THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 253/07

In the matter between:

PETER GRAHAM GARDENER **First Appellant**

RODNEY MITCHELL **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Gardener v The State* (253/07) [2011] ZASCA 24 (18 March 2011)

Coram: HEHER, CACHALIA and SERITI JJA

Heard: 18 February 2011

Delivered: 18 March 2011

Updated:

Summary: Criminal law – fraud – prejudice – intention to prejudice – company director intentionally and without acceptable explanation withholding disclosure of facts relevant to transaction in which company interested – *a priori* case of fraud.
Criminal law – sentence – role of public interest in balance of factors.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Uijs AJ sitting as court of first instance):

The appeals of both appellants against conviction are dismissed. The appeals of both appellants against sentence are upheld. The sentences imposed by the Western Cape High Court are set aside and replaced by the following:

Each accused is sentenced to seven years' imprisonment.

JUDGMENT

HEHER JA (CACHALIA AND SERITI JJA concurring):

[1] This is an appeal from a judgment of Uijs AJ sitting in the Western Cape High Court with leave of that court.

[2] The appellants, Mr Gardener and Mr Mitchell, were at material times joint chief executive officers of LeisureNet Limited, a listed company, and directors of LeisureNet International Limited, an offshore subsidiary, and of its subsidiary, Healthland Germany Limited. The last-mentioned held half the shares in Healthland Germany GmbH, the balance being held by a Jersey company, Dalmore Limited.

[3] In May 1999 International purchased Dalmore's interest in Healthland Germany for DM 10 million. The appellants each held a 20 per cent interest in the business of Dalmore in Germany and received a proportionate share of the purchase price (DM 2 million each) in consequence. The price was raised and paid by LeisureNet. The appellants had not disclosed their interest in Dalmore to LeisureNet or International before or at the time of the sale and did not do so subsequently. That fact only came to light in the course of an enquiry into the affairs of LeisureNet subsequent to its liquidation in 2001. The appellants were charged with (inter alia) fraud in failing to disclose their interest in Dalmore to the board of LeisureNet during the period about

April to December 1999 ('the Dalmore charge') and were duly convicted. Gardener was sentenced to 12 years' imprisonment (of which 4 years were conditionally suspended). Mitchell was likewise sentenced to 12 years' imprisonment, but, in his case, 5 years were conditionally suspended.

[4] The appellants acknowledged from the outset of the trial that they had at all material times been under a duty to disclose their interests in Dalmore to the LeisureNet board and, in failing to do so, had breached that duty. In the appeal they also conceded that their conduct had made them guilty of contravening s 234(1) of the Companies Act 61 of 1973, with which offence they had been charged in the alternative to the Dalmore charge. That concession was limited to an admission of negligence in failing to make the disclosure, culpa being sufficient *mens rea* for a contravention of the section.

[5] The issues in this appeal are:

1 Whether, in failing to disclose their interest in Dalmore, the appellants intended to deceive the board of LeisureNet.

2 If they did so intend-

(a) whether the appellants possessed an intention to prejudice the company; and

(b) whether their failure to disclose resulted in actual or potential prejudice to it.

3 If the conviction on the charge of fraud is sustained-

(a) whether the trial court misdirected itself in the manner in which it evaluated the interests of society in relation to the crime;

(b) whether the trial court erred in imposing a heavier sentence on Gardener by reason of certain convictions for VAT fraud and insider trading committed during his tenure as managing director of LeisureNet (but after the perpetration of the Dalmore fraud) and for which he had been convicted and sentenced before the trial commenced.

(c) whether the sentences were, in any event, disturbingly inappropriate, thus justifying interference by this Court.

4 If the fraud conviction should be set aside, the appropriate sentence for a conviction for contravening s 234(1).

[6] The proper determination of the appellants' intentions during the relevant period can only be made in the context of the evidence concerning their own experience and conduct during the preceding five years ('the facts as a whole': *S v Ressel* 1968 (4) SA 224 at 231A-D and 232A-E).

[7] Health & Racquet Club Ltd was listed on the Johannesburg Stock Exchange on 11 April 1994. According to its prospectus the company was 'the market leader in ownership and operation of fitness-based leisure clubs in South Africa'. During 1995 its name was changed to LeisureNet Ltd.

[8] For a number of years before the listing the appellants had been associated in establishing and managing fitness clubs. Gardener was a chartered accountant and possessed expertise in the financial aspects of running the businesses. Mitchell's skill lay in the planning, setting up and operation of the clubs.

[9] Initially the largest shareholder in LeisureNet was a Cape Town attorney, Mr Joubert Rabie. Both appellants held substantial interests. Rabie withdrew at an early stage but remained both a friend and business associate of the appellants. The Krok family, prominent in South African business, obtained direct or indirect holdings in the company and apparently influenced the appointment of its board to the advantage of the company. The chairman was Mr Joe Pamensky, a chartered accountant and businessman and, formerly, a respected administrator of South African cricket. Also appointed was Mr Archie Aaron, a very senior and esteemed Johannesburg commercial attorney. A strong corporate governance ethic was inculcated in the board members, and in particular, as the evidence showed, repeated calls were made on its members to disclose their personal interests in matters arising for discussion in the affairs of the company.

[10] Although LeisureNet was initially interested in expanding its interests beyond South Africa, unfortunate experiences in England and Holland in 1994 led the board to assure its investors in the 1994 annual financial statements that the company would not expand overseas, save by way of franchise.

[11] Early in 1995 the appellants were approached at the offices of LeisureNet in Cape Town by Mr Hans Moser, a former business associate who had relocated to Germany. He was eager to develop businesses in that country along the lines of Health & Racquet Clubs and enquired whether LeisureNet would be interested in embarking on a joint venture. The appellants explained to him that LeisureNet would proceed only by the route of a licence or a franchise. An oral agreement was reached in terms of which LeisureNet granted Moser licence rights for Germany in respect of the Health and Racquet brand name.

[12] During the first half of 1996 Rabie requested that the oral licence agreement be reduced to writing, and, as a result, a 20-year written exclusive licence agreement for Germany was concluded on 14 May 1996 between LeisureNet and Dalmore Ltd, in which Moser and Rabie had an interest through offshore entities. The agreement was signed by the first appellant and clause 2.6 provided that:

'in all of their dealings with the LICENSEE [Dalmore], the officers, directors, employees and agents of the COMPANY [LeisureNet] act only in a representative capacity, not in an individual capacity, and that this Agreement, and all business dealings between the LICENSEE and such individuals as a result of this Agreement, are solely between the LICENSEE and the COMPANY'.

[13] During the second half of 1996 Moser was again in Cape Town. He discussed the developing business with the appellants at LeisureNet's premises. He explained that it needed a competent business plan to persuade landlords and financiers to support it, a plan that provided a demonstrable ability to operate health clubs and to run a competent financial corporate structure in relation to a health club business. He asked the appellants, whose reputations apparently carried weight even in Germany, whether they would allow him to use their names and whether they would give him their personal backing in the German operation. They agreed to do so in return for a 20 per cent interest (for each of them) in whatever the German business produced in due course. This, it would appear, was not to be a direct interest in Dalmore through equity, but rather an undertaking by Moser to recognise their financial stake in the German aspects of its business. Despite the fact that the appellants thereby acquired an interest in LeisureNet's licensee with the obvious concomitant potential for a future

conflict of interest the appellants thought it unnecessary either to inform the LeisureNet board or seek its approval. Their explanation was that the prospect of future expansion of Dalmore's interests in Germany was so tenuous that they did not consider it necessary to do so.

[14] During about April 1997 LeisureNet considered investing offshore by way of joint ventures and as a result the board sent the appellants to Australia (in April) and Germany (in May) to investigate opportunities. Up to that stage the appellants had not visited Germany to assist Moser with his franchise. According to Gardener they had done nothing other than to lend their names to the business. According to Mitchell they had advised Moser in Cape Town from time to time. Both testified that, if the franchise in Germany were to continue, they would become involved in operations and management in return for the interests they had obtained in Dalmore.

[15] At an executive committee meeting of LeisureNet on 25 June 1997 the possible expansion of its business to Germany was discussed. The appellants raised the licensing agreement as a potential problem. It was then resolved that the appellants would 'pursue the investigation with regard to the cancellation of the regional licence for Germany and the conclusion of a joint venture with the licensee'. The meeting requested the appellants to open negotiations to these ends. The appellants consequently visited Moser in Germany in June 1997 where they had discussions with him and on their return they negotiated with Rabie representing Dalmore. It was agreed that the licensing agreement for Germany would be cancelled.

[16] On 1 August 1997 LeisureNet, Dalmore and Healthland Fitness Club GmbH entered into a written agreement which the second appellant signed on behalf of LeisureNet. In this, 'the first shareholders' agreement', LeisureNet in essence obtained 50 per cent of the shares in GmbH, the company through which Dalmore conducted its operations in Germany. LeisureNet undertook to advance on loan to Healthland Fitness Club GmbH its funding requirements to an amount equal to the cost of fitting out the first five facilities (health, leisure and fitness complexes). The agreement contained a right of first refusal in the event of either party wishing to transfer its shares in the company. LeisureNet was to appoint four directors to the board and Dalmore three. If

the appellants are to be believed it did not occur to them that LeisureNet should be informed that it was effectively going into partnership with its own joint chief executives and providing funds which would be used, at least in part, to their ultimate benefit. Gardener and Mitchell were appointed as two of LeisureNet's nominees to the board.

[17] During October 1997 LeisureNet approached the exchange control department of the South African Reserve Bank for approval of the first shareholder's agreement. Approval was given on 10 October 1997.

[18] From August 1997 LeisureNet, with the assistance of its auditors reconsidered its overall structure and agreements. Upon the advice of the auditors it decided to split the employment of the appellants between South Africa and its offshore interests. At about this time, as an incentive to the appellants, LeisureNet agreed to issue 5% of the shares in its international subsidiary, LeisureNet International, to each of the appellants on the basis that such holdings would be non-dilutable, ie the appellants would each retain that proportion in the shareholding of the company irrespective of the numbers of future shares allotted.

[19] In that context the appellants with the assistance of Investec Ltd, caused offshore trusts and companies to be set up by Insinger Trust (Jersey) Ltd to house these and other interests. Although the trustees were in law not bound to carry out the requests of the appellants in respect of the trust assets it appears that in practice their 'letters of wishes' were honoured.

[20] During 1998, as part of the restructuring of LeisureNet's offshore subsidiaries:

1 LeisureNet International Ltd was introduced as LeisureNet's subsidiary to hold its interests in Germany.

2 Teria Ltd, a United Kingdom company, was interposed above GmbH as the sole shareholder of GmbH. On 5 May 1998 its name was changed to Healthland Germany Ltd.

3 International and Dalmore each became 50% shareholders in Healthland Germany Ltd consistent with the joint venture agreed between them in August 1997.

4 To accommodate the restructuring, the first shareholders' agreement was

replaced by a second shareholders' agreement on 30 October 1998. It was signed by Gardener on behalf of LeisureNet and International, and by Dalmore and Healthland Germany Limited. In this agreement the funding obligation of LeisureNet was to be satisfied by subscribing for preference shares in Healthland Germany Limited 'limited to the fit-out costs . . . of such number of premises in aggregate not exceeding an amount of £5,000,000.'

[21] During the first half of 1998 the first appellant requested Rabie to record the interests that he and the second appellant held in the German business of Dalmore. Rabie duly instructed the Royal Bank of Canada Trustees Ltd, the trustees of an offshore trust set up by Rabie which held shares in Dalmore, on 30 June 1998 as follows:

'I hereby direct that 20% of the shareholdings of the company Teria Limited must be registered in the name of Peter Gardener and a further 20% in the name of Rod Mitchell as their respective nominees upon my death. The Trustee of the trust holds the said shares as trustee. This should be received as my wishes accordingly'.

The evidence of Gardener and Mitchell establishes that they discussed the request to Rabie, perhaps before it was made and, certainly, after the instruction was carried out, although neither was shown the letter.

[22] During 1998 International was engaged in discussions with a rival operator in Germany, Fitco, for the acquisition by International of shares in Fitco. To that end the appellants were involved in a process of due diligence in Germany.

[23] Towards the end of 1998 a venture capital fund, Brait, discussed with the group the possible acquisition of a portion of International's operations. During the same period and into the following year another venture capital fund, Bankers Trust, approached the group for the possible acquisition of a portion of International's European operations. It became clear to the appellants that it would redound to the substantial advantage of LeisureNet if it were able to acquire the whole of the shares in Healthland Germany, principally because that company would in consequence become much more desirable to prospective suitors. In addition the unattractive prospect of Dalmore disposing of its interest to a third party, perhaps one elsewhere in competition

with International, would be negated.

[24] At the beginning of April 1999 representatives of Fitco, together with Moser, visited South Africa to discuss the possible acquisition by Fitco of Dalmore's interests in the German operation. The appellants decided that LeisureNet, through International, should acquire Dalmore's 50% shareholding in the German operation. In telephone conversations with the directors of International and certain of LeisureNet's directors consensus was achieved. The second appellant then manipulated the negotiations to the advantage of LeisureNet. Knowing that Moser would consider a purchase price of DM 15 million, he suggested to the Fitco representatives that they offer about DM 10 million, telling them that he would try to persuade Rabie and Moser to accept such an offer. On 9 April 1999 Mitchell received a letter from Fitco containing a proposal to acquire Dalmore's shares in Healthland Germany for DM 10 million. He convinced Rabie, who acted on Moser's behalf, to accept DM 10 million. When Rabie agreed, Mitchell informed him that International intended to exercise the right of pre-emption stipulated in its favour in the second shareholders' agreement.

[25] On 16 April 1999 an agreement was signed in terms of which the shareholding of Dalmore in Healthland Germany was sold to International for DM 10 million. It was signed by Gardener on behalf of International, Leisurenet and Healthland Germany.

[26] At a meeting of LeisureNet's executive committee on 24 May 1999, the agreement with Dalmore was discussed and at the board meeting of 26 May 1999 the acquisition of Dalmore's interests in Healthland Germany was confirmed. At neither meeting was a disclosure made of the appellants' interests in the acquisition. Once again the appellants explained in evidence that they were so concentrated on the transaction that disclosure did not occur to them. The minutes of the meeting of the board on 26 May recorded the following statements which are relevant to this judgment:

'3. Disclosure of Directors' Interests:

The meeting was informed that no further disclosures were received from any of the directors subsequent to the previous meeting.'

And further:

'The meeting on the recommendations of Exco. . . confirmed LeisureNet International Limited's acquisition of all Dalmore Limited's interests in Healthland Germany Limited with effect from 1 May 1999 for an amount of DM 10 million and the payment therefor by the Company issuing 7,85 million shares at 420 cents per share with effect from 28 May 1999.'

[27] Within the following week both appellants issued appropriate instructions to ensure that their share of the proceeds of the sale was paid by Dalmore directly into the offshore accounts of their trusts.

[28] Before the acquisition of Dalmore's shares by International, a process of due diligence undertaken by Bankers Trust was already in progress. That continued after the acquisition of the Dalmore shares. It is clear from Mitchell's evidence that even before the Fitco offer was received he and Gardener were optimistic that they would be able to sell Healthland Germany to Bankers Trust at an enormous price provided International was able to obtain control of all the Dalmore shares. The key representatives of Bankers Trust left its employ in the middle of 1999 and moved to AIG. After substantial negotiations and a due diligence process lasting most of the year, an agreement was concluded on 21 December 1999 in terms of which AIG purchased 25% of International for £17 million. At that stage, too, Germany remained a major focus of offshore development for the LeisureNet group.

The law governing fraud

[29] It is trite that:

'Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'

J R L Milton: *South African Criminal Law and Procedure*, Vol. 2 (3rd Edition) at 702. And see *S v van den Berg* 1991 (1) SACR 104(T) at 106b.

[30] With regard to the question whether non-disclosure is criminally fraudulent Coetzee J in *S v Burstein* 1978 (4) SA 602(T) at 604G-605B, stated the law in this regard as follows:

'The question whether non-disclosure is criminally fraudulent is not an easy one. As pointed out by Hunt in *SA Criminal Law and Procedure* Vol 2 at 716, silence may well constitute civil fraud

without constituting criminal fraud. The distinguishing feature lies mainly in the presence or absence of the necessary intention to defraud. There are very few cases of criminal non-disclosure. The most comprehensive judgment on this topic is that of Trollip J (as he then was) in *S v Heller and Another* (2) 1964 (1) SA 524(W) at 536-538, which I adopt, with respect, as an authoritative statement of the law. For the purpose of dealing with the facts of the present case more conveniently, I would summarise the requisites of this type of fraud, as discussed by the learned Judge, as follows:

(a) a duty to disclose the particular fact;

(b) a wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact;

(c) an intention to defraud which involves

(i) knowledge of the particular fact;

(ii) awareness and appreciation of the existence of the duty to disclose;

(iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice;

(d) actual or potential prejudice of the representee.'

See also *S v Heller* (2) 1964 (1) SA 524(W) at 536F-537F; *S v Brande and Another* 1979 (3) SA 371 (D) at 381A-D; *S v Harper and Another* 1981 (2) SA 638 (D) at 677F-H.

[31] Professor Snyman puts the required *mens rea* thus:

'There is a distinction drawn between an intention to deceive and an intention to defraud. The former means an intention to make somebody believe that something which is in fact false, is true. The latter means the intention to induce somebody to embark on a course of action prejudicial to herself as a result of the misrepresentation. The former is the intention relating to the misrepresentation, and the latter is *the intention relating to both the misrepresentation and the prejudice*.' [Emphasis provided].

Snyman *Criminal Law* (5 ed) at 531-2; *S v Isaacs* 1968 (2) SA 187(D) at 191C-192A; *S v Huijzers* 1988 (2) SA 503(A) at 506I-508B.

[32] The authorities I have cited support the view that an intention to cause actual or potential prejudice is a necessary element of the crime of fraud. But it may be that proof of deceit which is calculated (likely) in the ordinary course of things to result in such

prejudice is sufficient without a subjective mental element.[1] The law has not been argued before us and it is unnecessary to decide the question, since, for reasons which will appear, the State has, in my view, succeeded in proving an intention to cause prejudice beyond a reasonable doubt.

Intention to defraud

[33] The State was required to prove beyond reasonable doubt that the appellants withheld disclosure of their interest in Dalmore with intent to deceive the board of LeisureNet (and thereby to induce it to act on the misrepresentation to its prejudice).

[34] There being no direct insight into the minds of the appellants, the case for the State was built on the cumulative effect of the objective probabilities. The contention, which was accepted by the court a quo, was that the weight of such probabilities was sufficient to disprove beyond a reasonable doubt, the truth of the explanations furnished by the appellants in evidence for their non-disclosure throughout the period April to December 1999. Once that finding was made an intention to defraud followed as the only reasonable inference.

[35] In the context of the events which I have described, the probabilities that influence a decision as to whether, in failing to make disclosure, the appellants intended to defraud the company, can be assessed by reference to the following:

1 What had to be disclosed, not so much as a requirement of law but rather as a matter of pragmatism.

2 The appellant's knowledge of the duty and their observance of it in general.

3 Their opportunity to disclose.

4 Whether the failure was isolated or repeated.

5 The prominence and importance of the subject matter requiring disclosure in the minds of the appellants.

6 What the effects of disclosure would have been.

7 Whether there were reasons for withholding disclosure.

8 Whether the appellants derived a clear benefit from non-disclosure.

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1 See particularly, *R v Jolosa* 1903 TS 694 at 700; *R v Henkes* 1941 AD 143 at 161; *R v Kruse* 1946 AD 524 at 532-4; *S v Huijzers* at 507I-508B; *S v Sithole* 1997 (2) SACR 306 (ZSC) at 312d-313c.

9 The conduct of the appellants in relation to the performance of their duty.

The subject matter of the disclosure

[36] This is not as straightforward as it might seem. Undoubtedly the primary duty of the appellants was to inform the boards of International and LeisureNet before the contract for the purchase of Dalmore's interest was concluded and confirmed that they each possessed a financial interest in Dalmore and the extent of that interest: s 234(1) read with s 234(3) of the Companies Act. But a full and proper disclosure would also have involved details of when and under what circumstances it was acquired. Inevitably such a revelation would have meant that LeisureNet's board became aware that since acquiring the interest the appellants had on various occasions negotiated with Dalmore ostensibly on behalf of LeisureNet and International and concluded agreements between Dalmore and those companies which also benefited themselves. Thus both the personal embarrassment to the appellants and the consequences of disclosure must necessarily have been in the forefront of the minds of both appellants as informed and experienced executives of LeisureNet if they had given any thought to the duty.

The appellant's knowledge of their duty to disclose and the opportunities available for disclosure

[37] The appellants readily conceded that as directors of LeisureNet they owed a duty to disclose situations of actual or potential conflict of interest and did not deny the applicability of that duty to any of their dealings between Dalmore and the LeisureNet group. They were both members of the executive and ethics committees of LeisureNet. They were conversant with the statutory requirements. The duty was drawn to the notice of members of the board by the chairman, Mr Pamensky, on repeated occasions during the period 1995 to 1999. Disclosures were openly made by the appellants and other directors on appropriate occasions and records were kept. Both appellants knew that in discussions with the Reserve Bank relating, for example, to the acquisition or financing of overseas assets by LeisureNet, disclosure of assets held by directors offshore was required. They insisted on disclosure by their subordinates in accordance with the principles of proper corporate governance where the possibility of conflict with the company might arise.

Examples of failure to disclose

[38] The appellants were silent as to their interest in Dalmore at all times, but particular reference to the following instances is warranted:

i) when they acquired the Dalmore interest at a time when Dalmore was a franchisee of LeisureNet;

ii) when they persuaded the Board of LeisureNet that the franchise licence should be cancelled and replaced by a joint venture;

iii) when they negotiated and concluded the first shareholders' agreement which brought Dalmore and LeisureNet into a partnership agreement;

iv) when they negotiated and concluded the second shareholders' agreement;

v) at the time of the Fitco negotiations and before signing the written agreement in terms of which International obtained Dalmore's shares.

vi) at the executive committee meeting held on 24 May 1999 and at the board meeting on 26 May 1999 at which the Dalmore transaction was discussed and confirmed.

vi) when it became necessary, in September 1999, to amend the second shareholders' agreement retrospectively. (Gardener again signed on behalf of the LeisureNet companies and Healthland Germany.)

The appellants' failure to disclose their connection with Dalmore may fairly be described as chronic.

[39] **The prominence and importance of their interest in Dalmore in the minds of the appellants**

1 According to their evidence, the initial oral agreement between themselves and Moser was regarded as no more than drawing a bow at a venture with little prospect of a return. By the time of the first shareholders' agreement the appellants felt that LeisureNet's proposed expansion into Germany required greater security than a franchisor/franchisee relationship could provide because of the probable scope of business in Germany which was opening up for LeisureNet.

2 In the first quarter of 1999, LeisureNet, through a rights issue and the sale of its non-core assets, raised capital of R200 million to finance its intended offshore expansion of which Germany was the major focus. As early as October 1997 a report before the LeisureNet board had referred to the 'unique opportunity' for development in

Germany. By November 1998 there was reference to ‘unparalleled opportunities offshore’ and Germany was described as ‘a powerhouse of the health and fitness industry’, and, in the following month as a ‘unique window of opportunity’. In early 1999 the health and fitness industry was ‘one of the fastest growing in Europe’. In this regard it is worth quoting from the appellants’ heads of argument in relation to the potential value of the German operation at the time of the Dalmore sale in April 1999:

‘However, the documentary evidence points with no exception at all and with a remarkable consistency to the massive value then represented by the German operation. This includes:

91.1. All of the board minutes dealing with the subject;

91.2. All of the Exco minutes dealing with the subject;

91.3. Mr Neil’s own independent observations in Germany (such as with his due diligence investigation into Fitco);

91.4. The financial interest shown by financiers such as Brait Capital;

91.5. The projected profit produced independently by the German team and reflected on the budget statements for Germany for both 1999 and 2000;

91.6. The acquisition of Fitco by Fitness First, prior to 9 April 1999;

91.7. The views of independent analysts published at the time; and

91.8. The in-depth (and conservative) view expressed by AIG in the investment memorandum (Exhibit CC in vol. 41).’

In 1999 LeisureNet budgeted for a 100 fold increase in the previous year’s operating profit of Healthland Germany.

3 I have referred earlier to the appellants’ obtaining of a non-dilutable 5% shareholding in International as compensation for the inconvenience of spending a large amount of time away from home during the projected expansion of the group’s activities overseas. The critical role which this interest assumed in the appellants’ intentions and actions over the next 18 months or so can best be spelled out in their own words.

[40] Gardener’s evidence as to his state of mind during the negotiations with Fitco, and Moser and Rabie, in April 1999 which culminated in the exercise of the pre-emptive right is revealing:

‘I had only one thing in mind and that was to make sure the top company [International] received the greatest benefit possible *because that’s where I had my 5% shareholding* and that was where LeisureNet had its interests.’

(My emphasis.)

He had earlier testified that, on the listing of International, an event contemplated from the outset of its existence as likely to happen in about 2001, his 5% interest in the offshore companies was going to be worth 'something like' R75 million. In an application to the exchange control department of the SA Reserve Bank in March 1999 the following was recorded:

'Such is the progress of the international company that it is anticipated that by the year 2001 it will be possible to list the international company on an international stock exchange. . . At that stage 20% of the international companies could be worth conservatively R300 million compared with the possibility of selling 20% at this time for R18 million.'

[41] The evidence of Mitchell leaves no doubt about his state of mind at the time of negotiating and concluding the Dalmore acquisition. As to his relationship with International and their interdependence he said:

'You must remember M'Lord, that, from '98, my interest and LeisureNet's interest, LI's interest, our stars were in a line. Whatever was good for LeisureNet, LI, was effectively good for me and vice versa. And with regard to the Dalmore entity, again I stress, I had no interest, control on the direction of that entity at all.'

And further, in reply to questions by the learned Judge:

'You were entitled to 20%? --- I was entitled to 20%, M'Lord.

Why did it not occur to you to disclose this to the Board, because you know 6 million rands is a large or that's the equivalent of – in those days, two million dm, that's a large amount of money. Did it not occur to you to tell your Board that? --- M'Lord, as I gave in my evidence, at that point in time, I again tried to put things in context in that week. The activity and the frenzy that was going, all that I was centred on in that week, as M'Lord has seen, is to bring that deal home for Leisurenet.

You wanted Germany? --- We had to have it. We had to have it.

That's how you saw it? --- 100%, M'Lord, and also what I did always see, M'Lord, is that LI, the top or the company (indistinct).

The company which was ultimately going to be listed in London? --- My – from the time that I got my founder shares, we were, as I've said, coupled on the (indistinct). It was as if we were going down the rainbow together, strapped to the pot of gold. What was good for the top company, was good for me and what was good for me was good for . . . (intervention).

I understand that concept, but where I am losing you and possibly you're missing the point of

my question. Didn't it occur to you when you realised that Dalmore was a done deal, did it occur to you that this was going to net you some six million rand? --- When the deal was done? Yes? --- Without a doubt, M'Lord.

Well the time the deal was done effectively, it would appear to me, at the time that you got consent from (indistinct), now the deal was done? --- Yes. At that time not, M'Lord.

It didn't occur to you? --- Not, M'Lord. And I can say (indistinct) say no and whether it was a case that I sabotaged that out of my mind, once I've done the deal way back in 1997, to me that was a done deal already then. There was an investment that I had and I hope to God one day it would materialise into something.

Yes? --- But it was done.

When it's done, it's going to net you or it having been done is going to net you a large lump of money? --- My mind was switching at that point in time, not during that week, a couple of weeks afterwards, where my mind was, M'Lord, was to say, this deal now has cleared the road to net me an enormous amount of money, not the six, to net me a potential 35 million, a 150 million if (indistinct).

Yes? --- An that was definitely top of my mind then, M'Lord.

Yes, no, I understand that and you thought you were going to get that from Leisurenet International Ltd? --- Yes.'

[42] The importance to Mitchell (and, equally, to Gardener) of the acquisition appears again from the following exchanges with the judge:

'If at the end of the day Leisurenet International Ltd when it was listed, was going to be worth a large pot of money, then it made sense to get the assets and the companies which would form part of the Leisurenet International Ltd Group as cheaply as possible, not so, because the cheaper you got it, the greater was going to be your ultimate worth? --- 100%, M'Lord.'

and

'No, let's call a spade a spade. You were the chap who actually manouvred everybody into the position where Leisurenet acquired Dalmore for 10 million? --- Bought Dalmore's shareholding for 10.

Yes. Now if it was bought for six and ultimately that was increased considerably or the value which it had paid was a 10 bagger, would have been increased to 60 million dm? --- Yes.

Do you understand what I am saying. I don't mean to confuse you and I am not trying to catch you. I am just trying to think, if I was thinking in the long term of what my ultimate worth would be for Leisurenet International Ltd, I would want to get . . . (intervention). --- At the cheapest price possible.

At the cheapest price, yes? --- I firmly agree with you and the cheapest possible price, I couldn't take it further down the 10, I mean . . . (intervention).
No, no, no, but you see what you could have done, is you could have said, I have done – or Mr Gardener and I have done the most magnificent deal here, because we can get it at 10 and we've got 20 already. And because we are Directors you don't necessarily have to pay us out for that price, because you were the agents who had in fact . . . (intervention).
--- But then sorry, M'Lord, are you proposing that I would have to walk away from my right to an investment.'

[43] The overwhelming benefit of the acquisition and the extent to which it relegated the payment for the Dalmore interest to 'small change' (Gardener's expression) was never made clearer than in the following passage from Mitchell's evidence under cross-examination:
'At this point in time [ie when carrying on the Fitco negotiations] my interest related that I – my anticipated pay out that I was going to receive from Hans [Moser] apropos my 1996 deal that I had done with him, didn't even come onto my radar at this point in time. At this point in time what was very firmly entrenched in my mind was that I had now cleared all obstacles out the way to drive the Bankers Trust deal through, which would affect – which it did do – put a value on Healthland – this is where my mind was sitting – of just on 700 million, and my personal wealth was linked into that on my founder shares, which were sitting at 35 million. And in my mind then, I thought that if Scott Paton [of Bankers Trust] could be half believed on his theory of the ten bagger, and if he only brought it home at a five bagger, the deal that I had consummated would have effectively created value for LeisureNet to the tune of 3.5 billion and my personal wealth could have been to the tune of 150 million. So in my mind I was always coupled on the tote, as it were, with LeisureNet.'
From this it seems clear that the stock exchange listing was taking second place to the dollar signs erected by the prospects of a deal with Bankers Trust even while Mitchell and Gardener were pulling the wool over the eyes of Fitco, Moser and Rabie, and added a new and very profitable motive to the conclusion of the purchase, a matter about which Mitchell had earlier crowed in his evidence in chief:
'Mr Mitchell, did you tell him [Rabie] of Bankers Trust's interest in the off-shore operations of LeisureNet at the time? --- M'Lord, what I didn't tell Joubert and again because there was only one entity that I was focused on, that was to acquire the equity for LI. What I didn't tell Joubert what our game plan was apropos that I requested Fitco to put the offer in at 10, not his asking price of 15. I didn't tell Joubert what our intention was to perform the classic gazump as soon

as we got that offer down to as low as possible, that we were going to grab it – that's LI. And what I didn't tell Joubert was that I had Bankers Trust effectively in the wings and that the upliftment in value, if Bankers Trust came in, could be potentially R75 million and that upliftment would fall into LeisureNet coffers, not Dalmore's coffers. That's what I didn't tell him.'

[44] In the context of all this evidence, when Mitchell said that they 'had to have' Germany, it is quite clear that he was speaking at least as much for Gardener and himself as for International. The purchase of Dalmore and the vast enhancement of the appellants' personal wealth were inextricably linked. It is in the circumstances wholly at odds with the evidence to describe the appellants' conduct as 'solely for the benefit of [International]' or as 'prejudicial' to their own interest (as appellants' counsel did in their heads of argument). Moreover the size and prominence of the benefits that the appellants stood to gain from the acquisition (together with their not-insignificant share of the price) render it in the highest degree unlikely that their own interest in Dalmore was not in the forefront of their minds during all the events of April and May, including the exco and board meetings on 24 and 26 May respectively. That they gave attention to their own personal interests only after the meetings is very improbable. Their prompt instructions to Rabie, within days of the board decision to confirm and fund the acquisition, was all one with the importance of the deal to them personally. The role that their shares in International played in influencing the appellants during the relevant period was not referred to by the learned judge in assessing the probabilities. It serves however as a substantial corroborating factor for his conclusion.

[45] **The effects of disclosure**

The possible consequences may be summarised as follows, bearing in mind the necessary breadth of such disclosure:

1 Diminution of the appellants' status in the eyes of the LeisureNet and, probably, its shareholders.

2 Inability on the part of the appellants to influence confirmation of the Dalmore transaction, because they would perforce have been obliged to distance themselves from any further involvement.

3 Uncertainty as to whether LeisureNet would be prepared to finance the purchase. As Mitchell put it, its refusal would 'shatter' the deal.

4 The strong likelihood that LeisureNet or International would take steps to recover the ‘secret profit’ derived by the appellants from their dealings with Dalmore.

5 Perhaps most pertinently, the threat which honest disclosure presented to the appellants’ trouble-free ride ’down the rainbow to the crock of gold’ to adapt Mitchell’s expressive description.

[46] All the factors mentioned in the previous paragraph were strong disincentives to a full and candid disclosure of the appellants’ interest in Dalmore. Aside from considerations of honest dealing and a clear conscience, however, the appellants stood to gain nothing material from opening the can of worms inherent in disclosure.

[47] **The benefit in fact derived from non-disclosure**

As the appellants had contemplated before concluding the purchase to Mitchell, within six months 25% of International had been sold to AIG for a vast profit, and the appellants, through their holdings in International, duly swelled by the Dalmore acquisition, were able to share proportionately in the resultant good fortune.

[48] **The conduct of the appellants during May and June in relation to the proceeds of the Dalmore transaction**

First, it should be noted that it must at all times have been apparent to the appellants that Moser would be and was able to liquidate their interest in Dalmore only if LeisureNet made funds available (for that purpose). Within a week after confirmation of the sale agreement the appellants had given the necessary instructions for the transfer of their proceeds into their offshore accounts. Neither suggested in evidence that the sudden availability of the money came as any surprise to them. On 3 June 1999 Gardener arranged for payment of £5000 to be paid from his trust in consideration for the 5% interest in International long previously allotted to him and Mitchell’s instructions followed shortly.

[49] The cumulative effect of all the aforegoing factors provides strong prima facie reason to conclude that the appellants knew at all material times that disclosure was required of them but deliberately withheld such disclosure. Whether that is a justifiable inference can however only be decided after considering the submissions made on

their behalf.

[50] In the appeal the appellants relied upon two major submissions to justify the contention that their explanations were reasonably true, ie that it had never occurred to either of them to make disclosure..

1 A strong credibility finding in favour of both appellants made by the trial judge based upon their demeanour, candour, consistency and the general impression created by his observation of the appellants in the witness box.

2 The overwhelming probability that the appellants were responsible for having procured the Dalmore shares at a bargain price through their planning and endeavours. This, it was submitted, was solely for the benefit of LeisureNet and to their own prejudice in so far as it materially reduced the value (and therefore the proceeds) of their 20% interests in Dalmore. Reliance was placed on an observation of the learned judge uttered in relation to the State's (unsuccessful) application to reserve certain questions of law:

"One can scarcely be intending to defraud anyone (in the sense intended by s 424 of the Companies Act) if one believes subjectively and on good grounds which turn out to be well-founded that one is benefitting one's company in may ways, including financially by entering into a deal.'

(This observation , if valid, will also be relevant to the existence of an intention to cause prejudice.)

[51] A credibility finding of the nature in question can never be entirely discounted. It is however the result of a subjective assessment. Its force in any given case depends upon the strength and cogency of the objective probabilities opposed to it: the more such probabilities accumulate the less persuasive it becomes. Moreover demeanour and (apparent) candour are tricky yardsticks when the very basis of the case is the ability of the witness successfully to deceive others. To rely unduly on such features may amount to no more than a demonstration of the expertise of the witness to deceive the judge, a self-defeating exercise. Such an exercise may also be suspect when the witness is an experienced public speaker and negotiator, or the issue in dispute is an extremely narrow one which allows for genuine candour and adherence to the truth in relation to the bulk of a witness's testimony. All of these considerations prevailed in this

instance. The result is that the weight of probabilities remains the acid test: are they sufficient beyond a reasonable doubt to exclude truth from the appellants' explanations?

[52] That the purchase of the half share in Dalmore for DM 10 million was a bargain and a coup for LeisureNet was proved many times over. To conclude that that fact establishes the good faith and selflessness of the appellants is however to look at only one side of the picture. The other is, cumulatively, this:

1 The appellants ensured that they were paid out rapidly and without question DM 2 million each for an interest in Dalmore to which they had made no material contribution. (There was no evidence of the extent to which Moser had used or relied on their names.) If Dalmore had accepted the Fitco 'offer' the benefit of payment would have been subject to stringent conditions and payment by instalments over several years. There is no suggestion that the terms of the Fitco offer were ever disclosed to the board of LeisureNet.

2 Both appellants would of course receive the kudos and increase in personal standing which necessarily flowed from the coup.

3 Because both appellants were shareholders in International and substantial shareholders in LeisureNet, the benefit of the bargain price was also to their advantage. More significantly, the booming health club industry, Germany as a powerhouse of that industry and the immensely favourable prospects for expansion in that country, meant that the LeisureNet acquisition of Dalmore held not only great potential value for LeisureNet and International but also for their shareholders.

[53] On the evidence, absent the machinations of Gardener and Mitchell, it is very likely that Moser would have accepted an offer of DM 15 million for his half share in Dalmore, an acceptance that would have resulted in only a further DM 1 million in the hands of each appellant. It seems clear that over and above the receipt of the DM 2 million each from the transaction, the appellants stood to benefit financially in proportion to each financial benefit which would in the future flow to LeisureNet or International. Taking all these considerations into account, two conclusions are warranted: first that the sale of the Dalmore shares to LeisureNet was, seen from the appellants' perspective of obvious and substantial benefit to them personally, and their

efforts, ostensibly on LeisureNet's behalf, were anything but altruistic; second, the fact that the deal resulted in substantial benefits for LeisureNet provided in itself no reason to conclude that the appellants would not have intended to deceive LeisureNet by withholding disclosure of their own interests. Indeed, having regard to the value of the potential returns to the appellants from the sale, they would have possessed understandable reluctance to make such disclosure if they had reason to believe either that the deal would thereby be threatened or that the company might take steps to limit the benefit to them. This last is an aspect I shall return to in the context of the enquiry into the intention to prejudice LeisureNet.

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• [54] A further strong inference arises from the unlikelihood that even if one of the appellants had deliberately or inadvertently failed through the long history of their Dalmore association to disclose his interest to LeisureNet, the other would have been similarly unconscious of his responsibilities. The evidence proved that the two appellants operated LeisureNet in a manner that involved frequent and close co-operation between them. This was very much the case in relation to international expansion and the running of the German operation. That both were consistently silent on a matter of such importance to themselves and their companies was, one is bound to conclude, no coincidence but rather the result of a premeditated policy.

[55] For the reasons which I have set out I am satisfied that the learned judge was correct in finding that the probabilities in support of a deliberate withholding of the existence and nature of the appellants' interest in Dalmore were overwhelming. It would in my view be naive in the extreme to believe that the benefits to the appellants themselves and, therefore, the need to disclose, were relegated or subordinated in their minds by the close attention paid to consummating and carrying through the sale to International. The State according proved beyond a reasonable doubt an intention to deceive the board of LeisureNet.

Actual or potential prejudice to LeisureNet

[56] At the hearing in this Court counsel did not press the absence of prejudice. This was unsurprising. By failing to declare their interest in Dalmore the appellants-

(a) precluded LeisureNet from considering the advantages and disadvantages of

the sale uninfluenced by the participation of the appellants;

(b) precluded LeisureNet from investigating and considering the circumstances under which that interest was obtained with a view to taking disciplinary steps against the appellants and/or recovering the whole or part of the profit which the appellants derived or stood to derive from the sale;

(c) threatened the relationship built up between the company and the exchange control authorities;

(d) induced LeisureNet to raise the finance and pay them for their interest in Dalmore.

In all of these matters there resided a potential for prejudice to LeisureNet.

The intent to cause actual or potential prejudice

[57] As I have previously indicated the withholding of the fact and details relating to their interest in Dalmore was deliberate and not accidental. It was done to avoid one or more of the consequences that I have identified. All of those consequences involved the self interest of the appellants to a substantial degree. They were all the probable result of the reaction of LeisureNet's board to the unwelcome news.

[58] However, in considering the intention to cause prejudice, it seems unnecessary to be more specific as to the nature of that prejudice. When company directors deliberately withhold information material to the affairs of their company from the board of directors, there is, in the absence of an explanation for such conduct which may reasonably be true, an *a priori* case of fraudulent non-disclosure. That is so because they know that the company can only make decisions through a board properly informed and that by withholding proper information they render it both blind and mute. Thus, in such circumstances, both prejudice and the intention to prejudice are proved beyond doubt. In the context of the evidence, the appellants deliberately withheld knowledge of their interest in Dalmore from the board of LeisureNet. They intended the other board members to believe that no such connection existed. The only purpose in so doing and, therefore, by necessary inference, the appellants' intention, can only have been that they feared or mistrusted the steps which the board, properly informed, might take and intended to preclude such action. Broadly stated, therefore, the prejudice to LeisureNet caused by their action was ensuring that the board was

deprived of the opportunity to exercise its judgment in the interest of the company, a consequence of which both appellants were fully aware.

[59] For all the aforegoing reasons I conclude that there is no merit in the appeal against the conviction for fraud.

Sentence

[60] The learned judge devoted careful attention to his assessment of the appropriate sentences. His judgment is criticized on only two substantial grounds. First, counsel submitted, he overemphasised his view of what society demanded by way of retribution at the expense of the other elements of sentencing. Second, it is said that he imposed sentences that were disturbingly inappropriate in the balance of relevant facts.

[61] Uijs AJ was of the view that the appellants had been convicted of 'an offence relating to a fraud involving more than R500000 . . . committed in the execution or furtherance of a common purpose'. Therefore, so he found, the minimum sentencing legislation applied, carrying a sentence of at least 15 years' imprisonment in the absence of a finding of substantial and compelling circumstances. Both parties were ad idem that such circumstances existed and the learned judge agreed. He referred to the fact that the appellants were first offenders, had 'disgorged the profits made by virtue of your short fall into criminality albeit under some measure of coercion' and that LeisureNet 'did not necessarily lose R12 million because the appellants gained that amount'. Although I have some reservations about the second and third factors mentioned by the court, I am prepared to accept that they are substantially accurate.

[62] The learned judge properly explained the balancing process involved in arriving at an appropriate sentence by reference to well-known authority which it would be superfluous to repeat here.

[63] As to the nature of the crime he took into account that:

(i) it involved a serious abuse of trust to the company and the public;

(ii) it was not committed on the spur of the moment but over a period which provided many opportunities for reconsideration and disclosure;

(iii) the amounts involved, R6 million in relation to each appellant, were 'huge';

(iv) the fraud did not actually cause the company to suffer a loss of R12 million;

(v) the fraudulent actions of the appellants did not lead to the eventual demise of LeisureNet;

(vi) repayment of R12 million by the appellants was an indication of remorse and a punishment.

[64] As I have indicated earlier, it seems to me that LeisureNet, properly informed of the true facts, would inevitably have been entitled to claim from the appellants at least R12 million as a secret profit made in breach of their fiduciary duty to disclose or to require them to forfeit their interests in the joint venture to LeisureNet. Nor does it seem correct to regard the 'coercive' payment of R12 million as induced by remorse: not only was there no indication of acceptance of the error of their ways but the criminal defence has been pursued to this point on a contention that the company was not prejudiced by such deception as the appellants may have perpetrated.

[65] As to the interests of society Uijs AJ said that he '*must* impose, *at the very least*, a sentence that will satisfy the community . . . I would be failing in my duty unless I give *full weight* to what the public out there thinks and expects'. (My emphasis.) In weighing that interest, as he perceived it, the judge took into account that:

(i) the appellants had let society down badly;

(ii) they had taken R12 million from the coffers of a public company;[2]

(iii) persons holding office at the helm of public companies should not get off lightly if they breach their trust;

(iv) there is a particular societal need to deter white collar crime.

[66] Counsel submitted that the italicized words went too far: the judge had allowed public opinion to override his own exclusive duty of achieving the balance which he had earlier espoused. In so doing, it was contended, he misdirected himself.

[67] In *R v Karg* 1961 (1) SA 231 (A) at 236A-C Schreiner JA said:

'While the deterrent effect of punishment has remained as important as ever, it is, I think,

2 This seems inconsistent with his earlier finding, but accords more nearly with my own view of the case.

correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally righteous anger should not becloud judgment.'

In *S v Homareda* 1999 (2) SACR 319 (W) at 324b Cloete J pointed out that 'it is not the function of the courts slavishly to give effect to public opinion'.

[68] True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal will never possess either sufficient comprehension of or insight into what is relevant or the objectivity to analyse and reconcile them as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence and why a court, *in loco parentis* for society, is responsible for working out the answer.

[69] It will often happen that a judicial officer, in a bona fide attempt to express one of the factors in the equation appears to overstate its effect. That applies to the two statements which I have emphasised in the court a quo's reference to the views of the community. But whether they indeed reflect a misdirection depends on a holistic consideration of the judge's treatment of the subject. In this instance he appears to have meant no more than that society would take it seriously amiss if company directors in the appellants' position were treated lightly. He was not suggesting that the community had implicitly fixed on a sentence of any particular degree of severity or duration in relation to the appellants. As he had earlier pointed out, the public, ill informed as to the causes of the liquidation of LeisureNet, had vented its anger on the appellants. In emphasising the reasons for imprisoning the appellants as 'paramount' 'as far as society is concerned' he was making it clear that he too regarded the retributive element as the most important factor and one which justified a substantial term of imprisonment. In balancing the equation of accused, crime,

retribution/deterrence and rehabilitation/reformation the weight accorded to each may fairly differ, as each clearly did in the judge's assessment. Given the nature of the crime and the circumstances of its commission together with the minimal degree of remorse expressed by the appellants for their actions, I cannot find that the learned judge either overemphasised the retributive aspect or allowed it to detract from according fair weight to the other elements of punishment.

[70] Counsel submitted that the origin of the crime was 'an innocent acquisition of an interest in the German operation years prior to the events in question'. This however is a lop-sided and inadequate reflection of the truth as the earlier part of my judgment makes clear. The oral agreement with Moser at the end of 1996 gave rise to a conflict with the appellants' fiduciary duty to LeisureNet, a conflict that was exacerbated by their part in the joint venture and which they steadfastly maintained until it became possible for their Dalmore interests to be turned into money. All the while the wool was being pulled over the eyes of the board of LeisureNet.

[71] Counsel described the acquisition of a 20 per cent interest in Dalmore by each appellant as 'having no obvious value'. But the worth grew exponentially over the next two and a half years. The growth in the consciences of the appellants unfortunately showed no comparable advance. However 'innocent' the origin the connection between the appellants and Dalmore, *vis-a-viz* LeisureNet it became steadily more tainted.

[72] It was further urged on us that Uijs AJ ignored the 'long and meritorious service to LeisureNet given by both appellants'. In carrying out a duty that was amply compensated by direct and indirect benefits I do not think credit of this nature required consideration in the sentence. In any event the breach of the duty of disclosure extended over a great part of their otherwise meritorious service to the company.

[73] Counsel finally submitted that the learned judge failed to take account of the mental anguish endured by the appellants while awaiting their fate over a period of five years. The pretrial procedures, the trial itself and appeal procedures were lengthy but not unduly so. Although they did not merit specific mention in the judgment of Uijs AJ there is no reason to believe that he did not bear those circumstances in mind.

[74] In the result my conclusion is that the learned judge did not misdirect himself in the respects urged upon us.

[75] There were however other misdirections at the heart of the sentences. The learned judge apparently regarded 12 years as the appropriate period of imprisonment in respect of each accused, but he considered it fair to suspend 4 years of that term, in the case of Gardener, and 5 years in the case of Mitchell. A suspended sentence is generally used as a weapon of deterrence against the reasonable possibility that a convicted person may again fall into the same error (or at least one substantially similar). However when the sentence requires that the accused serve a lengthy period of direct imprisonment (as to which seven years qualifies easily) that sentence is in itself, a deterrent to recidivism, and an additional period of suspension serves no purpose. This is the more so when the person convicted is already of mature years or the circumstances of the crime are peculiar or unlikely to be repeated, all of which applies to the appellants. Whether the suspension of a sentence may have a role other than deterrence may be determined by particular circumstances (see eg s 297(1)(a) and (b)), but it is never, as the learned judge held, ‘also a form of mercy’.

[76] The second aspect concerns the distinction in sentence between the two appellants. The learned judge apparently regarded Gardener as having ‘stooped lower’ than Mitchell inasmuch as he had engaged in other nefarious activities while a director of LeisureNet, viz VAT fraud and insider trading. But he had also been sentenced to correctional supervision and served his sentence. To distinguish as the learned judge did was to punish him a second time. That was improper. I can find no valid basis for distinguishing between the two appellants.

[77] The misdirection in relation to the suspension of part of the sentences leaves us at large to impose sentences which fit the case. Despite factual differences it seems to me that there are considerable similarities between this matter and *S v Blank* 1995 (1) SACR 62 (A) in which a well-to-do high-flying stockbroker was convicted of 48 counts of fraud arising from a failure to disclose his personal interest in sharedealings to his principal and his partners and to the Johannesburg Stock Exchange (of which he was a

member). The profits derived from the frauds exceeded R9,75 million of which the accused received nearly R1,5 million. He pleaded guilty and was sentenced to eight years imprisonment, a sentence which this Court confirmed on appeal. The benefits to the appellants of their fraud were potentially greater. They showed little or no remorse. But they were also some 20 years older than Blank. Taking into account all the circumstances of the case, which have been referred to in this judgment and in the judgment of the court a quo, I am of the view that a lengthy period of imprisonment was demanded and that 7 years' imprisonment sufficiently represents the balance between the competing personal and public interests.

[78] The appeals of both appellants against conviction are dismissed. The appeals of both appellants against sentence are upheld. The sentences imposed by the Western Cape High Court are set aside and replaced by the following:
Each accused is sentenced to seven years' imprisonment.

_____
J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS:	F van Zyl SC (with him J C Butler SC)
	Bernard Vukic Potash & Getz Attorney, Cape Town
	Lovius Block, Bloemfontein
RESPONDENT:	R F van Rooyen SC (with him R Valley-Omar)
	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein