IN THE HIGH COURT OF LESOTHO
HELD AT MASERU

CRI/T/111/99

In the matter between:

SOGREAH	**First Applicant**
COYNE ET BELLIER	**Second Applicant**
ANDREW GRIFFITHS	**Third Applicant**
and	
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**

In re:-

REX V MASUPHA EPHRAIM SOLE AND 18 OTHERS

For the First and Second Applicants:	**Mr H. Z. Slomowitz S.C., Mr A. P. Bezuidenhout**
For the Third Applicant:	**Mr P. V. Fischer**
For the Respondent:	**Mr G. H. Penzhorn, S.C., Mr H. H. T. Woker**

Before the Honourable Mr Acting Justice B. P. Cullinan on 5th, 6th, 12th, 13th, and 20th June, 2000.

ORDER

Cases referred to:

(1) *Bester v van Niekerk* 1960 (2) SA 779 (A);
(2) *Shillings CC v Cronje and Others* 1988 (2) SA 402 (A);
(3) *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A);
(4) *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412;

(5) *The Queen v Walker* 27 LJMC 207;
(6) *Yewens v Noakes* (1880) 6 QBD 530;
(7) *De Beer v Thomson & Son* 1918 TPD 70;
(8) *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) 446 (A);
(9) *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (1952), 1 TLR 100 (CA);
(10) *Bank Voor Handel en Scheepvaart NV v Slatford and Another* (1952) 2 All ER 956 (CA);
(11) *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 1 All ER 433 (QB);
(12) *Medical Association of SA & Others v Minister of Health & Another* (1997) 5 BLLR 562 (LC);
(13) *Gcilitshana v General Accident Insurance Co SA Ltd* 1985 (2) SA 367 (C);
(14) *Divine Gates & Co v African Clothing Factory* 1930 CPD 238;
(15) *Muller en 'n Ander v Pienaar* 1968 (3) SA 195 (A);
(16) *Rex v Leech* (1821) 3 Stark. 71; 171 ER 771;
(17) *R v Redford* (1869) 21 LT 508;
(18) *Donaldson v Williams* (1833) 1C & M 345; 149 ER 432;
(19) *Beckham v Drake* (1843) 9 M & W 79; 152 ER 35;
(20) *Brace v Calder and Others* (1895) 2 QB 253 (CA).

The first applicant ("Sogreah"), and second applicant ("Coyne"), both companies registered in France, are cited as the seventh and nineteenth accused respectfully in the above-mentioned criminal trial. The third applicant ("Mr Griffiths") is cited in the indictment, for the purposes of section 338 of the Criminal Procedure and Evidence Act, 1981 ("the Code") as representing them, that is, as their "director or servant". He is also cited as the "partner or servant" of the seventeenth accused Sir Alexander Gibb and Partners, described in the indictment as "a partnership". The papers before me indicate that not later than 30th August, 1991, the latter association had been incorporated as a company, named

Sir Alexander Gibb & Partners Ltd, ("Gibb") so that I assume that Mr Griffiths is cited as a servant of that company.

The seventeenth accused has made no application in the matter. Instead, Sogreah and Coyne raise objections to the indictment. Mr Griffiths, however, has filed applications raising objection to his citation as a representative of all three accused. Inevitably therefore, the Court's decision will affect the seventeenth accused also.

Sogreah and Coyne raise objection under section 162 of the Code. Mr Griffiths relies on the provisions of sections 152 (1), 153 (1) and 159 (1) of the Code. The provisions of sections 152, 153 (1), 159 (1) & (2) and 162 (1) & (2) (in part) read thus:

> "152. (1) Every objection to a charge for any formal defect apparent on the face thereof shall be taken before the accused has pleaded but not afterwards.
>
> (2) Every court before which an objection is taken for a formal defect of a charge may, if the court thinks necessary and the accused is not prejudiced as to his defence, cause the charge to be amended forthwith in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no defect had appeared.
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> 153. (1) When the accused excepts only and does not plead any plea, the court shall hear and determine the exception forthwith, and if the exception is overruled he shall be called upon to plead to the charge.
>
> 159. (1) The accused may, before pleading, apply to the court to quash the charge on the ground that it is calculated to prejudice or embarrass him in his defence.
>
> (2) Upon the motion under sub-section (1) the court may quash the charge or may order it to be amended in such manner as the court thinks just, or may refuse to make any order on the motion.
>
> 162. (1) If the accused does not object that he has not been duly served with a copy of the charge, or apply to have it quashed under section 159 he shall either plead to it or except to it on the ground that it does not disclose any offence cognisable by the court.
>
> (2) If he pleads to the charge he may plead - .....
> (e) that the court has no jurisdiction to try him for the offence; ..."

Suffice it to say, that in view of the above provisions the Court decided that the present applications should be heard *in limine*. Apart from the affidavits filed, the Court also heard *viva voce* evidence, that is, from Mr Griffiths.

The thrust of the applications is that Mr Griffiths is neither a director nor servant of the three accused companies; he cannot therefore, under the provisions of section 338 of the Code, represent them: the companies are therefore simply not before the court. There is also the aspect of service of the indictment, but then that very much depends upon the status of Mr Griffiths in these proceedings.

The three accused companies are members of a partnership. The partnership deed was signed in Maseru on 16th December, 1987, but the deed cites the 1st September, 1987 as the date of formation. At the same time another partnership, of two South African companies and one firm, was formed, such partnership entering into a joint venture with the first partnership mentioned , such joint venture being named "Lesotho Highlands Consultants" ("LHC").

Quite clearly all this had been a matter of earlier negotiation. As early as 14th August, 1987, the first accused, Masupha Ephraim Sole, Chief Executive of the Lesotho Highlands Development Authority ("LHDA") had written to "Lesotho Highlands Consultants (LHC)

Joint Venture, % Sogreah Consulting Engineers, Grenoble, France" stating that LHDA "intends to enter into a contract with your joint venture to undertake the design contract for the "Water Transfer" component of the Lesotho Highlands Water Project ("LHWP")", "in accordance with the terms set out in the Memorandum of Understanding ("MOU") between the LHDA and Lesotho Highlands Consultants (LHC) dated August 13, 1987." The letter required that LHDA should "have received and approved a final

signed copy of the LHC Joint Venture Agreement before finalising the contract." The letter also requested "that you initiate work on this contract not later than September 1, 1987."

Quite clearly therefore the South African and European partnerships and thereafter LHC, were formed, at least initially, in order to undertake what became known as LHDA Contract No15, that is, the "Lesotho Highlands Water Project Water Transfer Design Contract". The parties to the deed of the European partnership were named thus:

> "1. SOGREAH - a joint stock company with its Head Office at 6, Rue de Lorraine, 38130 Echirolles, France
>
> 2. COYNE ET BELLIER, a joint stock company with its Head Office at 5 Rue de Heliopolis, 75017 Paris, France
>
> 3. SIR ALEXANDER GIBB and Partners, a partnership with its Head Office at Earley House, 427 London Road, Reading, Berkshire, England."

The name of the Partnership was stated as "SOGREAH, COYNE ET BELLIER, GIBB, Registered Partnership No. ----------" with a place of business at 3rd Floor, West Wing, Maseru Sun Complex, 12 Orpen Road, Maseru and other "location and construction site offices". The recitals to the deed indicated that the partners "have to enter into Partnership in the business and practice of consulting engineers in Lesotho and elsewhere," the purpose for which the partnership was being formed being "to provide consulting engineering and related services in the Kingdom of Lesotho and such other places as the Partners may from time to time decide." As for profit sharing, the deed provided that all profits and losses would accrue to the accounts of the partners in the following proportions:

Sogreah	52%
Coyne	30%
Gibb	18%

That deed was signed on 16th December, 1987. On 14th December the South African partnership deed had been signed in Maseru, the deed stating that the date of

formation had been 1st September. The three partners were described thus:

> "21. NINHAM SHAND INCORPORATED an incorporated unlimited liability company whose registered office is 1601 Main Tower, Cape Town Centre, Heerengracht, Cape Town, Republic of South Africa, and whose postal address is P O Box 1347, Cape Town, 8000, Republic of South Africa.
>
> 22. KEEVE STEYN INCORPORATED an incorporated unlimited liability company whose registered office is 11 Biccard Street, Braamfontein, Johannesburg, Republic of South Africa, and whose postal address is P O Box 31021, Braamfontein, 2017, Republic of South Africa.
>
> 23. WATERMEYER LEGGE PIESOLD AND UHLMANN, a partnership whose registered office is Cnr Rivonia Road and 10th Avenue, Sandton, Republic of South Africa, and whose postal address is P O Box 221, Rivonia, 2128, Republic of South Africa."

All three formations have now changed their corporate status to that of a private limited liability company. I shall hereafter refer to them respectively as "Ninham", "Keeve" or "Keeve Steyn" and "Watermeyer".

The name of the above partnership was stated to be "HIGHLANDS WATER DEVELOPMENT CONSULTANTS ["HWDC"], Registered Partnership No ----------", with its place of business being at the same address as that of SCBG in Maseru. Again, the purpose of formation was identical to that of SCBG. As to profit sharing, however, profits and losses were to accrue in the following proportions:

Ninham	37.5%
Keeve	31.25%
Watermeyer	31.25%

On 18th November, 1987, HWDC and SCBG had signed a Memorandum of Agreement, whereby the said parties agreed to "join forces for the establishment of a joint venture in the form of an unincorporated association under the name Lesotho Highlands Consultants," reciting that LHDA had "appointed a joint venture comprising the above parties for the preparation of the Phase 1A Design and Tender Documents for the Water Transfer Contract of the [LHWP]"... the "Design Contract"." Both parties to

the agreement, HWDC and SCBG were each described therein as "an unincorporated Consortium of three firms", no doubt because at that stage, 18th November, 1987 the said parties had not become partnerships. Ultimately as indicated, they were registered as partnerships and then, on 15th (possibly 19th - the date, in manuscript, is not clear) December, 1987 HWDC and SCBG entered into a deed of partnership, the date of whose formation was expressed to be 1st September 1987, the name of the partnership being "Lesotho Highlands Consultants", with its address, being similar to that of HWDC and SCBG stated above. The partnership was formed "for the purpose of providing consulting engineering and related services in the Kingdom of Lesotho and such other places as the Partners may from time to time decide." In particular, the deed provided that profits and losses would be shared in the following proportions:

SCBG	50%
HWDC	50%

It was the Memorandum of Agreement signed on 18th November, 1987, which however contained "the mutual responsibilities and duties of the Parties". HWDC and SCBG were described therein thus:

"1.HWDC - is an unincorporated Consortium of three firms, viz
NINHAM SHAND INCORPORATED an incorporated unlimited liability company with its Head Office at 16th Floor, Cape Town Centre, Heerengracht, Cape Town

KEEVE STEYN INCORPORATED an incorporated unlimited liability company with its Head Office at 11 Biccard Street, Braamfontein, Johannesburg

WATERMEYER LEGGE PIESOLD AND UHLMANN a partnership with its Head Office at Cnr Rivonia Road and 10th Avenue, Rivonia, Sandton

With four other firms who will act as sub-consultants

2. SCBG is an unincorporated Consortium of three firms viz;
SOGREAH a Joint Stock Company with its Head Office At 6 rue de Lorraine, 38130 Echirolles - France

COYNE ET BELLIER a Joint Stock Company with its Head Office at 5 rue de Heliopolis, 75017 Paris - France

SIR ALEXANDER GIBB AND PARTNERS a partnership with its Head Office at Earley House, 427 London Road, Reading, Berkshire, England."

The agreement provided for the appointment of a Management Committee with "ultimate responsibility for the execution of the Design Contract in all its aspects ..... consisting of one representative from each of the six firms making up the two Parties", with provisions for alternate representation in case of absence of any representative. The Committee was required to meet at least three times a year, the Chairman thereof being a member of the HWDC Executive Committee unanimously appointed by the two parties to the agreement. The agreement also provided for a Project Manager to be appointed by the Committee, on the nomination of Sogreah, "to be responsible to the Committee for the execution of the Design Contract." Indeed, the agreement specified that "LHC will be represented by the Project Manager."

Ultimately, on 28th January, 1988, LHDA and LHC signed the LHWP Water Transfer Design Contract (No.15). Under the *International General Rules of Agreement Between Client and Consulting Engineer For Design and Supervision Of Construction Of Works* embodied in the contract, that is, under the Conditions of Particular Application, Clause 2.1.5, LHC is described as consisting of "two consortia of three professional consulting firms each" and goes on to name the six "firms" involved. Clause 2.1.7 provided that "the designated representative of the Consultant [LHC] is the Project Manager", and again (Clause 2.2.2) that "the services [of LHC] shall be deemed to have been commenced on 1 September, 1987."

In November, 1989 LHDA requested a Proposal for Engineering Services to be performed for the detailed design, preparation of construction drawings and supervision of the construction of Katse Dam and appurtenant works and Transfer Tunnel. LHC

submitted a Proposal in February 1990 which was accepted by LHDA. A year later, on 20th February, 1991, LHDA and LHC signed LHDA CONTRACT 45 - PREPARATION OF CONSTRUCTION DRAWINGS AND SUPERVISION OF CONSTRUCTION OF KATSE DAM AND APPURTENANT WORKS - CONTRACT 123, TRANSFER TUNNEL - CONTRACT 124/125. The Contract recited that "certain consulting engineering firms have entered into an association hereinafter called "the Joint Venture" to form Lesotho Highlands Consultants for the sole purpose of performing the Services" and that such Joint Venture had been duly registered as a partnership under the Laws of Lesotho.

In Appendix A to the Contract under Clause A.7.1. "Overall Management and Structure" the Consultant (LHC) is described as:

"a joint venture of six firms responsible to LHDA under this Contract."

Clause A.7.1 then in part reads:

"Each of the six firms will nominate a representative member of a Management Committee. The Committee will, in turn, delegate certain powers to their Project Manager, who will be responsible for managing the Project.

Each of the six firms will also appoint Home Office Liaison staff to undertake the routine follow up of the project for each member firm.

The Project Manager will be responsible for the performance of both the design and administrative staff in Maseru and the activities at the various sites. In view of the widespread locations of the project offices requiring a significant amount of travel by the Project Manager, a Deputy Project Manager will also be appointed to share the management and liaison duties, and deputise for him in his absence.
The Project Manager will be responsible to LHDA for all matters relating to the project, for liaison with other consultants and for coordination with JPTC, funding agencies and other such organizations, as required.

Reporting to the Project Manager will be the Chief Design Engineer and the Administration Manager based in Maseru, the Chief Resident Engineer (Dam) based at Katse, and the Chief Resident Engineer (Tunnel) who will be based near Ha Lejone, each with their own staff and the Technical Advisor.

The two Resident Engineers will be empowered to act as the Engineer's Representative in terms of the Construction Contracts.

Each of the six firms will nominate a senior Technical Representative to form a Review Panel. The composition of the panel will reflect a wide range of engineering experience appropriate to a project of this nature. The members of the panel will visit Lesotho together, at approximately six-monthly intervals, to review the design and construction works, to advise the Project Manager and to assure LHDA and the parent firms that the services are being performed to appropriate professional standards....."

On 30th August, 1991, SCBG and HWDC entered into a "Memorandum of Agreement in respect of LHDA Contract No. 45", the purpose whereof was to define "the mutual responsibilities and duties of the Parties." The Memorandum of Agreement specifies in Article 3 thereof that "The Contract 4 5 Agreement" was "part of the agreement". HWDC was described therein as "an unincorporated Consortium of three firms [as described above] with three other firms who will act as sub-consultants". SCBG was similarly described i.e as "an unincorporated Consortium of three firms". Articles 4 and 5 of the Agreement read in part thus:

"Article 4 - Management Committee
Ultimate responsibility for the management of LHC and execution of Contract 45 in all its aspects shall rest with a Management Committee (referred to herein as the Committee), consisting of three representatives from each party as notified to the Chairman of the Committee, one representative being nominated by each of the firms nominated in Article 1. Each firm shall be entitled to nominate an alternate representative who may replace the firm's nominated representative in cases of absence.

The Committee shall meet at least *twice per year*. Meetings shall be held in Maseru unless otherwise agreed. *Each member firm shall have a right to request a special meeting* of the Committee upon giving fourteen days' written notice to the Chairman of the Committee.

A quorum of the Committee shall consist of four representatives, at least two from each Party. The second representative of a Party may be represented by the first representative if he carries his proxy.

The Chairman of the Committee shall be appointed unanimously by the Committee from among its members for a period of one year. Unless otherwise agreed, the Chairman shall be a representative of the party not supplying the Project Manager (see Article 5). The Chairman shall organise meetings of the Committee and shall be entitled to represent the Committee to the Contracting Authority and other bodies involved in the project. He shall be the channel of communication between the Project Manager and the Committee when the Committee is not in session. The duties and authority of the Chairman and the channels of communication he shall use will be defined in further detail by the Committee.....

Article 5 - Project Manager

The Committee shall appoint a Project Manager to be *responsible to the Committee* for the management of LHC and the execution of Contract 45 to the extent of the duties *assigned to him by the Committee*. The Project Manager shall provide the Committee with the information they require to monitor the progress and financial status of Contract 45.

The Project Manager *shall* organise the execution of the work in accordance with the Contract 45 Agreement, with any amendment *approved by the Committee*. In no case shall the Project manager act in a matter of principle *at variance with the Contract 45 Agreement* without *prior approval* of the Committee or at variance with the *policy established* by the Committee.

The Project Manager *shall be responsible* for liaising with the Contracting Authority to ensure that approval is obtained for the methods of working and the resources to be applied, so that the Contracting Authority accepts liability in terms of Contract 45 for costs thus incurred. At the appropriate time the Project Manager shall confirm or adjust particulars of the date and duration of each staff member's appointment.

Should a risk arise that liability will not be accepted, the Project Manager shall review his proposal for executing such work and confirm or modify his proposals for carrying out the item of work concerned. He shall *immediately notify the Chairman* of the circumstances and of his assessment of the risk involved..

The Project Manager shall be *responsible only for the duties assigned to him by the Committee*, and not for the execution of Contract 45 in toto. The responsibility of the Party that seconds the Project Manager to LHC shall not on this account be greater than that of the other Parties. The duties and authority of the Project Manager and the channels of communication he shall use are to be defined in further detail *by the Committee* (see letter of appointment dated 21 January 1991)." (Italics added)

Article 7 of the agreement provided in part that:

> "[e] ach *member firm* of the two Parties shall submit to the Project Manager, by agreed dates each month, any information needed in order for the Project Manager to prepare claims for payment and to calculate any taxes to be paid by LHC."
> (Italics added)

That agreement, as I have said was signed on 30th August, 1991. The agreement provided in Article 2.4 that the acceptance thereof by SCBG and HWDC would be signified by the signatures of the authorized representatives of the respective three firms listed under Article 2.2. And so it was that the agreement was signed"FOR SCBG "by the respective representatives of Sogreah, Coyne & Gibb, and "FOR HWDC" by the respective representatives of Ninham, Keeve & Watermeyer.

LHC appointed a Project Manager for Contract 45, a Mr A. Collings, by letter of 21st January 1991. Mr Collings held that post for some five years until approximately 1996. A Project Manager was then appointed on a temporary basis, until April 1997 when Mr Griffiths was appointed to act in the post, that is, until June 1997, when he was permanently appointed Project Manager, which position he still holds. Mr Griffiths deposed in a supporting affidavit and testified that his obligations and responsibilities in that post are identical to those contained in the letter of appointment of Mr Collings of 21st January, 1991 and the annexure thereto. That letter, written by the Chairman of the Management Committee, having stated that "this letter is to formally appoint you as [LHC s] Project Manager," goes on to state in part:

> "In accordance with our contract with LHDA, in your capacity as Project Manager you will be *responsible* for the day to day management of LHC and the performance of the design and administrative staff in Maseru and of the staff of LHC and sub-consultants at the various sites.....
> We expect you to refer to the Chairman of the LHC Management Committee for comment and *agreement* when decisions are to be taken affecting *major principles* or *large claims*, particularly as may arise from design changes or within the framework of the following sub-clauses of the Conditions of Contract of the Construction Contracts....."(Italics added)

There followed a list of 15 of such sub-clauses in respect of which consultation was required. The annexure to the letter read in part thus:

"Duties and Responsibilities of LHC Joint Venture Project Manager

1. The Project Manager will be *the representative* of the Lesotho Highlands Consultants Joint Venture. He will be based in Maseru and will be *responsible* for all aspects of the execution of the LHC Joint Venture contract with the LHDA, Contract 45, whether carried out in Lesotho, RSA *or Europe*. He will be assisted by a Deputy Project Manager, who will also be based in Maseru.

   The Project Manager has delegated authority to act as the Engineer for LHDA Contract Numbers 123, 124 and 125, subject to reference *under certain circumstances* to the Chairman of the LHC Management Committee.

2. He will obtain from the LHC Management Committee, *general guidelines* for the execution of the Contract. He will submit to the Committee brief *confidential monthly reports* supplementing those he is required to submit to the LHDA, mentioning any issues of concern and providing up to date information on the financial status of LHC. Some 2 to 3 weeks before the regular Management Committee meetings he will *submit to each member* a comprehensive report covering the interval since the previous meeting. According to the *individual wishes of members* of the Management Committee, he will send copies of selected correspondence to the member firms.

3. All written communication with LHDA, concerning the execution of the Contract shall pass through the Project Manager. He will maintain close day-to-day contact with the senior staff of the LHDA and when required with the Chief Executive.....

5. He will be responsible for the efficient day to day management of the Joint Venture staff working in Lesotho, but following as far as possible the division in terms of man-months and costs as given in Contract 45 *unless agreed otherwise by the Management Committee*. He *will inform member firms* of the long range planning of staffing for the project, with updating as necessary, and will confirm at appropriate times in advance the dates for individuals to take up and relinquish their posts.

6. Although in terms of Article 3 of the LHC Joint Venture Agreement the Management Committee is required to reconcile any differences between the Parties regarding the provision of suitable staff, the Project Manager is expected in the first instance to attempt to overcome such problems by *discussion with the affected member firms*....." (Italics added)

Mr Griffiths testified that he is a director and employee of Keeve Steyn (Pty) Ltd. He became a director of that company in 1993/94. His salary is paid by Keeve Steyn, although he is also, as is the case with all expatriate employees of LHC, in receipt of a territorial allowance, which is paid by LHC and reimbursed by LHDA. He still attends Board meetings of Keeve Steyn. He also represents that company, for the purposes of negotiations with LHDA, concerning two Phase 1B Projects of the LHWP. He is also a director of another Joint Venture of four South African firms, involved in other projects in South Africa. All of such activities have the blessing of the Management Committee of LHC, apart from which activities he devotes his full time to LHC.

Quite obviously, inasmuch as Sogreah, Coyne, Gibb, Ninham, Keeve and Watermeyer are each represented on LHC's Management Committee, and the Project Manager is required to coordinate all staff selections and movements and the reimbursement of such staff and indeed of the two main components of LHC i.e. the South African and European partnerships, the Project Manager clearly represents to LHDA the interests of each of the six companies making up LHC. That, of course, does not necessarily make him a servant of any of those companies. Mr Griffiths, as I have said, maintains that he is not and never has been a director or servant of Sogreah, Coyne or Gibb and cannot therefore be cited as the representative of any of them in these proceedings.

The learned Senior Counsel Mr Penzhorn submits that the two consortia and ultimately LHC itself were formed for the purpose of providing the services envisaged in LHDA Contract No.15 and other work on the LHWP. The associations involved were at times described as a "consortium", or a "joint venture". In the case of *Bester v van Niekerk* (1) Holmes AJA (as he then was) considered whether or not a joint venture could be a partnership. He observed that the four essentials of a partnership prescribed in *Pothier on Partnerships* were:-

> "First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally the contract between the parties should be a legitimate contract ..... Where all these four essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership. It makes no difference what the parties have chosen to call it; whether they call it a joint venture, or letting and hiring. The court must decide what is the real agreement between them."

Holmes AJA observed that there "seems little point in perpetuating a reference to *Pothier's* fourth requirement." After a review of the authorities Holmes AJA concluded that "a joint venture in respect of a single transaction is a partnership if the first three essentials mentioned by *Pothier* ..... are present." In arriving at that conclusion he had quoted "as a matter of persuasive interest" a passage from *Lindley on Partnership* 11 Ed at pp70/71 - see now 14 Ed at pp 116/117:

> "It is customary for writers on partnership law to divide partnerships into universal, general and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the *Digest* - "*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius*" ("*Partnerships are contracted either in the whole of the goods of the respective partners, or in some particular speculation, or in a state concession or even in a single piece of property.*" *Dig. Xvii, tit. 2 (pro socio), 1 - 5 pr.*) - and is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally from those in which they are partners in some particular transaction or adventure only.
>
> If persons who are not partners in other business share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else. For example, if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further. So a partnership may be limited to purchase and sale of particular jewels, the working of a particular patent, the working of it in a particular place, the development of a parcel of land, the exploitation of a contract of service, or the sowing, cropping, harvesting and sale of a particular crop. In all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships; but such rights and liabilities are

> necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners depends entirely on the agreement into which they have entered and upon their conduct."

In the case of *Shillings CC v Cronje and Ors* (2) Nestadt AJA (as he then was) observed at p421:

> "Appellant's reliance on a partnership requires special mention. I accept in this regard that the contemplated formation of the company was not inconsistent with the existence of a partnership and that, despite the absence of any actual mention in appellant's papers that respondents were co-partners, this was established. What was stated was that there was a 'joint venture' (involving second, third, fourth and fifth respondents). There would not, however, appear to be any meaningful difference between it and partnership (Bamford the *Law of Partnership and Voluntary Association in South Africa* 3rd ed at 11-12.)"

Bamford *op. cit.* observes at p12 that:

> "It is submitted that there is no value in treating a joint venture as a category different from a partnership .....
> [I]f the rules of partnership apply to joint ventures, there can be no usefulness in a distinction."

Quite clearly *Pothier's* three essentials apply to the associations under consideration. Further, while the Memorandum of Agreement signed by HWDC and SCBG on 18th November 1987 in respect of LHDA Contract No.15, was directed at providing services for such Contract, the deeds of partnership between Ninham, Keeve and Watermeyer, and between Sogreah, Coyne and Gibb, and that between HWDC and SCBG, were directed at "providing consulting engineering and related services in the Kingdom of Lesotho and *such other places as the Partners may from time to time decide*", or were directed at "entering into Partnership in the business and practice of consulting engineers in Lesotho *and elsewhere.*" In no case was it provided that dissolution would follow the completion of services in Lesotho, so it could not be said that the partnerships were formed for the purpose of providing services only in Lesotho. In any event, partnerships they were, all three of them, duly registered in Lesotho.

Mr Penzhorn refers to the provisions of section 4 of the Partnerships Proclamation no.78 of 1957. It reads thus:

> "4. *Nothing in this Proclamation contained shall confer upon any partnership the status of a body corporate* Provided that a partnership registered in terms of this Proclamation may under the style or firm name under which the business of such partnership is registered-
>
> (a) sue and be sued;
> (b) hold property or assets;
> (c) hold certificates of allotment of rights to occupy land,
> (d) hold deeds relating to immovable property; and
> (e) be dealt with as though it were an entity distinct from the identity of the individual partners in terms of, and for the purposes of *any law requiring or authorising partnerships to be so dealt with.*" (Italics added)

I had occasion to deal with those provisions in a ruling which I delivered in these proceedings on 12th June, at pp21/22. Everything depends on the content of "any law" specified in section 4 (e). I am not aware of any law affecting the present situation, which in particular affects the status of a partnership, or that of the partners therein. While a partnership may sue and be sued under the style or firm name under which the business of the partnership is registered, nonetheless the individual partners are and remain jointly and severally liable e.g. in the matter of any judgment against the partnership. The common law has not changed in the matter: the partners are jointly and severally liable upon any contract for the benefit of the partnership. The partnership possesses no *persona* at law and for that reason, while it may, under the Proclamation be sued in civil proceedings under its name, it nonetheless is not an entity distinct from the identity of its individual partners and cannot e.g. be prosecuted at criminal law.

In particular, I repeat, the common law as to contractual liability has not changed. As regards third parties, the act of a partner, within the ordinary scope of the business, binds the other partners, whether or not they have sanctioned such act. In brief the remedy of the third party lies not against the partnership, but jointly and severally against the individual partners.

Thus in the present case, while the partnerships of SCBG and HWDC purported to form a partnership of two partners, those two partners, being partnerships themselves, are not distinct entities and consist each of three partners. In brief it is trite that when two partnerships form a third partnership, the partners of the two partnerships all become partners in the new partnership. Thus there were not two, but six partners in the LHC partnership, and that of course was the reality of the matter. The letter of 21st January, 1991, appointing the Project Manager, bears a letterhead describing LHC as "a joint venture comprising the following firms of Consulting Engineers." Thereafter the six firms are listed, three each under "SCBG" and "HWDC". That aspect of course is not conclusive.

The governing body of the partnership, the Management Committee, consisted of six members, that is representatives of the six partners, so that each partner had equal representation in the management of the partnership. When it came to profit sharing however, while profit and losses were expressed to be shared equally between SCBG and HWDC , nonetheless the resultant allocation arising from the three deeds of partnership was as follows:

Sogreah:	26.000%
Ninham:	18.750%
Keeve:	15:625%
Watermeyer:	15.625%
Coyne:	15.000%
Gibb:	9.000%

It could well have been that because of the dominant position of Sogreah, that is, profit-wise, Sogreah initially had the right to nominate the Project Manager. The partners had equal voting rights on the Management Committee, however, and indeed each "member firm" (a phrase that crops up a number of times in the papers) had the right to request a special meeting thereof on 14 days notice. Ultimately, for the purposes

of LHDA Contract No.45, Sogreah's power of nomination of the Project Manager fell away. The latter was appointed by the Management Committee. That body, however, was not a corporate entity and the Project Manager was not employed by the Committee: he was expressed to be employed by the partnership, that is, by LHC. In this respect section 338 (2) of the Code in part reads thus:

> "(2) In any criminal proceedings referred to in sub-section (1), a director or servant of a corporate body shall be cited as a representative of that Corporate body, as the offender and thereupon, the person so cited may, as such a representative, be dealt with as if he were the person accused of having committed the offence in question;..."

The question arises, what constitutes a servant? That aspect engaged the Appellate Division in a number of cases. In the case of *Smit v Workmen's Compensation Commissioner* (3), to which Mr Penzhorn refers, Joubert JA observed at pp61/62:

> "In *Colonial Mutual Life Assurance Society Ltd v MacDonald* (4) this Court adopted the so-called supervision and control test of English law in determining whether an insurance agent was the employee (*locator operarum)* of a life insurance society or an independent contractor (*conductor operis)*. This test based on the right of supervision and control which a master (*conductor operarum)* has, according to English law, over his servant (*locator operarum*) was formulated as follows by DE VILLIERS CJ at 434-435:
>
> > "But while it may sometimes be a matter of extreme delicacy to decide whether the control reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workman, one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done. In *The Queen v Walker* (5) BRAMWELL B put in this way: 'A principal has the right to direct what the agent has to do'. In *Yewens v Noakes* (6) the same learned Judge applied the same test. Pollock on Torts 12th ed at 79, 80 draws the same distinction ... So also does Salmond *Law of Torts* 6th ed at 96 ..."
>
> It was, however, unnecessary for this Court to have had recourse to English law as authority for the so-called test of supervision and control inasmuch as it is indisputably clear from our investigation of our common law that the so-called test of supervision and control is firmly rooted in Roman-Dutch soil.

> Insofar as the above *dictum* of DE VILLIERS CJ regards the presence of the employer's right of supervision and control over the employee as an indispensable requirement for the existence of a contract of service (*locatio conductio operarum)* as distinct from a contract of work (*locatio conductio operis)* it must with due respect be qualified. The presence of such a right of supervision and control is indeed one of the most important *indicia* that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work. Cf De *Beer v Thomson & Son* (7) at 76; *AVBOB's* case (8) at 456C. Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole *indicium* but merely one of the *indicia* to be considered depending upon the provisions of the contract in question as a whole.
>
> In many cases it is comparatively easy to determine whether a contract is a contract of service and in others whether it is a contract of work but where these two extremes converge together it is more difficult to draw a border line between them. It is in the marginal cases where the so-called dominant impression test merits consideration. See *AVBOB's* case (8) per RABIE JA at 457A:" "

The learned Judge of Appeal went on to quote from the latter judgment of Rabie JA (as he then was) at p457A which passage I reproduce herewith from the English translation of the judgment (Vol 1976 Translations at p788):

> "It is also common cause that where a relationship has elements of both a master and servant relationship and another sort of relationship, one must try to determine which sort of relationship most strongly appears from all the facts, or, as was said in the judgment of the Court *a quo*, what the "dominant impression" is which the contract makes upon a person. I am of the opinion that this approach is obviously correct, for if a relationship is not predominantly one of master and servant, it would hardly be correct to refer to it as such."

Joubert JA in the *Smit* (3) case at p63 went on to consider the so-called organisation test, as enunciated by Denning LJ (as he then was) in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (9) at p111, thus:

> "One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of business; whereas under a contract

> for services [that of an independent contractor], his work, although done for the business, is not integrated into it but is only accessory to it."

Again in the case of *Bank Voor Handel en Scheepvaart NV v Slatford and Anor* (10) Denning L J observed at p971 at E:

> "... I would observe the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation:"

After consideration of further authority, namely the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (11) in particular at p445 G, Joubert JA concluded in *Smit* (3) at p63:

> "In my view the organisation test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (*locator operarum)* and an independent contractor (*conductor operis)* in our common law."

There is then the "multiple test", which finds its origins in the *AVBOB* (8) case. The learned author of *Riekert's Basic Employment Law* 2 Ed. at p11, to which Mr Penzhorn refers, observes:

> "Although the court did not spell out in that case [*AVBOB* (8)] exactly what may be included in the general picture, some guidance is to be derived from the English case of *Ready Mixed Concrete* (11), in which MacKenna J sets out three possible components. His Lordship said:
>
> > "A contract of service exists if ... three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service."
>
> Under the third heading the court will consider all the facts which are relevant, including the form of the contract, the method of payment, the supply of capital assets, and the employer's right of suspension and dismissal."

See also the case of *Medical Association of SA and Ors v Minister of Health and Anor.* (12) per Zondo AJ (as he then was) where the learned Judge reviews the authorities at pp566/571.

I turn then to apply those tests to the present case. The papers that I have set out above indicate the extent of the control which the Management Committee exercised over the Project Manager. He was responsible to the Committee for the due execution of his duties and in a number of places, indeed, he was specifically required to refer certain matters to the Committee for its decision. No doubt the Project Manager was required to exercise his own discretion on a daily basis, as indeed is every servant, but he was nonetheless ultimately responsible to the Management Committee and subject to its ultimate supervision. Quite clearly one is left with the "dominant impression" of a master and servant relationship.

The Project Manager was obviously "part and parcel of the organisation"; indeed as he represented LHC in his dealings with LHDA, his post could well be regarded as perhaps the most important or influential, and certainly the most representative post in the organisation.

As to the "multiple test" in the matter, I can see no difficulty with the first two components as expounded by MacKenna J. Turning to the third component, the Project Manager was paid an allowance on a regular basis. He was initially appointed in an acting capacity by the Committee, which, being vested with the power to appoint, would then be vested, subject of course to the principles of natural justice, with an implied power of dismissal. In brief, I cannot but see that what was here involved was a master and servant relationship.

The learned Senior Counsel Mr Slomowitz for his part conceded that Mr Griffiths is a servant of LHC, having been *seconded* thereto by Keeve Steyn. He submits however

that he is nonetheless not a servant of LHC for the purposes of section 338 of the Code and he certainly is not a servant of the three accused companies. In this respect Mr Penzhorn refers to the case of *Gcilitshana v General Accident Insurance Co SA Ltd* (13) before Friedman J. (as he then was). The learned Judge was there dealing with the aspect of workmen's compensation, the plaintiff having been employed by a partnership of four brothers named Ambrosio. Friedman J observed at pp 370/371:

> "The Workmen's Compensation Act does not deal with the position where a workman is employed by a partnership. A partnership is not a legal *persona* and has no legal personality separate from its members as, for example, a company has. It is merely a group of individuals who are associated together by their partnership contract. See *Divine Gates & Co v African Clothing Factory* (14) at 240; *Muller en 'n Ander v Pienaar* (15) at 202-203. When a person contracts with a partnership he is in effect contracting with all the partners individually. The individual partners are jointly and severally liable under the contract and debts arising under the contract are owed to the individual partners jointly and severally. Thus, when it is said in the stated case that "plaintiff worked for Amrosio Brothers", that means that he was employed by the partnership, i.e. the four brothers who constituted the members of the partnership."

Mr Slomowitz submits that Friedman J was there constrained to contain such dicta to the aspect of workmen's compensation. I must observe, with great respect, that the learned Judge was there stating a general common law principle, namely that the servant of a partnership is the servant of all the partners. That principle is not of recent origin. In the old (1821) case of *Rex v Leech* (16) the report (E R) is very brief. It reads thus:

> " (A servant in the employment of A. and B., who are partners, is the servant of each; and if he embezzle the private money of one, may be charged under the stat. 39 Geo. III. c. 85, as the servant of that individual partner.)
> [Applied, *R v Redford*, (17)]
> The prisoner was indicted under the stat. 39 Geo. III. c. 85, for having embezzled a number of bank notes, which he had received into his possession as the clerk and servant of Thomas Ridgway Bridson, for and on account of the said Thomas Ridgway Bridson.
>
> He was also charged with a common larceny.
>
> The prosecutor Thomas Ridgway Bridson and Thomas Ridgway were partners in trade, and the prisoner was in their employment in the capacity of book-

keeper.

Whilst he was thus in their employment he received the notes in question into his possession, being the private property of Thomas Ridgway Bridson, to be deposited in the safe where the money of the firm was usually kept. He afterwards took them from the safe, and absconded with them.

It was objected, that he could not be considered as the servant of Thomas Ridgway Bridson the prosecutor, being in fact the servant of the prosecutor and his partner jointly; but Bayley J. held, that he was the servant of both; and said, that it had been decided by the Judges, that where a traveller is employed by several houses to receive money, he is the individual servant of each. The prisoner was convicted."

In the (1833) case of *Donaldson v Williams* (18) it was held that one of two partners, joint tenants of a house where their joint business was carried on, had a right to authorize a joint weekly servant to remain in the house, although the other partner had regularly given him a week's notice to leave the service. Lord Lyndhurst C B observed at p434 (ER):

"As the partners are jointly interested in the house, has not either of them a right to retain a servant in the house? Are not their rights coextensive? I am of opinion, that in this case one joint tenant had a right to order the servant to remain; and, if he remained under the authority of one joint tenant, such remaining was lawful,
The rest of the Court concurred."

In the (1841) case of *Beckham v Drake* (19) two partners in a three-man partnership entered into a contract with the plaintiff, Beckham, engaging him as a foreman in their type - founders business for a period of seven years, subject to damages of £500 if by default terminated earlier. The defendant was a dormant partner and Beckham was unaware of his existence when he and the two other partners signed the contract. Two years later, the business being no longer profitable, Drake discharged all the workmen including the plaintiff. In an action for damages Lord Abinger C B observed at p41 (ER):

"[T] hey formed a partnership on the 1st of January, 1834, and in the month of August the same year the plaintiff was by a verbal contract engaged in the service of the firm. It is true he was hired by a contract to which Drake was

> personally no party; but he was hired to serve the partnership, in a business from which Drake derived an immediate benefit..... He was, therefore, in the service of the partnership of which Drake was the principal partner; he was working the whole time for Drakes's benefit; he was working under a contract, not to serve them separately or conjointly in any other concern, but in the very concern in which they were in partnership with Drake. What profits were made were equally for Drake's benefit as for the rest of the firm, and the wages paid were equally Drake's money..... What right had he to discharge the plaintiff, except he was a party to the agreement? .....he, assuming the right to act as he did under the circumstances, discharges the plaintiff with the other workmen. It appears to me, upon the whole, that it cannot be denied that this was a contract made by these persons, in the terms of the declaration, - on behalf of themselves and Drake; being made by the two other partners with his implied assent, and being necessary in order to carry on the joint trade in which all three were engaged. It seems to me to be opposed to every rule of law to say, that a man who has by his partners entered into a contract, he himself being afterwards allowed to carry on the business, is not bound by that contract."

To say that the partners were equally bound by a master and servant contract of service is to say that each partner stood in the relationship of master to the particular servant. In *Brace v Calder and Ors* (20) Lord Esher M R described the case in the following terms at p258:

> "In this case the plaintiff had agreed with the defendants, a firm consisting of four partners, that he should serve them in their business for a term of two years. Before the two years had expired two of the partners retired, the two other partners continuing to carry on business. Thereupon the defendants offered to the plaintiff that he should serve the new firm for the remainder of the two years upon the same terms and at the same rate of remuneration as before. He, however, said that the new firm *were not the masters he had contracted to serve*, and he declined to serve them, *which I apprehend he had a right to do.*" (Italics added)

The Master of the Rolls held, however, that no wrongful dismissal arose: Lopes and Rigby LL J held to the contrary, but awarded only nominal damages, due to the offer of continued employment. All three of their Lordships, however, were agreed that dissolution had brought about termination of the contract of service. Rigby LJ put it succinctly thus at p263:

> "A contract to serve *four employers* cannot without express language be construed as being a contract to serve two of them. In my judgment the dissolution of the partnership operated as a dismissal of the plaintiff not authorised by law." (Italics added)

Inherent in the dicta of the Court of Appeal is the principle that a servant of a partnership is in fact the servant of each and every partner. Mr Slomowitz submits that *Mr Griffiths* cannot be the servant of any of the relevant three companies, cited in the indictment, that is, for the purposes of section 338 of the Code. He submits that Mr Griffiths was not subject to the directions of those three companies, who could not exercise any control over him. Neither for that matter, I observe, could Keeve Steyn, who were his direct employers, at least not in the matter of the services rendered to LHC. Once seconded to LHC, Keeve Steyn had no more right of control over the Project Manager than any other partner. None of the partners could exercise direct control over the Project Manager. They could however exercise, and did exercise *joint* control over him through their membership of the Management Committee, through the *aegis* of which body they had appointed him in the first case.

Mr Slomowitz nonetheless submits that it cannot be that Mr Griffiths can represent any of the five partners, other than Keeve Steyn, for the purposes of section 338, when one considers the tenuous connection with those companies. What is involved in that submission is a shifting of emphasis. It is the nature of the Project Manager's relationship with the *partnership,* that is, LHC, which is under examination. I am in no doubt, that, upon any test, and this Mr Slomowitz concedes, Mr Griffiths is a servant of the partnership, jointly administered by the six partners. He is thus, as a matter of common law, a servant of each and every partner.

Mr Penzhorn submits that Mr Griffiths is cited, not as an accused, but in a representative capacity, in order to bring the particular companies before the Court. He then submits that the Court should not look "through *in favorem libertatis* spectacles." But that the Court is always obliged to do, in matters of construction. Here, however, it is conceded that, on any test, Mr Griffiths is a servant of LHC. Thereafter, as I have said, as a matter of law, he is a servant of all the partners thereof.

Mr Slomowitz points to the fact that, in 1995, LHC had some 134 employees in Lesotho, including Mr Griffiths (all but Mr Griffiths have departed it seems), and it would be a startling result if the Crown could select any of those 134 people to represent the individual partners charged. I cannot see that sheer numbers affect the principle involved. Mr Slomowitz points to the temporary visits of experts from the home offices of the partners, and submits that it would also be startling if any such individuals were cited as servants. It seems to me that if any such expert was a director or servant of one of the partners, through service elsewhere, he might well be cited as a representative of *that* partner; I imagine, however, that a temporary visit to Lesotho, for a specific project or mission, would hardly classify him as a *servant* of LHC and hence of the other five partners. In any event, those considerations do not arise in the case of Mr Griffiths.

Mr Slomowitz submits that it would seem that the Project Manager need not, before appointment, necessarily be an employee of any of the six companies, and, that he, might well have been chosen from 'outside' LHC and its partners (it seems to me that, at least at one point, the papers contemplate otherwise); but I observe that in that event the Project Manager nonetheless becomes a servant of each of the six partners. It was submitted indeed that Mr Griffiths might well have resigned from Keeve Steyn and, say, gone into private practice, no doubt with the approval of the Managing Committee: in such circumstances it would be unrealistic to say he still was a servant of Keeve Steyn. But that submission does not take into account the whole purpose of the creation of the three partnerships. Mr Griffiths remains a servant of Keeve Steyn in regard to its general operations. He is also a servant of the six partners of LHC for the purposes of specific services rendered in Lesotho. His hypothetical resignation from Keeve Steyn would then not affect the latter situation.

Accordingly I hold that Mr Griffiths is a servant of the seventh accused Sogreah, of the seventeenth accused, Sir Alexander Gibb & Partners Ltd, and of the nineteenth accused Coyne Et Bellier. I also hold that Mr Griffiths has been regularly cited as a

representative of the said accused and that the said accused have also been regularly cited in the indictment.

There is, as earlier indicated , a further ground to the applications, and that concerns the aspect of service. The initial service of the summons before a Magistrate's Court was not effected personally upon Mr Griffiths, but was left with his secretary. Nonetheless, Mr Griffiths attended the Magistrate's Court. As for the indictment in these proceedings, it was served upon him personally and he accepted it, writing thereon that he had accepted it without prejudice to his right to object thereto. I cannot see that any irregularity in the service of the summons in the Magistrate's Court can affect the validity of these proceedings. No question of any *impropriety* in securing the attendance of an accused arises. The point is, that the process issued in the Magistrate's Court, and in this Court, has served its purpose; it has secured the attendance of the accused concerned.

Accordingly the applications are dismissed.

Delivered this 20th Day of June 2000.

B. P. CULLINAN
ACTING JUDGE

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