

Supreme Court of Appeal of South Africa

MEDIA STATEMENT

From: The Registrar, Supreme Court of Appeal

Date: 18 March 2011

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

On 18 March 2011 the Supreme Court of Appeal delivered judgments in two related appeals of *The State v Gardener & Mitchell* (Case 253/07) and *National Director of Public Prosecutions v Gardener & Mitchell* (Case 582/09).

In case 253/07 the appellants appealed against their convictions for fraud by the Cape High Court and the resultant sentences of 12 years' imprisonment (of which four years were suspended in Gardener's case and five in Mitchell's). The appellants were the joint chief executive officers of LeisureNet Ltd. The fraud alleged against them was an admitted non-disclosure to the board of the company of a twenty per cent interest possessed by them in a Jersey company Dalmore Ltd. The failure to disclose took place during the first half of 1999 at a time when the appellants were negotiating and concluding an agreement on behalf of a LeisureNet subsidiary (in which they held shares) for the sale of half the shares in Dalmore to that subsidiary and when the appellants presented the deal to LeisureNet for confirmation and funding. The appellants shortly received more than R6 million each from Dalmore pursuant to the sale and many millions more in consequence of the increase in the value of their shares in the subsidiary.

At their trial and in the appeal the appellants, while admitting the duty to make disclosure, claimed that their withholding of the information had not been intentional, that they had not intended to prejudice LeisureNet and that the company had not suffered actual or potential prejudice as a result of their silence.

The SCA rejected the arguments. It considered the background facts over several years and concluded that there was no reasonable possibility that the appellants' failure to disclose had been unintentional. Moreover the withholding had been intended to deprive the LeisureNet board of the ability to reach an informed decision on whether to approve and fund the purchase. The appellants were not prepared to run the risk that the transaction would not be approved or that steps would be taken to deprive them of the very substantial benefits which they would directly and indirectly, derive from the acquisition by the subsidiary. The convictions for fraud were dismissed.

The SCA also rejected arguments on behalf of the appellants that the trial judge had accorded undue weight to the supposed public interest in punishing persons in the position of the appellants. It found however that the imposition of suspended sentences served no purpose and that no reason existed to distinguish between the appellants in respect of sentence. In reconsidering the sentences the SCA concluded that seven years' imprisonment was the sentence appropriate to each appellant.

In Case 582/09 the NDPP appealed against the refusal by the high court to order a confiscation order of the proceeds of crime (the fraud) in terms of s 18 of the

Prevention of Organised Crime Act. Although the appellants had paid R6 million each to the liquidators of LeisureNet in respect of the Dalmore transaction, the SCA held that the benefits received by the appellants exceeded those amounts. Accordingly a confiscation order was appropriate in relation to the additional benefits that had not been repaid. The appeal was upheld. Gardener was ordered to pay R6 583 231,14 increased at the rate of the CPI from 30 June 2007. Mitchell was ordered to pay R3 594 339,10 increased at the same rate from 30 June 2003.

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