) the act of concealing, disguising etc;
(b) in relation to property;
(c) which was the benefit from criminal conduct; and
(d) that the accused knew or suspected that the property represented a benefit from criminal conduct.

The above elements constitute the actus reus of the offences herein charged. The question is whether a proper basis has been laid for this court to find that the Crown led sufficient evidence for a finding of accused's guilt.

[69] The Crown charged the accused of money laundering alleging that he funded his businesses, namely City Brothers Catering, Greenside Tavern, Senatla Poultry, City Brothers Hair Salon, Josysy Bar and Shop and further purchased motor vehicles using the proceeds of crime. The Crown alleged that the accused obtained money through fraud or, alternatively, theft between April 2017 and July 2018. He then put this money through his businesses and acquired assets in an effort to conceal the illicit origin of the proceeds of crime. The submission by Crown counsel was that the accused's election not to give any evidence cannot save him from conviction even assuming that he was entitled to his constitutional right to remain silent.

I proceed to examine the import of the accused's election to remain silent.

Accused's silence

[70] The accused has not adduced any evidence in answer to the Crown's case and has elected to remain silent. He is not obliged to give any evidence. That right is enshrined in the Constitution. The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain

silent and may not be compelled to make any confession or an admission that could be used in evidence against that person.[30] It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of MADALA J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*[31] when he said the following:

> *"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."*[32]

[71] In *Ephraim Masupha Sole v The Crown*[33] the Court of Appeal of Lesotho, in dealing with the question of circumstantial evidence at page 39 quoted HC Nicholas (a former Judge of Appeal)'s essay titled "*Two Cardinal Rules of Logic*

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[30] Section 12 (7) of the Constitution of Lesotho provides that

[31] 1998 (11) BCLR 1362 (CC); 1998 (4) SA 1224 (CC)
[32] Ibin at para 22
[33] C of A (Cri) 5 of 2002

in Rex v Blom" which appear in Fiat Justitia (Essays in Memory of Oliver Deneys Schreiner) who wrote

> *"…[n]o person who is tried for a criminal offence shall be compelled to give evidence at the trial."*
>
> *"Where the facts are such as to call for an explanation by the accused and he does not give one, the trier of fact may conclude that any hypothesis consistent with his innocence should be discarded as not reasonably possible."*

The learned author was concerned with the process of reasoning which is to be applied when considering the circumstances in which an inference of guilt may be drawn from circumstantial facts. He concludes his essay with the following sentence (at 328):

> *"In investigating other possible inferences [i.e. inferences consistent with the accused's innocence], the field of inquiry may be limited by the fact that the accused has given an explanation, or by the fact that he has failed to give an explanation where one was called for in the circumstances."*

[72] The Court in *Sole* went on to point out that the above statement accorded with sound legal principle and with authority. See *S v Mthetwa.*[34] In considering whether the proved facts exclude every reasonable inference save the one sought to be drawn (*R v Blom* 1939 AD 188 at 202-3) regard may be had to accused's failure to testify. This is however not to say that such failure gives rise to an inference of guilt in itself; it is merely one of the circumstances to be taken into account in establishing whether the accused's guilt has been proved beyond reasonable doubt. As to the submission that the accused had the constitutional right to remain silent, the learned judge reasoned thus:

> *"We understood the implication to be that, as a matter of law, no adverse inferences should be drawn from the appellant's failure to testify as he was merely exercising his constitutional right to remain silent. The appellant undoubtedly had a right to remain silent. But he was also entitled to testify. His failure to do so cannot be ignored as a*

[34] 1972 (3) SA 766A at 769 B-C.

matter of course. It is a factor to be taken into account and its significance depends on the circumstances of the case."[35]

[73] The facts regarding the charge of money laundering have been traversed above. In the present case, the prosecution for money laundering is based on proof of a predicate offence of fraud. The accused did not offer a defence known to the law with respect to this charge. Put in another way, the facts regarding the predicate offence remained undisputed as found in the above analysis. It follows therefore that in order to determine whether the Crown has tendered proof of the crime of money laundering beyond a reasonable doubt, the court must determine whether there are other reasonable inferences that can be drawn on the facts including the fact that the accused failed to give an explanation when the circumstances clearly required him to do so. The facts established in evidence are that the accused defrauded his employer of a huge sum of money in excess of two million maloti. He was employed as a messenger. At the same time he ran businesses. The evidence showed that those were not huge enterprises but small to medium enterprises which could not rate in five-digit figures in daily sales. Yet there were instances of such deposits. His employees claimed that it was possible to bank such sums of money. We were not persuaded by these witnesses as they were proved to be unreliable in their evidence.

[74] The evidence was that there were huge cash deposits which could not have been proceeds of sales from his businesses. To crown this, the accused did not offer an explanation himself as to the source of his wealth when the evidence clearly showed that he underbanked his employer's daily collections. The accused chose not to take the court into his confidence about this strong circumstantial evidence. Normally where someone is accused of serious wrong-doing, remaining silent amount to a clear acknowledgement of consciousness of

[35] Sole note 11 at para [80].

guilt on that person's part. It is the only reasonable inference to be drawn, when all the circumstances of the case are weighed in the balance.

Disposition

[75] In the present case, the sums of money he stole were such that his life-style would have considerably changed and the mismatch between his lawful earnings at Sentebale Gap Funeral Services would have inevitably attracted unwanted attention as to the source of his new found wealth. In order to disguise the criminal origin of this wealth, he opened these several businesses to clean up his ill-gotten wealth. In our view the Crown has established the accused's guilt beyond reasonable doubt.

Accordingly, he is found guilty as charged in respect of both fraud and money laundering.

SENTENCE

[76] The accused has been found guilty of fraud and money laundering. It was submitted on behalf of the accused that the following factors constitute extenuating circumstances in this case. In *R v Biyana*[36] extenuating circumstances were defined as "any fact associated with the crime which serves in the minds of reasonable man to diminish, morally albeit not legally, the degree of the prisoner's guilt". The factor or circumstance must be related to the commission of the crime. This was confirmed in *R v Fundakubi*[37] where the court stated:

[36] 1939 EDL 310 at 311
[37] 1948 (3) SA 810 (AD) at 818

> *"No factor not too remote or too faintly or indirectly related to the commission of the crime, which bears on the accused's moral blameworthiness in committing it, can be ruled out from consideration."*

This definition has become the gold standard definition of extenuating circumstances in South African jurisprudence. Extenuation affects the moral guilt but not the legal guilt of the accused which remains a distinct finding of fact. The following factors, it was submitted, constitute extenuating circumstances:

- that the accused has always attended court without fail;
- that he has never interfered with Crown witnesses or police investigations;
- that he never exhibited contemptuous behaviour towards the court;
- that his witnesses described him as a person of good and humble character.

[77] These are factors peculiar to the accused. It is every citizen's civic duty to attend court and to comply with every order of court binding on him including bail conditions, where one is an accused person. They have no bearing on the commission of the crime. He exhibited his loyalty to a citizen's civic duties after the commission of the crime. In order to constitute an extenuating circumstance, a factor must be related to the commission of the crime. In the present case, one could argue, as an example, that the accused was exposed to temptation by handling large amounts of money without appropriate supervision. I therefore find that there is no substance in the submission that the factors advanced by counsel on accused's behalf constitute extenuating circumstances.

[78] Counsel for the accused made the following submissions in mitigation:

- that the accused is a first offender;
- that as the first born in the family, he looks after his siblings;
- that he cooperated with the DCEO throughout the investigations and religiously attended court till his conviction and remand into custody;

- that he showed remorse.

The first three factors are mitigatory. I am unable to find that the accused exhibited any degree of remorse which this court is entitled to credit him with. Generally speaking, in a crime involving the causing of financial loss, remorse is exhibited by such factors as:

- tendering a guilty plea;
- making full restitution to the victim of crime before conviction or,
- where this is not practical, offering to make restitution sometime in the future or;
- making a full disclosure of the outstanding proceeds of crime so as to allow recovery of the same; or
- verbally apologizing to the victim of crime in court as a sign of contrition.

In *casu,* these factors are conspicuous by their absence. The accused never expressed himself in respect of the allegations, thereby putting the Crown to the strict proof of each and every allegation of fact. He could have saved everyone's time, if he wanted to, by coming clean but he chose not to. Of course, it is his constitutional right to adopt that stance. He will not be punished for not tendering a plea of guilty since he believed that he was not guilty. He cannot however expect the court to find this conduct as an expression of remorse because it is not.

[79] In assessing sentence the court must strike a balance between three competing interests. These may be summarized as follows:

(a) Punishment must fit the crime. The more serious the offence, the stiffer the sentence as society expects that as a containment policy, serious crimes must

attract stiffer sentences. A repeat of the same conduct constituting the crime should be treated as an aggravating feature in a case.

(b) In its assessment of sentence, a court must consider the personal circumstances of the offender. A repeat offender will be punished more stiffly than a first offender. Where possible a first offender ought to be kept out of prison by selecting an appropriate non-custodial sentence. Youthfulness, where it played a part, should be considered as a highly mitigatory factor.

(c) Society's interest in the punishment of crime must be taken into account when assessing sentence. Public interest in this regard includes the traditional purposes of punishment i.e. deterrence, retribution, protection and rehabilitation.

[80] I must express my gratitude to both counsels for the defence for their effort in representing the accused. It was the best effort in the circumstances of this case. I say this because I find that there are more aggravating factors than mitigating ones. The court found that the amount of prejudice suffered by the complainant is in excess of M2 328 000, 00. That is indeed a staggering amount by any standard which the complainant suffered as a result of the fraud perpetrated by the accused. The immediate impact of this proclivity was that the company's cheques bounced. The persistence with which he committed the fraud prevents this court from making a finding that his personal circumstances are mitigatory. The court would be failing in its duty to mete out stiff penalties where this is called for as in the present case where the aggravating circumstances far outweigh the mitigatory ones. His personal circumstances must recede into the background in light of his attitude to the harm he inflicted upon the complainant for this carefully planned and executed crime.

[81] One can only imagine the other effects once the company cheques are dishonoured by the banks. Its image suffers, it goes without saying. The future of the company as a viable entity is brought into doubt. The clear consequence of this is anxiety throughout the company as well as its clients. The nature of the company's operations, funeral services, are such that should it fail to render the services, the grief of the aggrieved clients is further compounded. There was however no evidence that this was indeed what happened. What is critical to this court is that by stealing from a funeral services company, the accused exhibited heartless greed and shameless disregard of the plight of those who would be directly affected by his dishonest frolic.

[82] The amounts involved in this case qualify this crime as a grave and grand crime. The accused stole from his employer. By so doing, he committed a serious breach of trust reposed in him as an employee. Besides earning his regular salary, he helped himself to huge amounts of cash over a period covering two years. This was a crime motivated by greed not need, hence he opened businesses using stolen money. Clearly, had he not been caught out all indications are that he would have continued on this criminal escapade which he had habituated himself to. After he stole for the first time, the accused had an opportunity to reflect on his behaviour. He could have stopped. If he had, one would have understood that this was an isolated instance of temptation. He chose to continue on this downward spiral of crime. He then chose to cover his criminal tracks by committing another serious offence – money laundering. In order to sanitize the proceeds of his crimes, he opened businesses through which he sought to make the origins of his ill-gotten gains legitimate then they were not.

[83] Society has a vested interest in the punishment of crime. It has done this through legislative instruments such as the Penal Code Act and the Money Laundering and Proceeds of Crime Act. Both Acts regulate the crimes for which the accused stands convicted. The Kingdom of Lesotho joined the international community by adopting legislative measures to combat money laundering which is a crime of international concern. In this regard, Parliament has set ten years as the mandatory minimum sentence which the courts must impose on anyone convicted of money laundering. This is a clear reflection of the abhorrence with which this crime is regarded in the Kingdom as in the international community of nations.

[84] The reasons for the stiff mandatory sentence is easy to appreciate. Money laundering is generally difficult to detect. Yet it is a conduit of other serious crimes involving drugs, narcotics and terrorism. Happily, none of these other serious crimes are implicated in this case. The evidence before this court shows that this was a simple case of money laundering. The accused sanitized the criminal origins of money by setting up local businesses and acquiring vehicular assets. Those motor vehicles have been seized. That was the accused has been forced to disgorge his ill-gotten profits of criminal conduct. Whether what has been seized will fully recompense the complainant is doubtful. The accused however remains civilly liable for the complainant’s financial loss.

Consequently, the court is of the view that the following sentence will meet the justice of this case.

Count 1- Fraud: 10 years imprisonment of which five (5) years is suspended for a period of five years on condition that the accused is not, during this period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

Count 2 – 9 Money Laundering: (All counts treated as one for the purpose of sentence): 10 years imprisonment.

The sentence in count one is ordered to run concurrently with that in the remaining counts.

… … … … … …

C. HUNGWE A.J

For the Crown: Adv. Baasi
For the Accused: Adv. Letompa and Adv. Mokobori