

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

ACRES INTERNATIONAL LIMITED

APPELLANT

and

THE CROWN

RESPONDENT

Held at Maseru on 6 - 15 August 2003

CORAM:

Steyn, P

Ramodibedi, J.A.

Plewman, J.A.

JUDGMENT

Summary

Appeal - Common law bribery - Reasoning by inference - Approach to be adopted - Sentence - Considerations when imposing sentence on a corporation.

THE FULL COURT:

[1] This is an appeal from a judgment by Lehohla C.J. convicting the appellant on two counts of bribery. The appellant, Acres International

Limited (“the appellant”) was tried in summary proceedings in the High Court. Initially the appellant was indicted with others. After a separation of trials was decreed, a new indictment was framed. In this indictment the Crown alleged in count 1 that the appellant, over the period June 1991 to January 1998, paid CAD 493,168.28 into a Swiss Bank account held by one Z.M. Bam (now deceased and hereinafter referred to as “Bam”) who thereafter transferred the said sum, or part thereof, to Mr. Sole (“Sole”) who was the Chief Executive Officer of the Lesotho Highlands Development Authority (LHDA) and a civil servant in the employ of the Lesotho Government at all material times in question. The respective roles of Bam and Sole will be explained below.

Count 2 alleged payment by the appellant, over the period 31 January 1991 to 3 April 1991, of CAD 188,255.48 into a Swiss Bank account held by the wife of the aforesaid Bam namely one Margaret Bam (“Mrs. Bam”) who thereafter transferred “or was supposed to pay/transfer the said sum” or part thereof to Sole.

The Court *a quo* sentenced the appellant to a fine of M22,058,091-00. It has appealed against both convictions and sentence.

[2] The events which gave rise to the trial in the High Court arise out of the Lesotho Highlands Water Project, (“the L.H.W.P.” or “the project”). The governments of Lesotho and South Africa concluded a Treaty to govern all the activities associated with it. It was described by this Court in its judgment in the matter of *Sole vs The Crown* (C of A (CRI) 5/2002) delivered on the 14th of April 2003 as being :

“[O]ne of the biggest and most ambitious dam projects in the world, which entailed *inter alia* the construction of the Katse Dam in a remote and inaccessible part of the highlands of Lesotho”. The Court goes on to say: “Initially the project involved the building of the essential infrastructure, such as access roads and accommodation facilities. One of the main aims of the project was the delivery of water to the Republic of South Africa. The delivery of water to South Africa necessitated the construction of a delivery tunnel. Another object was the generation of electricity and this entailed the construction of a

hydropower complex and a transfer tunnel from Katse to Muela where the complex was to be built. All of this required substantial funding, most of which came from outside agencies such as the World Bank, the European Commission and the African Development Bank”.

The Court proceeds to describe the management and supervisory structures of the project as follows:

“The implementation, supervision and maintenance of the LHWP was entrusted to the Lesotho Highlands Development Authority (“the LHDA”), a statutory body created by the Lesotho Highlands Development Order 23 of 1986, pursuant to and in terms of a Treaty between the governments of Lesotho and the Republic of South Africa. The LHDA was governed by a board of directors but the day to day running of its affairs was in the hands of its chief executive officer. Another body, the Joint Permanent Technical Commission (“the JPTC”), subsequently known as the Lesotho Highlands Water Commission, which was composed of representatives from both Lesotho and South Africa, acted in an advisory capacity to the LHDA and also monitored the progress of the project.”

It need only be added that the project gave rise to a large number of civil engineering contracts, said at one point to number as many as 500.

A number of large international firms of civil engineers were from time to time engaged in work for the project.

[3] Sole is a qualified civil engineer who on the 1st of November 1986 was appointed as the first chief executive of the L.H.D.A. He served in this capacity until he was suspended in October 1994 and after a departmental inquiry was dismissed from this post in October 1995. He sought to review this decision through the courts, but these proceedings were dismissed in October 1996 with reasons given in January 1997. The other principal actor on the scene was Bam. He had practised as a civil engineer in Lesotho during the eighties. As will be seen below he was the founder of "Lescon" a company registered in Lesotho with which Sole had also been involved as a subscriber to its memorandum of association. The case for the Crown rested on the premise that the appellant funded the payments in

question with the intention of bribing Sole and that for that purpose it paid him through intermediaries namely Bam and Mrs. Bam. There was evidence that as Bam was paid by appellant he (in turn) and over a significant period - some six years - paid over to Sole in the region of 60% of what was paid to him by the appellant.

[4] Although both the Crown and the defence called several witnesses, the material facts of this case are either common cause or only peripherally in dispute. In so far as the facts that are common cause are concerned we record the important concessions quite properly made by Counsel for Acres. It was conceded that the payments made by Bam to Sole were funded by payments made by appellants to Bam and were made unlawfully. Nor was it in dispute that the Crown evidence, particularly the evidence concerning the flow of payments, placed an obligation on the appellants to explain the payments to Bam. There was therefore an evidential burden on the appellant to explain such payments. Counsel also conceded that without an acceptable explanation the inference could properly be drawn that

appellant was guilty of bribery.

[5] The facts outlined in summary below which were relied on by the Crown are the following:

5.1 From 1980 to 1986 the appellant was engaged as a sub-consultant on the Lesotho Airport contract - a contract not connected with the project. Lescon (Pty) Ltd of whom more later - was also engaged as a sub-contractor on the same project.

5.2 In March 1987 and under Contract designated in the project works as Contract 19, the appellant provided key technical personnel to line positions within the LHDA, the statutory body which was charged with the implementation, supervision and maintenance of the

LHWP. In so doing the appellant's staff members employed in Lesotho effectively became part and parcel of the LHDA, supervising the contracts on behalf of that body. More importantly, it is common cause that at the commencement of the construction phase of the Katse Dam, a major part of the contract, three of the five senior executive positions within the LHDA were occupied by appellant's personnel.

5.3 After securing Contract 19 the appellant engaged the services of Lescon as its agent. Bam held the controlling interest in this company. At the end of 1988 Bam left Lesotho to take up full time employment with the Botswana Housing Corporation in Botswana. He remained there until February 1991.

5.4 By letter dated 28 April 1989 the appellant was notified by Sole that it would be invited, on a sole-sourced basis - a concept to be explained below - to put up a proposal for the continuation of its services under a new contract to be designated Contract 65. Indeed it had as early as March 1988 identified the securing of this contract as an

objective to be pursued. The appellant was the only entity invited to submit such a proposal.

5.5 In February 1990 the appellant was formally invited to submit its proposal which it did. Contract 65 then became the subject of negotiation. Prior to its final conclusion a memorandum of understanding (MOU), a preparatory step to the conclusion of a final contract was, prepared.

5.6 On 28 July 1990 the appellant was issued a conditional letter of intent by Sole. Thereafter the appellant mobilized its resources to enable it to implement its obligations in terms of the proposed contract. Sole himself authorised such mobilization and gave the undertaking to pay the appellant. This was in terms of a letter dated 14 August 1990. The Treaty had provided for the establishment of a supervisory body known by the acronym J.P.T.C. (Joint Permanent Technical Commission). It was a joint monitoring and approvals body that had to ensure compliance with the Treaty obligations. The powers of this body and its volatile relationship with the L.H.D.A.

will be commented on below. However it should be noted that at the time of the issue of the M.O.U. and the letter of intent these actions as well as the authorisation of appellant's mobilisation had not received J.P.T.C. approval. Indeed the events recorded above occurred despite the fact that Contract 65 had not been formally concluded. Even the appellant's fees had not yet been agreed.

- 5.7 Whilst negotiations concerning Contract 65 were proceeding the appellant was also discussing the conclusion of a representative agreement (abbreviated hereinafter to RA) with Bam. The initial proposal (made early in 1989) was a contract between Lescon and the appellant. However in the final analysis and on the 23rd of November 1990 an agreement was concluded between the appellant and an "entity" called Associated Consultants and Project Managers (A.C.P.M.) The terms, the status and the legality of this agreement are crucial to the determination of this appeal.
- 5.8 Shortly after the conclusion of this agreement and on the 29th November 1990, an advance part-payment of the

fees in respect of services rendered under the - as yet unsigned contract 65 - was paid to the appellant on the authority of Sole and without J.P.T.C.'s sanction. The Maloti portion paid as above was M250,000. This was followed by the payment in Canadian dollars (C.A.D.)1,160,000 on the 4th of January 1991.

5.9 On 31 January 1991 the appellant made a payment into a Swiss Bank account in Geneva nominated by Bam in the representative agreement and belonging to Mrs. Bam in an amount of C.A.D. 180,000. This payment is the subject matter of count 2 referred to above.

5.10 It was only on 21 February 1991 that Contract 65 was formally concluded. Sole signed it on behalf of the LHDA. It was however only approved by the J.P.T.C. on the 14th of March 1991.

5.11 One Roux, a forensic accountant in the employ of Price Waterhouse, Coopers, gave evidence confirming the flow of funds from the appellant to Bam and from Bam to Sole

and prepared a flow chart Exhibit K4, demonstrating graphically how these funds moved from the appellant to the accounts held by Bam and his wife, and from there to a Swiss bank account held by Sole in a regular or defined pattern. All these payments were effected in Switzerland using Bam's Swiss accounts in Geneva. Bam shared these payments with Sole on an approximately 60/40 basis, 60% being allocated to Sole. Bam transferred these funds to Sole either on the same day or within a few days of his receipt of the funds from the appellant.

5.12 The arrangement referred to above endured until January 1997 when Sole finally lost his Court challenge against his dismissal. In July 1997 the appellant reduced its payments to Bam to \pm 40% of what it had been paying up to that time. Bam no longer shared these payments with Sole. The appellant ceased paying Bam when the latter died in 1999 though it made further payments (or a further payment) to Mrs. Bam.

[6] It was the Crown case then that the only reasonable inference to be drawn from all the facts is that the appellant knew that it was paying Bam

to use its money to bribe Sole and that it used Bam as a conduit to camouflage this fact. The Crown contended that the RA between the appellant and Bam was a device to disguise the true purpose of appellant's payments, being corrupt payments to Sole.

The Crown further argued that the evidence established that the pattern of payments into Bam's Swiss Bank account demonstrated that it was used as a vehicle inter alia to transfer bribe monies to Sole. These payments, all of which came from and were paid into overseas accounts, were never disclosed to the L.H.D.A., the J.P.T.C. or anyone involved in Contract 65.

[7] The true meaning, purpose and effect of the RA referred to above will be dealt with later in this judgment. However the Crown also contended that the payments by the appellant to Bam and from Bam to Sole cannot be justified on the basis of work performed by Bam in terms of the R A. The Crown pointed to the fact that no documentation such as invoices were produced in evidence to justify the payments in question and that no one

within either the LHDA or JPTC knew that Bam was the appellant's agent.

Indeed no records relating to this R A, such as were normally maintained by appellant, were produced. None of the senior executives employed on the project who were appointed by parties other than appellant, knew of this arrangement. Neither did any of them observe Bam performing any of the obligations he undertook in the R A. Thus, e.g. Mrs. Sophia Mohapi who was the Financial Manager and later the Deputy Chief Executive of the LHDA and Mr. Putsoane, later to act as C.E.O. of the L.H.D.A. testified that Bam did not at any time involve himself in activities of the kind described in the agreement.

[8] It is common cause that Sole occupied an influential position at all material times until after his dismissal in October 1995. He could therefore influence decisions improperly benefitting contractors or consultants including the appellant. It was indeed through him that matters in respect of which the J.P.T.C. and the World Bank had to concur were channelled and - as would appear below - his failure to honour these obligations

caused tensions and ultimately recriminations. It seems incontrovertible that he could improperly benefit those he favoured. Moreover these bodies and others tended to have acted on recommendations emanating from him. He was indeed a very influential member of the Board of the LHDA.

[9] On the Crown's case by the 23rd November 1990 the appellant found itself in a difficult situation. It had been working for four months without remuneration. During that period it was in effect financing Contract 65. It was contended that the conclusion is unavoidable that the appellant needed Sole's help in order to obtain payment for work done. The payment it received took the form of the advance payments referred to above.

[10] The evidence of the Crown witness Mr. Putsoane referred to above, established that Sole was certainly well disposed towards the appellant and favoured it. Moreover, despite the fact that Article 9 of the Treaty which established the LHDA required JPTC approval in writing for any decision by

the LHDA, more particularly a decision involving the expenditure of funds, Putsoane's evidence pointed to non-compliance by Sole of JPTC procedures in so far as the appellant was concerned.

[11] In the light of the above, it is clear that the single issue which this Court is called upon to decide is whether the appellant has discharged the evidential burden it accepted. Before analysing the evidence it will be appropriate to outline the approach the law adopts in the evaluation of evidence in a case such as the present.

[12] The court a quo was faced with a case based on circumstantial evidence. As in all such cases it was, in significant measure, obliged to reason by inference. It is not in dispute that it was proper for the court to do so, though appellant contends for a different result. Defence counsel argued that the court misdirected itself in certain respects. We will presently consider the arguments advanced on this ground but it is necessary before doing so to make some observations of a general nature

relating to the correct approach to circumstantial evidence and the need to reason by inference. The problem is by no means unusual and the rules to be applied are in no sense new.

[13] For generations courts have found the tools they need in the canons of logic and it is to these that they look for guidance so as to avoid error. The classic formulation of the rules followed in courts in Southern Africa are found in the decision of the South African Appeal Court in the case of R v. Blom 1939 AD 188. But over the years there has been a tendency (particularly by counsel “harassed by strongly inculpatory evidence”) to overstate and misapply the proper principles. This tendency formed the subject matter of an essay published in a work “Fiat Justitia (Essays in Memory of Oliver Deneys Schreiner)” by H.C. Nicholas - a judge of the Supreme Court of South Africa and later a distinguished member of the Appellate Division in South Africa. We will, in what follows, refer to the author - as we think is proper - as the learned judge.

In the essay the rules relating to inferential reasoning are discussed and their relationship to the underlying onus resting on the prosecution in criminal cases is considered. What is important is the concept as a whole.

This is well summarized by the learned judge at the conclusion of the essay. It is, however, necessary first to set out what is termed the second rule in the Blom case. This is that when reasoning by inference, a conclusion on the basis that the inference sought to be drawn is consistent with all the proved facts, can only be drawn if the proved facts are such that they exclude every reasonable inference save the one sought to be drawn.

The conclusion to the essay is as follows: -

“The second rule of logic in Blom is a salutary rule, whose field or application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of

fact *must* convict the accused. It does not license speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused. In investigating other reasonable inferences, 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.”

[14] Given the circumstances which arise in this case and in the light of certain arguments addressed to this Court, it is important to underline - as is explained in the essay - that it is a fallacy to suggest that each factor (or proved fact) must or can be taken separately, and if then each of them is possibly consistent with innocence it must be discarded. It is well recognized in the authorities that the court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. On the contrary a court must weigh the cumulative effect of all the proved facts taken together and it is only after that has been done that it must consider whether it is entitled

to draw the conclusion which it is asked to make on the basis of inference.

[15] The learned judge's essay is today generally regarded as a correct analysis of the law also in Lesotho and certain further quotations therefrom seem apposite. What we would quote are the following extracts:

At page 320 it is stated:

“In a criminal case the ultimate proposition to be proved, the *factum probandum*, is the guilt of the accused. Where the case is one depending upon circumstantial evidence, the *factum probandum* is established as a matter of inference from the proved facts, the *facta probantia*. But a *factum probans* may itself be a proposition to be proved by way of inference from other facts.

In considering whether the *factum probandum* has been established in a criminal case depending upon circumstantial evidence, the trier of fact must decide two questions: whether the inference of guilt can on the proved facts logically be drawn; and whether guilt has been proved beyond a reasonable doubt. The latter requirement does not necessarily mean that ‘every

factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied.”

Further at page 321 it is said:

“In order to apply the second rule (in Blom), the trier of fact must consider what other possible inferences can be drawn from the proved facts. If any of them is a reasonable inference, then the inference sought to be drawn cannot validly be drawn.

This does not mean, as has sometimes been suggested, that the trier of fact is entitled to speculate as to the possible existence of facts which, together with the proved facts, would justify a conclusion that the accused may be innocent.”

[16] The essay also contains a reasoned but firm warning against improper speculation and guidance as to how a court must deal with a

situation where the circumstances called for an explanation from an accused person and the explanation is not satisfactory. A further quotation will serve. At p325 the learned judge says:

“The investigation into other possible hypotheses is not an academic exercise. It is conditioned by the nature of the task in hand - the practical business of deciding a criminal trial. Legal reasoning works in an atmosphere and not in a vacuum. And in considering whether there are other reasonable inferences, the fact that the accused has given an explanation, or the fact that, although an explanation was called for in circumstances, the accused failed to give one, may considerably narrow the inquiry.

Where the accused does give an explanation, whether extra-judicially or in the evidence at his trial, ‘its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence’.

If the explanation is a reasonable one, then unless it is negated by the State (or it can be said that it cannot reasonably be true), the inference of guilt cannot be drawn. If the explanation is negated by the State, then ordinarily the

court will not investigate the possibility of other inferences not mentioned by the accused.”

[17] The subject of inferential reasons was extensively debated in the court a quo. The learned Chief Justice charged appellants with “compartmentalising” the facts proved. Appellant’s counsel denied in argument before this Court that they had done so and indeed argued for the proposition that the evidence should be considered as a whole. That this is so is beyond dispute. It has been so held by this Court in the case of Moshephi and Others v R (1980-1984) L.A.C. 57. In that case Marais A.J.A. said the following at p.59:

“The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is

appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

See also S. v. Hadebe and Others 1998 (1) SA C.R. 422 (A). It is necessary only to add that it may transpire in the evaluation of the evidence as a whole that particular facts may be of a neutral character to any matter under consideration. There are in the present case examples of this. Such facts are not then disregarded. They are considered but found not to be of assistance in the process of inferential reasoning.

[18] This leads to a further observation. As will be seen presently the court a quo admitted and relied on certain evidence which in our view was inadmissible. An appeal court’s approach in such circumstances is to consider the importance and effect of such evidence and weigh it in the overall balance. This is well illustrated by the following quotation from the

case of Rex v De Villiers 1944 AD. 493. At p.509 Davis AJA said as follows:

“To sum up: though the learned Judge thought for the moment that the inadmissible evidence was important, upon careful analysis I am satisfied that it was wholly superfluous for his finding upon the true issue and thus was of itself of little or no importance. I am further satisfied that the evidence of the guilt of the accused upon the whole case was so strong that in any event, without the inadmissible evidence, the learned Judge must inevitably have convicted. The accused having consequently suffered no actual and substantial prejudice as the result of the admission of exhibit H, though the first question of law reserved must be answered in his favour, that cannot affect his conviction; the second question is answered in favour of the Crown.”

[19] With this preamble in mind we turn to the judgment of the court a quo.

That it is expressed in robust and at times even colourful language is clear. But this does not of itself give any reason for criticism. The simple fact is that the record shows that the appellant was given a fair trial and that there is not the

slightest indication or suggestion to the contrary. Indeed when debating the issues in this Court appellant's counsel readily conceded that the appellant had indeed been given a fair trial. In its judgment the court a quo carefully considered all the evidence that had been put before it. For reasons which we will give presently, it is not essential to this judgment that this Court concern itself with every submission made regarding the court a quo's judgment. It is however appropriate that we deal with certain aspects. Perhaps the most important comment to be made, is that the court a quo included in the facts which it took into account evidence relating to payments made by other contractors which found their way to Sole. These are illustrated in Exh. K4 . This is the diagram depicting the flow of funds from appellant to Bam and from Bam to Sole. The firms or contractors so referred to need not be identified in this judgment. But assuming that this evidence would, as against those contractors, show or suggest that they too bribed Sole, the evidence was inadmissible against appellant and is prejudicial to it. The admission and reliance thereon constitutes a misdirection. The Crown argued, we suspect without great conviction, that the evidence was relevant as showing that Bam was "a bribe merchant" which it then said must have been known to the appellant. As to the latter - there is no evidence at all that appellant was aware of the fact that Sole was being bribed

by other contractors. This seems a very strained argument, but even if correct, though in our view it is not, there is no basis for the admission of evidence showing misdemeanours by other persons as evidence against the appellant. Another contention that the court misdirected itself refers to its reliance upon a submission by the Crown that the R A concluded by appellant with the entity A.C.P.M. (being the proposal made by Bam as to who the representative should be) involved a contravention of the Exchange Control Regulations in Lesotho and South Africa and that appellant was “aiding and abetting Bam to contravene the law”. It is not necessary to decide this issue because in our view the value of this evidence and the impact on the inferences sought to be drawn are of such little weight that they can safely be ignored. The same considerations apply to the Crown’s contention that tax evasion had taken place. It can for present purposes be accepted that these findings by the court a quo amounted to misdirections. If so they were inconsequential.

[20] Even if, therefore, the court a quo did misdirect itself in these respects the question before us is whether, without these considerations, its ultimate conclusion as to the guilt of the appellants was correct. See R v De Villiers

(supra). The present appeal as it developed constituted a rehearing of the issues and, in the result this Court has found itself obliged to evaluate the evidence afresh. We have however also re-examined the court below's findings on the credibility of the witnesses and considered to what extent they can be supported on the record.

[21] We now proceed to consider the question whether the R A was a genuine contract or whether it was a mechanism to channel funds to Sole via Bam. The relevant facts and circumstances surrounding the conclusion of the R A are the following:

21.1 Acres had been involved in engineering work in Lesotho from 1986 onwards. From March 1987 it was involved under Contract 19 in providing personnel to the L.H.D.A. for engineering services required for the L.H.D.A.

21.2 Lescon, a limited liability company of which Bam was the effective owner and Sole a subscriber to its memorandum of Association, was appointed as the

appellant's agent after Contract 19 was awarded to it. The purpose of this appointment was to render services in respect of that contract. No written agency agreement is extant. However there is evidence that Bam was involved in late 1988 via Lescon in connection with the award of engineering contracts to other Canadian firms. As we have also seen the appellant had targeted contract 65 as a desirable extension of its services to the project already in 1988 and that on the 3rd of April 1989 Sole advised the World Bank of his proposal to "sole source" the appellant to render engineering services under Contract 65. It is not without significance that Sole had visited appellants' senior management in Canada prior to this and that they were well acquainted with him and he with them.

- 21.3 "Sole sourcing" has been described in the evidence as follows: In contrast to the process called competitive bidding, sole sourcing authorises only one consultant being invited to submit proposals or tenders. This sole-sourcing process was seen as particularly appropriate in the case of Contract 65

because it was considered and described as a logical extension of Contract 19. The latter was primarily concerned with the design of tenders and the preparation of tender documents, especially for the main construction activities. Contract 65 was directed at the provision of services for the establishment and implementation of the construction of the Katse dam and the tunnels - both delivery and transfer tunnels - required to facilitate the flow of the water to the south. What Contract 65 involved was essentially the secondment of appellant's employees to act as officials of the L.H.D.A. - a fact of some importance to the question of whether the execution of Contract 65 required the supervision of an outside agent.

[22] We now come to deal with the circumstances in which the relevant RA was concluded between the appellant and A.C.P.M. We will examine this document with reference to the description of the agent; how the parties themselves evidenced the document; the nature of the obligations undertaken by the representative and to what extent Bam or A.C.P.M.

discharged those obligations. We will also consider the arrangements concerning where and how the payments were made and what the relationship was between the amounts paid to Bam and the services he was to render as well as the changes that were made after Sole's term of office finally came to an end.

[23] It is common cause that the fifth and final draft of the RA was concluded on the 23rd of November 1990. However negotiations in regard to its terms - particularly as to whom, how and where payments had to be made - were conducted over a period of some months. In so far as the identity of the payee under the RA was concerned it is also an admitted fact that the first draft submitted by D.W.1 - a Mr. Hare (appellant's principal witness) - to Bam, provided for the appointment of Lescon as the representative. This was only to be expected as Contract 65 was a successor to Contract 19 and would have required similar services from the representative. However at Bam's request the identity of the representative was altered to A.C.P.M. - an entity that was never formally constituted and

was unknown to anyone other than to Bam and the appellant. A further observation to be made is that during the negotiations changes were made only to the clauses relating to payments, the amounts thereof and their structure. This despite material developments in the relationship between appellant and L.H.D.A. in so far as the conclusion of Contract 65 was concerned.

[24] The use of the name A.C.P.M. in the RA did of course have the effect of disguising the true identity of the person appellant wished to use as a representative and the fact that money was being paid to Bam. Indeed the appellant knew that it was paying Bam and not A.C.P.M. The witness Hare said so and the documentation disclosed by the appellant demonstrates that the appellant knew the true identity of the payee when it made payments to Bam. Despite Hare's protestations to the contrary, it is certainly a reasonable inference to be drawn from these facts that the change from identifying Lescon - known to be Bam's firm - as the appellant's representative - to A.C.P.M. was deliberately designed to

obscure the true identity of the person to whom the appellant was making payments. Indeed had it not been for the discovery of Sole's Swiss banking records, the link between the payments made by the appellant to Bam and thence to Sole would never have been discovered.

[25] Counsel for the appellant contended that the Court should not draw the inference that this substitution was a deliberate effort at concealment on the part of the appellant and Bam. However, Hare's evidence that the fact of the concealment of Bam's identity did not arouse his suspicion was correctly in our view rejected by the trial court.

[26] This inference is buttressed by other facts. At the time this contract was negotiated it was a notorious fact that the records of Swiss banks were secret and were regarded as a safe haven for "hot" money. Whilst reasons could be advanced why payment in a foreign currency, such as the then dominant currency - the US dollar - should be nominated as the monetary unit for payments under the contractual obligations, no acceptable reason

was advanced why the payments should have been made to a non-existent agency called A.C.P.M., in a nominated Swiss bank account number. The objective of this device could certainly sustain the inference that it was intended to hide the true identity of the recipient. It is therefore a reasonable inference to be drawn in the absence of an acceptable explanation that the underpinning of these payments was an illegal and not a regular or transparent transaction. Hare, who was involved in the structuring of the RA, must have been aware that Bam, who was insistent on the concealment of his identity and who required that he be paid into numbered accounts in Switzerland, was making the appellant a party to an unlawful transaction.

[27] There is also evidence that the parties themselves viewed the transaction as one that had to be recorded in communications between them in obscure or opaque terminology. Thus Bam writes to Hare in a handwritten communication dated the 4th of June 1991 as follows:

“Dear Mr. Hare,

Following our discussions earlier today please accept this letter as confirmation that:

- Submissions be made on a three monthly basis;
- the address for submissions has changed twice from the original, to the one communicated to you o/a 26 May, which works properly I confirmed today.

Thank you,

Yours sincerely

Z.M. BAM.

(A.C.P.M)” (emphasis added).

The court a quo, in our view correctly, rejected Hare’s protestations that the relationship with Bam was untainted and that payments were made to him as remuneration for lawful services rendered as a representative. This communication is a further and devastating demonstration of Hare’s mendacity. What possible purpose could there be for using the term

“submissions” if this was a transparent payment made pursuant to a valid and regular agreement and in accordance with acceptable international practice?

[28] That there was an attempt to present this agreement as regular and in conformity with the normal provisions of agency contracts is evident from the request by Hare for a bank guarantee from A.C.P.M. Whatever purpose could such a guarantee have served? A.C.P.M. did not exist as a corporate structure. It was only a designation of convenience and proceedings for the enforcement of such a guarantee would have been fruitless. Indeed, in view of the fact that A.C.P.M. did not exist, the appellant could not and did not make any payment whatsoever in terms of the RA.

[29] We come to deal with the obligations undertaken by the “representative” in the RA. This in effect was Bam, because Hare conceded that he was the person whose services were under consideration. They are contained in Schedule 1 of the contract and remained unchanged

from draft 1 to draft 5 - the final and signed contract. This schedule reads as follows:

“Schedule 1 The Services

ACPM shall perform for ACRES the following services with respect to the Lesotho Highlands Water Project - Technical Assistance Contract Engineering 2 - 1990-1996.

1. Keep ACRES informed of all developments with respect to the services.
2. Keep ACRES informed of general conditions and developments in Lesotho which could affect ACRES interest in undertaking the services or which could adversely affect ACRES ability to complete the services in a fully effective manner.
3. Make ACRES known to and assist if necessary in registering ACRES with appropriate agencies and staff.
4. When requested by ACRES, collect appropriate documents and information for forwarding to ACRES.
5. Promote ACRES interests in Lesotho by presenting brochures and other publicity material to appropriate officials.
6. Assist ACRES in seeking, negotiating and securing a contract or contracts in Lesotho for the performance of the services.
7. Assist ACRES in the conduct of business, financial and other affairs of ACRES in Lesotho so as to meet the legal requirements of the Government of Lesotho and properly and lawfully to minimize taxes and other public impositions to be met by ACRES.
8. Provide to ACRES support facilities in regard to office, secretarial, accounting, banking, telecommunication and other such matters as mutually agreed from time to time.
9. Assist ACRES maintain good relationships with LHDA and assist in

expediting payments due to ACRES in accordance with its Agreements with LHDA.”

[30] The genuineness of the agency contract would be best evidenced by proof that the services to be delivered by this mandate:

- i) Were genuinely required by the consultant concerned;
- ii) Could be delivered by the representative;
- iii) Were in fact delivered; and
- iv) Generated remuneration that was commensurate with the anticipated and the actual service delivery.

30.1 Mr. Putsoane testified that:

- (i) There was no need for the services described in the agreement to be delivered by a representative acting on behalf of the appellant.
- (ii) There was no record of any involvement of A.C.P.M. in respect of Contract 65 and he was unaware of the existence of such an entity.
- (iii) He was unaware of Bam ever performing any such duties for the appellant.

30.2 In so far as 30.1 (i) above was concerned the witness testified that the appellant would not have such a need as they were as a team integrated into the L.H.D.A. Their “top man” was the closest to the C.E.O. (Sole) at a working level. They - the L.H.D.A. team - worked

in the same offices with them and there was no need for the services of a representative. Moreover by the time the R.A. was signed in November 1990 the terms of and the parties to Contract 65 had already been settled - all that remained was for the contract to be signed. Mobilisation had already taken place and the effective date of that contract was 1 August 1990.

- 30.3 The defence case as put to the witness was that what the agency agreement obligated its representative to do was to provide “political intelligence”. This was the explanation appellants gave to the World Bank in an inquiry that body initiated. It was to this mast that also Hare nailed his colours. Counsel for the appellants urged us to find that paras (1) and (2) of the RA obligated the representative to provide such a service (“political intelligence”). In so far as par. 1 is concerned we are unable to construe the contract in this strained and artificial manner. Thus, as in par. 2, the agreement defines the duties to relate to the “services”, the undertaking thereof and the ability to complete the services in a “fully effective manner”. This paragraph makes no explicit provision that would oblige the agent to “deliver political intelligence” as it would have done if that had been the intention. It was conceded that in respect of paras 3,5,7 and 8 no evidence was adduced that Bam/ACPM ever delivered any services. We are unable to find any acceptable evidence that appellant needed, or that Bam supplied the services specified in paras 6 and 9 in respect of “the services to be provided under Contract 65.” There is thus simply no obligation in the agreement on him to provide the one service the appellant alleges he was obligated to do. The terms of this schedule read as a whole were completely inappropriate for the services the appellant suggested Bam was to perform.

30.4 Appellant's counsel sought in the main to place his reliance on the witness Hare's evidence. It has already been recorded that the court a quo rejected his evidence as unworthy of any credence. We referred above to aspects of Hare's evidence that speak of mendacity. A careful reading of his evidence and that of the witness Brown tendered to support him - and also rejected by the court a quo - convinces us that this rejection was fully justified. Their strenuous attempts on the flimsiest of grounds to advance the defence case, seriously undermined their credibility. Hare's insistence, in the light of the evidence of the payments by Bam to Sole (as evidenced by Exh. K4) to defend Bam's conduct and to continue to assert that he was a man of the highest integrity was both indefensible and unacceptable.

[31] It was also contended by the appellant that:

- (1) It was standard international practice to appoint representatives;
- (2) Bam was eminently suitable to fulfil this function;
- (3) The cost of his remuneration was in any event built into the contract price and did not have a material impact on the profitability of the services rendered by him; and that
- (4) Bam indeed did render services in terms of the RA.

[32] For present purposes it will be accepted that contractors do use representatives when they

work on foreign soil. However, it is clear from the evidence that this is not an invariable practice. It speaks for itself that no honest contractor will appoint an agent unless it needs one. Argument was addressed to us that the manner in which the contract price was structured meant that the costs of the employment of a representative in casu had no impact on the profit generated for the appellant. Even on this assumption, we find it difficult to accept that a contractor would enter into a bona fide representative agreement which would oblige it to pay what equates to 25% or more of its profit, merely because it was not for its account, unless it had good reasons to do so. Whether the charge-out of C.A.D. 682,000 (rounded off) was wholly, partially or not at all debited to the account of the contractor, it had to be paid by someone. If it was for the account of the L.H.D.A. and ultimately for the World Bank or other development agency, it would be most reprehensible for a contractor to levy such a charge unless it had reasonable grounds for believing that it needed such services and would receive value for such a substantial investment.

[33] Moreover it becomes incomprehensible that it would proceed and continue for six years to do so when it received little or no benefit from the arrangement. We have considered the references counsel advanced in argument to sustain the contention that Bam did on isolated occasions give advice which related to an issue that was of some concern to the appellant. However on such evidence as is on record, conceded by counsel for the appellant to be flimsy, we have no doubt that Bam rendered no significant services for the appellant under the RA. Bearing in mind that Contract 65 was already "in the bag" when the RA was concluded (this is common cause), Bam could have played no role in securing the contract and in fact played no such role. During the first 3-4 years that the appellant was engaged on this contract, Bam was in full-time employment in Botswana. The Crown evidence justifiably relied on by the court below, made it clear that in view of the appellant's

extensive and lengthy involvement in Lesotho during the eighties, there was no need for a representative and that Bam did not render the services mandated in the RA.

[34] It follows that for these reasons the appellants failed to discharge the evidential burden that a representative was necessary, that Bam was an appropriate person to be appointed or that he rendered any significant services. Moreover the substantial payments made to him were in any event out of all proportion to either the contracted services or such services as he may have rendered independently of his obligations under the RA.

[35] We now deal with the “pattern of payments” from the appellant to Bam, its significance and the attempt to explain the inferences that could be drawn from these payments.

As can be seen from Exhibits K1 and K4, and as admitted by the appellant, the monies paid by the appellant into the Swiss Bank accounts were generally divided between Bam and Sole on a 60% allocation to Sole; 40% being retained by Bam. The transfers made to Sole by Bam were generally made on the same day as he received the payments from the appellant. From January 1997 these regular payments, being a monthly honorarium of CAD 7 800, were reduced to CAD 3 500. This constituted approximately 40% of the originally agreed amount as provided in the RA.

It will be remembered that Sole had been first suspended in October 1994 and then dismissed from his post in October 1995. He mounted a court challenge which was dismissed in October 1996, but reasons were only given in January 1997. Counsel for the Crown contended that the reduction

in the payments to Bam at this time is supportive of the inference that the appellant knew, not only that their payments were being channelled to Sole by Bam, but that the appellant also knew how these payments were to be divided.

[36] The evidence of the Swiss Bank records and of the forensic report (K1) of the Crown witness Roux would, in the absence of an acceptable explanation, constitute damning support for the Crown's contention. The court a quo found accordingly. A concerted effort was therefore mounted to challenge the correctness of the inference drawn by the court a quo with reliance upon the contents of Exhibit "L" as supported by the evidence of the defence witness Gibbs. This evidence was adduced in an attempt to prove that the payments were reduced in conformity with the provisions of the RA and it was urged upon us for the same reason.

Appellant contended that the reduction was triggered by the fact that at that time (January 1997) the percentage payable to Bam by the appellant exceeded the 3.6% provided for in the RA. However, the attempt to address this discrepancy was only effected by Mr. Gibbs on the 3rd of July 1997 when he wrote a memorandum to the appellant's representative in Maseru that it "does not seem feasible" to continue to pay A.C.P.M. CAD 7 826,09 per month. He suggested reducing the amount to CAD 3,500 per month as from January 1997, to be paid every three months.

[37] A reading of Gibbs' evidence leaves us unconvinced as to the sustainability of his reasoning for the reduction, for its timing and the quantum thereof. It is an extraordinary co-incidence that the reduction is mooted in July 1997 - some 6 months after Sole's review application had been disposed

of and his appeal against such decision abandoned and became operative retrospectively from January 1997. Sole was as from that date no longer in a position to perform any services for the appellant. However, this co-incidence is compounded by a second one. The quantum of the reduction equates to that share of the appellant's payments that Bam had previously channelled to Sole. Moreover, the RA itself does not appear to us to justify a reduction in the payments as contended for. There is therefore considerable force in counsel for the Crown's submission that the reduction is arbitrary and not made in conformity with the RA. Certainly, the evidence of the witness Claasens called by the Crown and accepted by the court a quo is strongly supportive of this contention.

[38] For these reasons it is our view that the court a quo was entitled to infer as it did; i.e. that the reduction in the payments was effected because Sole was no longer in a position to favour the appellant in the services it was obligated to perform or might in future be called upon to perform. The appellant could not cease to make payments to Bam because it was clearly obligated to do so in terms of a contract to which it was a party - albeit not for its avowed purpose.

[39] We should add that the fact of these coincidences between the RA and its de facto external manifestations do not necessarily point to the legality or probity of its purpose. As we pointed out above, the agreement did obligate the appellant to pay as per its terms. This conformity does not establish the validity of the RA. It is one of the neutral manifestations referred to in the analysis of the law set out above. These could not be accorded any weight one way or the other.

[40] The Crown also relied upon a range of other factors that it contended supported the inference to be drawn that the appellant made the payments to Bam, knowing that they were, at least in part, intended to be used to bribe Sole. Amongst these were the occasions Sole departed from the prescribed procedures of the Treaty and the contractual obligations and controls that it imposed on the L.H.D.A. and its chief-executive. Some of the approvals in the processing of Contract 69 were given by Sole without regard to these procedural checks. The minutes of the J.P.T.C. reflect their discontent with the rough-shod manner in which Sole disregarded the monitoring and approval safeguards in the process of the approvals, the mobilisation, the issuing of the M.O.U. and the letter of intent to the appellant. The Crown also pointed to the chronology in which various events occurred as a supportive consideration for its contentions. These events can certainly be construed as indications that Sole had maneuvered the approvals and the payments thereunder in such a manner so as to place the appellants at risk. The unacceptable delays to obtain signed approvals must have been particularly irksome and exposed the appellants to the unilateral exercise of discretion by Sole. However, these and the other less weighty considerations do not in our view require separate debate and determination. We have also considered other submissions and arguments advanced by counsel for the appellant. An example of these is the reliance counsel sought to place on an inadmissible affidavit by a Mr. Witherall a senior employee engaged on the project by the appellant. This and similar submissions do not in our view justify individual debate.

[41] We say this, because we have acted as this Court laid down in Moshephi and Others v Rex (supra). We have done “a detailed and critical examination of each and every (significant) component in (the) body of evidence”. We have “step(ped) back a pace and considered the mosaic as a whole”, to ensure that we do not err and “fail to see the wood for the trees”. We are of the view

that the appellant did not succeed in discharging the evidential burden that rested upon it to advance a satisfactory explanation for the substantial body of evidence that points to the fact that it was a party to the bribery of Sole.

[42] The inferences which the trial court was entitled to draw must now be related to the two charges as contained in the indictment. As appears above, the Crown chose to separate the payments made to Mrs. Bam from those made to Bam. They accordingly charged the appellant on two counts. It is clear that in the light of our findings the conviction on count 1 is upheld and the appeal on this count is dismissed.

[43] There is however a significant distinction between the two counts. It was established by the investigation of the witness Roux that the monies paid into Mrs. Bam's account as particularized in count 2 were never, either in whole or any part thereof, paid to Sole. It is common cause that this payment was in due course transferred to another Swiss bank account in the name of Bam where it remained for some 7 years until in 1998 it was transferred to an account in London. At this point the money trail disappeared.

[44] This means that in respect of this count one of the most significant elements of the Crown case admitted and proved in respect of count 1, is missing. One of the factors the Court is entitled to take into consideration in drawing an inference of guilt on count 1, is the link between the payments to Bam and from him to Sole. The question is, can the Court infer an intention to bribe Sole on the part of the appellant, when in contra-distinction to all the other payments, this, the first and largest single payment did not, either in whole or in part as far as can be determined on the evidence go to Sole.

[45] The Crown's submission was that in the absence of an explanation for this payment the Court

a quo was right in all the circumstances in inferring that the same intention must be ascribed to this payment as to the payments charged under count 1.

Counsel referred us in this regard to the definition of the common law crime of bribery as formulated by the courts in Southern Africa. The leading case in this regard is R. v Patel 1944 A.D. 511. At p.521 Feetham JA endorses the following statement as a “sufficient working definition of bribery”:

“It is a crime at common law for any person to offer or to give to an official of the State, or for any such official to receive from any person, any unauthorised consideration in respect of such official doing, or abstaining from, or having done or abstained from, any act in his official capacity.”

We were also referred to the Chapter “Bribery” in Vol. 12 of the American Jurisprudence, 2 ed. P.752 par. 6 where the following is said:

“The existence of a corrupt intent to influence, or be influenced in, the discharge of official duties is a necessary element of the crime of bribery. The corrupt intent need not exist in the mind of both parties to the offer, solicitation, or passage of money, however. It is sufficient if the intent exists in the mind of either, the one having the corrupt intent being guilty.”

[46] The indictment is quite specific. It specifies that the appellant made the payment with the intention to bribe Sole. It is clear, therefore, that in order to prove the guilt of the appellant on count 2, the Crown has to prove that when appellant made the payment of CAD180,000,000 into a Swiss

bank account, it intended the payee to transfer all or some of those monies to Sole. It is not necessary for proof of the conviction of the crime of bribery to prove that the benefit was in fact handed over. The crime of corruption is completed the moment an agreement or even a mere offer is made to hand over the benefit (see Snyman, Criminal Law, 3rd Ed. 362 - 365 and the cases cited *op. cit.*).

[47] While it has been established that the appellant's explanation - namely that this too was a payment in terms of a valid RA - has been found to be unacceptable, the question is whether on the evidence viewed as a whole, the only reasonable inference to be drawn is that when the appellant made this payment it intended all or some of the benefit to go to Sole. This may have been and probably was the intention. However, can a court on the evidence find this proved beyond a reasonable doubt? Counsel submitted that it has been proved that all the other payments were made with this intention and that this enhances the probability that this payment was also made for this purpose - more particularly since no explanation for this payment has been given.

[48] The latter consideration is certainly one which has considerable significance. The former contention is, however, a double-edged sword. Why does Bam not transfer any part of this money to Sole if it was the true objective of the payment, and then does so promptly on receipt of all subsequent payments in a consistent and defined pattern? The first payment is made several months before the other payments, it is a single, discreet and distinctive payment unrelated to the other transactions which are the subject of count 1 and which we have found to have been paid by the appellant with an intent to corrupt Sole.

[49] Having “step(ped) back a pace” and “having considered the mosaic as whole” - see the Moshephi decision cited above - we concluded that on the facts of this case viewed as a totality, a piece of the mosaic is missing. It is our view that we cannot hold that the only reasonable inference to be drawn is that when making this payment the appellant intended the payment or part thereof to be paid to Sole. We therefore find that there is a reasonable doubt that this was the appellant’s intention in making this payment.

[50] In the result the conviction on Count 1 is confirmed and the appeal is dismissed. The appeal on Count 2 succeeds and the conviction is set aside.

[51] We come to deal with sentence. The appellant was sentenced to pay a fine of M22,058,091.00. This amount represents what the court a quo said was appellant’s profit under Contract 65, plus the amount appellant paid to Bam as alleged in counts 1 and 2. These two counts were taken together for purposes of sentence.

[52] It is an established principle of our law that sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. An appellate court will not interfere, save where there is a material misdirection resulting in a miscarriage of justice or the sentence is so unduly severe as to compel interference.

[53] It is also trite that when sentencing an accused person the court must have regard to the triad consisting of the crime, the offender and the interests of society. As Holmes JA put it in S. v. Rabie 1975 (4) SA 855 (A) at 862:

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

[54] The appellant in its grounds of appeal complained that the court a quo failed to take into account the consequences of the bribery conviction on the appellant. It was submitted that the court overemphasised what it perceived to be aggravating circumstances and the need for deterrence.

[55] Before dealing with these criticisms, we need to consider the approach a court should adopt when seeking to measure an appropriate punishment for a corporation. It is our view that as a matter of principle the approach of the trial court in having regard to the profit the appellant made in respect of the tainted transaction when determining its sentence cannot be faulted. Support for such an approach is to be found in the decision of the South African Court of Appeal in S. v. Scheepers 1977 (2) S.A. 156 (A). At p159 the Court says the following (in translation):

“In my opinion the imposition of a fine is a particularly appropriate punishment in a case like the present where the appellant’s unlawful conduct was directed towards monetary gain. Where materialism as motive plays a big part in the unlawful conduct it is usually a hard blow to the offender if he has to part with his illegally gained profits or if that which he held out as a prospect to himself is converted to a loss. This complies with the requirements of retribution as well as deterrence.”

[56] It would be wrong however if, in having regard to such a consideration, a court were to ignore

other relevant considerations and to settle upon a monetary sentence simply equated to the financial benefits reaped by a convicted corporation.

[57] Similarly, and once again as a matter of principle, the trial court's approach in having regard to the need to consistency between offenders convicted of the same crime cannot be faulted. In Molapo v. Rex 1999-2000 L.L.R. and L.B. 316 at 321, this Court said the following:

“However, in determining sentence the following factors must in our view also be taken into account:

1. Offenders who have the same or similar degrees of moral guilt and involvement in the commission of a crime, should, in the absence of circumstances that justify discrimination, be treated equally. The Court's impartiality and fairness could be seriously questioned if marked disparities between offenders whose moral guilt is indistinguishable from one another were to occur. The fact that the appellant's co-conspirators were each sentenced to 2 years imprisonment and that the appellant's guilt is certainly no greater than theirs is therefore a compelling factor in determining his sentence.”

[58] In a case such as the present where a very lengthy period of imprisonment has been imposed on Sole - a natural person - it is a well-nigh impossible task to settle upon a monetary punishment that would equate to a sentence of e.g. 12 years imprisonment. We believe the court's attention should be more properly directed at determining a fair punishment having regard to all the relevant considerations, both aggravating and mitigating.

[59] In embarking upon this process, we believe that we are obliged to do so afresh. We say this because of two considerations. Firstly, we have only convicted the appellant on one of the two counts on which he was convicted in the trial court. Even though that court took the two convictions

together for purposes of sentence, the degree of the moral guilt of the appellant must be regarded as diminished to the relevant extent.

[60] Secondly, the trial court, with considerable justification, took into account several aggravating circumstances which it listed in its judgment. Having done so, it concluded as follows:

“As has often been said, it is easier to reach a verdict in a criminal trial than consider what would be the right punishment to suit the offence taking all factors pertinent to the case into account, including the post-verdict and a new procedure altogether that has to take into account the personal circumstances of the accused. In this regard I paid particular attention to Mr Alkema’s submissions. The question of conviction alone is a far-reaching punishment, because Acres will be unlikely to secure contracts funded by the World Bank. While I do accept this proposition, I find the proposition compelling on the other hand that bribery whose essential character is that it renders detection wellnigh (sic) impossible and conviction such a rare event that on that score it may well be worth risking by those participating in it for the benefit they reap therefrom, would be best discouraged by sending a clear message that participants in it should not be so foolhardy as to even think of taking such a risk.”

[61] We are of the opinion that in the articulation of its motivation for the sentence it imposed, the court tended to over-emphasize the aggravating features of the appellant’s conduct and to minimize the mitigating features evident on the record. These are, inter alia, the extra-curial impact the conviction will have not only on the corporation itself but also on its employees who number some 1 000 persons. The reputation of the appellant will be sullied by the conviction and it will live in the shadow of the taint of the corruption. As an international corporation it is to a considerable extent dependent on project activities undertaken and funded by development agencies both international such as the World Bank and by national governments. Its capacity to be gainfully

involved in such work will for some time be seriously and negatively impacted. Such profits as it may have made on Contract 65, will we are certain, be dissipated by not only the very large fine we intend to impose, but also by all the costs it incurred in the various protracted proceedings not only in these courts, but also before the World Bank. Its travails are also by no means over. An embargo by the World Bank and other institutions such as e.g. donor agencies is no remote possibility.

[62] Having said that, the gravity of the offence must not be under-estimated; both generally and also particularly in relation to this project and this country. The devastating impact bribery has on society was dealt with in an affidavit by the witness Camerer which served before the trial court. The witness is a policy researcher and analyst with focused experience and expertise concerning corruption and its consequences, particularly on developing societies. She said:

“Corruption, defined as the abuse of public power for private gain, is of growing international and regional concern. In a context of political and economic globalisation we are all affected. Corruption is not a victimless crime, but negatively affects a number of people, mainly the poor. While corruption is a feature of all societies to varying degrees it has a particularly devastating impact on development and good governance in developing countries in Africa, because it undermines economic growth, discourages foreign investment and reduces the optimal utilisation of limited resources available for infrastructure, public services and anti-poverty programs. It may also undermine political institutions by weakening the legitimacy and accountability of governments.”

[63] Courts in Southern Africa have also taken a serious view of this offence. In S. v. Narker 1975 (1) SA 583 (A), at 586 the Court describes bribery as a “corrupt and ugly offence, striking cancerously at the roots of justice and integrity” and that it is calculated to deprive society of fair administration. The Court confirmed that they view the crime with abhorrence. See also S. v Kelly

1980 (3) SA 301 (A) at 313.

[64] This Court in R. v Sole said that: “corruption is inimical to sound public administration, itself essential to the strength of constitutional democracy; it also threatens investor confidence, development projects and employment including in Lesotho”. We endorse these sentiments. Lesotho is a small land-locked country. It has limited resources. Its economic development was seriously damaged because of the policies and actions of its large and powerful neighbour and the sanctions imposed on that country. The L.H.W.P. was a visionary initiative to put the country back on the road to recovery. Its cynical exploitation by the appellant - motivated as it was by greed, - is the more reprehensible.

[65] Having said that, we are mindful of the need “not to approach punishment in a spirit of anger”. Corbett JA (as he then was) said the following in S.v. Rabie (supra) at p.865-866:

“In his *Commentary on the Pandects*, 5.1.57, Voet writes on the need for Judges to be free from hatred, friendship, anger, pity and avarice. In a note on this section in his *Supplement* to the *Commentary* (published in 1973) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the *Selective Voet* - Gane’s translation, vol. 2, at p. 72). The note (quoting Gane’s translation) commences:

“It is true, as Cicero says in his work on *Duties*, bk. 1, ch. 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but

in one of equity.”

Van den Linden further notes that among the most harmful faults of Judges is, *inter alia*, a striving after severity (*severitatis affectatio*). Apropos this, a passage is quoted from Seneca on *Mercy*, including the declaration: “Severity I keep concealed, mercy ever ready” (*severitatem abditam, clementiam in promptu habeo*). *Van den Linden* concludes with a warning that misplaced pity (*intempestiva misericordia*) is no less to be censured.

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in *S.v. Zinn*, 1969 (2) S.A. 537 (A.D.) at p. 541). A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.”

[66] As indicated above we are at large to impose what we believe to be a proper sentence. The fact of the conviction is in itself perhaps more important than any sentence we could pass. It demonstrates to those who

do business in developing countries that they do not have a licence to buy favours from governments by making corrupt payments to persons in authority. If they do so, they will be vigorously prosecuted and if found guilty fairly but severely punished.

[67] In launching the prosecution in respect of the criminal activities of developers and the officials engaged on this project, the Lesotho authorities demonstrated courage, determination and competence. It has been an arduous task. However they set an example of good governance and have delivered a blow on behalf of all countries who face major challenges in strengthening their infrastructure through project activity. This Court particularly commends the Director of Public Prosecutions and his team for their dedicated and resolute efforts.

[68] So that, whilst the prosecution and the conviction are milestones on the road hopefully to greater morality in the initiation and management of development activity, a significant deterrent sentence is called for this premeditated and carefully planned criminal act. In our view a sentence

of a fine of M15 million would meet the requirements and criteria laid down for the determination of a fair sentence.

[69] For these reasons this Court makes the following Order:

2. The appeal against the conviction on Count 1 is dismissed;
3. The appeal against the conviction on Count 2 is upheld and the conviction is set aside.
4. The appeal against the sentence is upheld and altered to read:

The accused is sentenced to the payment of a fine of 15 Million Maloti.

.....
J.H. STEYN
President

I concur:

.....
M.M. RAMODIBEDI
Judge of Appeal

I concur:

.....
C. PLEWMAN
Judge of Appeal

Delivered at Maseru on this 15th Day of August 2003.

For Appellant: Mr. S. Alkema SC and Mr. K.J. Kemp SC
For Respondent: Mr. G.H. Penzhorn SC and Mr. H.T.T. Woker