CRI/T/111/99
IN THE HIGH COURT OF LESOTHO HELD AT MASERU

In the matter between:-

HIGHLANDS WATER VENTURE Applicant
and
THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent
In re:-
THE CROWN V MASUPHA EPHRAIM SOLE & 18 OTHERS
For the Applicant: Mr G. Farber, S.C.
For the Respondent: Mr G.H. Penzhorn, S.C,
Mr H.H.T. Woken

Before the Honourable Mr Acting Justice B.P. Cullinan on the 6th, 7th, and 12th Days of June 2000.

ORDER

Cases referred to:

1) R v Levy and Others 1929 AD 312;
2) Palmer and Another v The Attorney - General and Another 1930 TPD 50;
3) Solomon v Law Society of the Cape of Good Hope 1934 AD 401;

4) R v Loebenstein 1947 (4) SA 362 (C);
5) R v Ah Foo and Another 1926 CPD 167;
6) R v Jasman 1915 TPD 295;
7) R v Van den Berg and Another 1955 (2) SA 338;
8) S v Coetzee 1997 (1) SACK 379 (CC); 1997 (4) BCLR 437 (CC); 1997(3)SA 527(CC);
9) Ngcwase and Others v Terblanche NO and Others 1977 (3) SA 796 (AD);
10) Shillings CC v Cronje and Others 1988 (2) SA 402 (AD);
11) Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs 1960(3) SA 291 (AD);
12) R v Commissioner under the Boilers Explosion Act 1882 (1891) 1 QB 703;
13) Bradley v Baylis (1881) 8 QBD 195;
14) Robinson v Barton Eccles Local Board (1883) 8 App Case 798;
15) London School Board v Jackson (1881) 7 QBD 502;
16) Commissioner for Inland Revenue v Simpson 1949 (4) SA 678 (AD);
17) Brown v Cape Divisional Council and Another 1979 (1) SA 589 (AD);
18) Canca v Mount Frere Municipality 1984 (2) SA 830 (Tk SC).

The present applicant, Highland Water Venture, was fourth respondent to an application, wherein I delivered a ruling on 31st May, 2000. As I said in that ruling (at p2) Highland Water Venture is the third accused in the above-mentioned criminal trial. In the indictment the following particulars are stated:-

"Accused 3 is Highlands Water Venture, a partnership registered in Lesotho under Partnership Proclamation No.78 of 1957 comprising inter alia Kier International Limited of the United Kingdom and Impregilo S.p.A. of Italy, and for purposes of these proceedings a "company" as defined in section 3 of the Lesotho Criminal Procedure and Evidence Act, No.9 of 1981 ("the Act"), of "The Site Office", Mohale Dam, Lesotho, alternatively First Floor, Maseru Book Centre, 4 Kingsway, Maseru, Lesotho, alternatively Viale Italia, 20099 Sesto. S. Giovanni, Milan, Italy, which is represented in these proceedings for purposes of section 338 (1) and (2) of the Act by its director or servant, namely R. Bestagno."

It is not disputed that the applicant is a partnership registered in Lesotho. The applicant's notice of motion seeks an order:

1) "declaring that the applicant has been irregularly and improperly cited as an accused in the criminal proceedings.....;
2) declaring that there is no lis between the Applicant and the Respondent;
3) declaring that the Respondent is in law precluded from proceeding with the prosecution of the Applicant....."

The grounds for the application are two-fold, but the parties have agreed that the court might separately consider the first of those grounds. Such ground is contained in a founding affidavit wherein it is averred that:

"given the true juridical nature of the Applicant, the Respondent's reliance on the provisions of section 338 (1) and (2) of the Criminal Procedure and Evidence Act, No.9 of 1981, in citing and bringing the applicant before this Honourable Court, is misconceived,"

At the outset I wish to express my appreciation of the heads of argument and the formidable body of authority placed before me by Counsel. To arrive at the correct interpretation of section 338 of the Criminal Procedure and Evidence Act, No.7 of 1981 ("the Code"), it is necessary to set out its historical development. The forerunner of the section was section 322 of the Criminal Procedure and Evidence Proclamation No. 59 of 1938. That section in turn was based on the provisions of section 384 of the Criminal Procedure and Evidence Act, No. 31 of 1917, of the Union of South Africa.

The 1938 provisions repeated, practically verbatim, the 1917 provisions. The 1938 provisions read thus (I shall reproduce the marginal notes, as headings, in all cases):-

Liability to punishment in case of offences by corporate bodies, partnerships, etc.

"322 (1) In any criminal proceedings under any statute or statutory regulation or at common law against a company, the Secretary and every director or manager or chairman thereof in the Territory may, unless it is otherwise directed or provided.,

be charged with the offence and shall be liable to be punished therefor, unless he proves that he was in no way a party thereto.

2) In any such proceedings against a local authority, the mayor, chairman, town clerk, secretary or other similar officer shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.
3) In any such proceedings against a partnership, every member of such partnership who is in the Territory shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.
4) In any such proceedings against any association of persons not specifically mentioned in this section, the president, chairman, secretary, and every other officer thereof in the Territory shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.
5) Provided that nothing in this section contained shall be deemed to exempt from liability any other person guilty of the offence."

The 1917 legislation was repealed in the Republic of South Africa by the Criminal Procedure Act No.56 of 1955, assented to on 22nd June, 1955. Section 384 of the 1917 Act was replaced by section 381 in the new Act, which introduced substantial change. On the 11th November 1955 the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation No. 91 of 1955 was promulgated, no doubt for the purpose of adopting some of the new South African measures. As to section 322 of the 1938 Proclamation, it was amended in subsection (1) thereof to place the additional onus upon the accused of proving that he could not have prevented the commission of the offence. That measure was in keeping with the new South African provisions, as were the following four new subsections, which were added to section 322 (numbered section 332 in the 1960 Edition of the Laws, Vol II at pp987/988):-

6) "In any criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such

director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.

7) For the purposes of sub-section (6) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or control shall be presumed to have been made or kept by him or to have been in his custody or control within the scope of his activities as such director, servant or agent, unless the contrary is proved.

8) In any proceedings against a director or servant of a corporate body in respect of an offence, any evidence which would be or was admissible against that

corporate body in a prosecution for that offence, shall be admissible against that director or servant.

9) In this section the word "director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or where there is no such body or group, who is a member of that corporate body."

While those subsections adhered to the South African 1955 provisions, it cannot be said that there was any wholesale adoption of such provisions. That did not take place until 1981, with the enactment of the Code and the present section 338. It proves necessary to carefully compare the provisions of section 338 with those of section 381 of the South African 1955 Act: For that purpose I propose to set out the two sections hereunder:-

SECTION 338 OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT, 1981
"Liability for Corporate Bodies, Partnerships, etc.

338.

(1) In any criminal proceedings against a company under any law or at common law-

a) an act performed, with or without a particular intent, by or on instructions or with permission express or implied, given by a director or a servant of that Corporate body and

b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that Corporate body in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that Corporate body, shall be deemed to have been performed, with the same intent, if any, by that corporate body or as the case may be, to have been an omission, with the same intention, if any on the part of that corporate body.

SECTION 381 OF THE CRIMINAL PROCEDURE ACT, 1955, RSA
"Prosecution of corporations and members of associations. –

381.

(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law –

a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body;and
b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

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: Provided that-

a) if that person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty;
b) if at any stage of the proceedings that person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for that person any other person who is a director or servant of that corporate body at the time of the substitution, and thereupon the proceedings shall continue as if no substitution had taken place.

c) if the person representing the corporate body is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as [an] alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the body corporate and may be recorded by attachment and sale of property of the corporate body.

(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: Provided that-

a) if the said person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty;
b) if at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court or magistrate concerned may, at the request of the prosecutor, from time to time substitute for the said person, any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
c) if the said person, as representing the corporate body, is committed for trial, he shall not be committed to prison but shall be released on his own recognizance to stand his trial;
d) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the

relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and

(d) the citation of the director or servant of a corporate body to represent that corporate body in any criminal proceedings against it, shall not exempt that director [or] servant from prosecution for that offence under sub-section 5.

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3) In any criminal proceedings against a company, any record which was made or kept by a director or servant or agent of that body corporate within the scope of his activities as a director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent, shall be admissible in evidence against the accused.
4) For the purposes of sub-section (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time under his custody or under his control, shall be presumed to have been made or kept by him or (to have been made or kept by him or) to have been in his custody or under his control within the scope of his activities as director, servant or agent unless the contrary is proved. [Words in brackets constitute printer's error]
5) When an offence has been committed, whether by the performance of any act or by [the] failure to perform any act for which a corporate body is or was liable to prosecution, any person who was, at the time of commission of the offence, a director or servant of that corporate body, shall be guilty of that offence, unless it is proved that he did

may be recovered by attachment and sale of any property of the corporate body in terms of section three hundred and thirty-seven; (e) the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of sub-section (5).

3) In any criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.
4) For the purposes of sub-section (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or control shall be presumed to have been made or kept by him or to have been in his custody or control within the scope of his activities as such director, servant or agent, unless the contrary is proved.
5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not

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not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the company or apart therefrom, and shall on conviction be personally liable to punishment therefor.

6) In any criminal proceedings against a director or servant of a corporate body in respect of an offence –

a) any evidence which was or would be admissible against that company shall be admissible against the accused;
b) whether or not the corporate body is or was liable to prosecution for the offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or, under the control of any director, servant or agent of that corporate body in his capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he proves that at all material times he had had no knowledge of that document, memorandum,book or record, in so far as its contents are relevant to the offence charged, and was in no way a party to [the] drawing up of such document, memorandum or the making of any relevant entries in such book or record.

take part in the commission of the offence, and that he could not have prevented it, and and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore

(6) In any proceedings against a director or servant of a corporate body, in respect of an offence-

a) any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against the accused;
b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of that corporate body's business, or which was at any time in the custody or under the control of any director, servant, or agent of such corporate body, in his capacity as director, servant or agent, shall be prima facie evidence of its contents and admissible in evidence against the accused, unless and until he is able to prove that at all the material times he had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or making of any relevant entries in such book or record.

7) Where a member of an association, not being a corporate body has in carrying on the business or affairs of that association or in furthering or endeavouring to further its interests, committed an offence whether by the performance of any act or by failure to perform any act, any person who was, at [the] time of the commission of that offence, a member of that association shall be guilty of that offence unless it is proved that he did not take part in the commission of that offence and that he could not have prevented it.

Provided that if the business or affairs of the association are [governed] or controlled by a committee or other similar governing body this subsection shall not apply to a person who was not at the time of commission of the offence a member of that [c]ommittee or other governing body.

8) In any criminal proceedings against a member of an association under sub-section (7) any record which was made or kept by any member or servant or agent of that association within the scope of his activities as such member, servant or agent, or any document which was at any time in the custody or under the control of such a member, servant or agent within the scope of his activities as such a member or servant or agent shall be admissible in evidence against the accused.

9) For the purposes of sub-section (8) any record made or kept by a member, servant or agent of an association, or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept by him or to have been in his control within the scope of his activities as

7) When a member of an association of persons, other that a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body the provisions of this sub-section shall not apply to a person who was not at the time of commission of the offence a member of that committee or other body.
8) In any proceedings against a member of an association of persons in respect of an offence mentioned in sub-section (7) any record which was made or kept by any member or servant or agent of the association within the scope of his activities as such member, servant or agent or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his activities as such member, servant or agent, shall be admissible in evidence against the accused.

9) For the purposes of sub-section (8) any record made or kept by a member or servant or agent of an association or any document which was at any time in his custody or control shall be presumed to have been made or kept by him or to have been in his custody or control within the scope of his activities as such member or servant or

such a member, servant or agent, unless the contrary is proved.

10) The provisions of this section are additional to and not in substitution for or in derogation from any other law which provides for the prosecution against

companies or their directors or servants or against associations [of] persons or their members.

11) In this section the word "director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body." (Italics added)

agent, unless the contrary is proved.

10) In this section the word "director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or where there is no such body or group, who is a member of that corporate body.

11) The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members." (Italics added)

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Section 381 was re-enacted in the provisions of section 332 of the Criminal Procedure Act, No.51 of 1977, R.S.A., but for present purposes it suffices to consider the provisions of section 381. The scheme of that section above is apparent. Sub-sections (1) to (6) and (10) quite clearly deal with a "corporate body"; subsections (7) to (9) deal with "an association of persons, other than a corporate body", e.g. an unincorporated association such as a partnership. Subsection (11) is an omnibus provision, stating that the provisions of section 381 are additional to the existing law, including, no doubt, the common law.

There is a marked contrast between the provisions in the said grouping of the subsections. Whereas a director or servant of a corporate body may find himself personally liable (under subsections (5) and (6)) to prosecution and punishment, subsections (1) and (6) clearly envisage a prosecution against the corporate body itself as physically represented in court by a director or servant thereof. On the other hand, subsections (7) to (9) do not speak of a proceedings against e.g. a partnership, but instead of "proceedings against a member " of such partnership. That situation, as the learned Senior Counsel for the applicant, Mr Farber, submits, is entirely in keeping with the common law, at least in the Republic of South Afica, whereby a partnership does not, in criminal law, as distinct from a corporate body, possess a persona. The leading case on the point, which turned on the provisions of section 384 of the 1917 Act, reproduced in section 322 of the 1938 Proclamation, quoted above, is that of R v Levy and Others (1) per Curlewis J (Wessels & Stratford JJ A concurring): The learned Judge of Appeal observed at p322:

> "Now under our common law a partnership is not a persona as distinct from the individuals who constitute the partnership, it is not a separate entity, and apart from the partners it can have no mens rea and can therefore not commit a crime for which mens rea is essential. And 1 do not think that the Legislature by section 384 (3) intended to introduce any innovation contrary to this well recognised doctrine of our common law. In my view the words in

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sub-sec. (3) "and in like circumstances punished for the offence" refer only to the last portion of sub-section (1) which provides for the liability to punishment of the person charged unless he proves that he was in no way a party thereto. And when the Legislature used the words "In any such (criminal)proceedings.....against a partnership," it contemplated not proceedings against a partnership as a persona, but proceedings in the form under which, by our common law, they can only be brought against a partnership, namely, against the individuals in their capacity as partners and as constituting the partnership. It is a matter of procedure.

But the Legislature did by sub-sec. (3) introduce this innovation in our law, namely, that whereas under our common law a partner is not ordinarily liable for the criminal act of his co-partners, when thenceforth a partner commits a criminal act in furtherance of the interests of the partnership, each member of the partnership who is in the Union, becomes liable, in proceedings against the partnership, to be charged with the offence and to be punished for it unless he proves that he was in no way a party thereto.
If this view of section 384 (3) be correct, then the indictment is -a charge or criminal proceeding against the partnership in the only form in which it can be brought against the partnership, that is against the three accused as lately carrying on business in partnership as Levy Brothers & Co., and the body of the indictment alleges that the accused as partners aforesaid and on behalf of the firm made the corrupt payments complained of."

Those dicta were applied by Barry and Grindley - Ferris JJ in the Transvaal in the case of Palmer and Anor. v The Attorney General and Anor. (2) at p51 and confirmed by the Appellate Division in the case of Solomon v Law Society of the Cape of Good Hope (3) per Wessels CJ (Curlewis & Beyers JJ A concurring) at p410.

Mr Farber submits that not alone should all the partners in a partnership be joined in an indictment, but that also the indictment should contain an averment specifying which partner or partners committed the offence and that he or they did so in carrying on the

business or affairs of the partnership, or were endeavouring to further its interests: thereafter the statutory onus falls upon the other partners under the legislation. This submission finds authority in the case of R v Loebenstein (4) where Steyn J at p365 referred to the decision in R v Ah Foo and Anor. (5). In that case Gardiner J (as he then was) at p 171 referred to the case of R v Jasman (6) where Wessels J (as he then was) said:

"If a person is in law criminally liable for the act of another, the Crown must allege who that other person is and what that other person did in order to make the person charged liable. It may not always be possible to give the name of the agent but then the circumstances must be set out with sufficient exactness to enable the agent to be identified."

In Loebenstein (4) Steyn J observed at p365.

"If the Crown proposes to hold a partner liable for the acts of his co-partner, then there must be a definite averment in the indictment, in the body of the charge, that the one partner committed the offence and that the other partner was liable, or committed the offence through the act of his co-partner. If that is done, it is brought home to the partner who is accused of the offence committed by his co-partner, that he will be hit by this regulation, or by sec. 384 (7) of Act 31 of 1917, as amended by Act 23 of 1939, where this section deals with an association of persons and provides that such persons are liable for the acts of the others. It seems to me that the partner must be charged with being guilty of the offence committed by his co-partner, and that must be averred. This was not done in this particular charge. It seems to me that my decision on this point is covered by the decision in the case Rex v Ah Foo and Another [5].

It seems to me also that, insofar as it purports to rely on sec. 384 (7), the Crown is faced with the decision in Rex v Palmer [2]. This decision was before the section was amended, but the amendment was not of such a nature that the decision cannot be still applied. The head-note reads:

" A partnership as such cannot be charged with or convicted of a criminal offence. If it is sought to charge the partners with an offence committed by them in the course of their partnership business, they should be charged individually and described as carrying on business as the partnership in question." "

The case of R v Van den Berg and Anor (7) was decided in 1955, before the passing of the 1955 Act. It turned on the provisions of section 384 (7) of the 1917 Act, which as

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I observed above, was the forerunner of section 381 (7) of the 1955 Act. At that stage of development, the two subsections were identical, with the exception that section 384 (7) did not contain the proviso (concerning membership of a governing committee or other body) introduced in section 381 (7). For our purposes, Van den Berg (7) could well have been decided on the 1955 provisions, as the aspect of a committee did not arise in that case. The indictment simply alleged that the two appellants set fire to their garage in order to defraud an insurance company. The indictment was amended, after the Crown had closed its case, and after the evidence of one witness for the defence, to aver that the appellants were in partnership, seemingly because the evidence established that it was the second appellant, and not both appellants, who had committed the arson. In the Appellate Division Greenberg JA (Hoexter JA and Fagan JA (as he then was) concurring) observed at pp341/342.

"The grounds on which the first appellant has been convicted are that the second appellant was a member of an association of persons, viz. a partnership, that he committed arson in furthering or endeavouring to further the interests of the partnership, that at the time of the commission of the offence the first appellant was a member of the partnership and is therefore deemed to be guilty of the offence. It may be that the amendment to which I have referred was applied for in order to bring the sub-section into operation if the need arose, but it alleged only one of the elements on which the Crown had to rely in order to obtain a conviction under the sub-section. In my opinion, the conviction was not competent as the indictment did not set out the essentials of the crime on which the conviction was based; the indictment alleged that the first appellant was guilty of the crime of arson because he had set fire to the

> premises, but on the facts found he could only have been convicted on the ground that he was deemed to be guilty of that crime because his partner had committed it in furthering the interests of the partnership and he had not discharged the onus mentioned in the sub-section. It is this allegation, that the arson was committed in the interests of the partnership, which is missing. This defect in the indictment could not be cured by evidence establishing the fact, for that was not the charge which the first appellant was called on to meet."

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There are then the general statements in the matter to be found in Gardiner and Lansdown: South African Criminal Law and Procedure 6 Ed (1957) at p81;

> "In the case of a partnership, club or other unincorporate association there is no artificial body capable of prosecution and penalty. Subsections (7) to (9) of [section] 381, Act 56, 1955 deal with the situation.."

There follows a summary of the provisions of section 381 (7) and then the following:

> "Similar provisions to those applied to corporations.....are made by subsection (8) in regard to the admissibility of records kept or documents held by any member, servant or agent of the association; and by subsection (9) as to the presumption attaching to any such record or document.
>
> These provisions do not contemplate proceedings against the partnership or association as a persona, but proceedings in the form under which at common law they can only be brought against a partnership or association, namely against the individuals in their capacity as partners of the partnership or officers of the association - R v Levy and Ors [1], Palmer and Anor, v Attorney General and Anor, [2]."

As to the aspect of the reverse onus placed upon directors and servants of corporate bodies, under section 332 (5) of the Criminal Procedure Act, 1977 (formerly section 381 (5) of the 1955 Act), the Constitutional Court of the Republic of South Africa held such onus to be unconstitutional in the case of S v Coetzee (8). The aspect of unconstitutionality (as it affects corporate or unincorporate bodies - see section 338 (5) and (7) of the Code and section 381 (5) and (7) of the 1955 Act, need not here concern us. The point is, the latter aspect apart, the interpretation of the 1955 provisions are then not in doubt. It is in the interpretation of the 1981 provisions, obviously based on those of 1955, that the difficulty arises.

It will be seen that the word "company" is used in the very first line of section 338 (1); it is used again in subsections (3), (5), (6) (a) and (10). The word "company", which

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is not defined in the 1955 Act, is defined thus in section 3 of the Code:

> " "Company" means a company incorporated or registered under any law generally governing companies, or under any special law or under letters patent Royal Charter, and includes a partnership, a firm, an association of persons, local government body, or any other association of persons."

Learned Senior Counsel Mr Penzhorn submits that the case of Levy (1) was decided under the 1917 Act, the provisions of which were not carried forward into the 1955 Act. It seems to me that the underlying principles of such provisions were so carried forward. As late as 1955, Levy (1) was being still applied - see the Van den Berg (7) case at p339. As the above extract from Gardiner and Lansdown indicates, it was being followed in 1957. Indeed, it is still applied to the provisions of section 332 (7) of the 1977 Act - see Commentary On The Criminal Procedure Act by Etienne Du Toit et al. 1996 (service 20, 1998 at p33-7).

Mr Penzhorn submits that because of the wide definition of "company", the legislature intended the provisions of subsections (1) to (6) of section 338 to apply to partnerships, and accordingly that subsections (7) to (9) deal with associations other than partnerships and can thus, for our purposes, be ignored. Leaving aside the introduction in 1981 of the word "company" for the moment, the suggested interpretation is clearly contrary to the 1955 and 1977 provisions and indeed all authority in the matter: see Du Toit et al., ibid., where it is said of section 332 (7):

> "A partnership, although not a corporate entity, is an association of persons for the purpose of this subsection R v Levy and Ors [1], Solomon v Law Society of the Cape of Good Hope [3])"

To return to the word "company", I have italicized in the provisions of section 338 reproduced above, the repetition of the phrase "that corporate body," or "corporate body"

or "body corporate" (the latter juxtapositioning of the words serving but to emphasise their meaning and the retention thereof by the draftsman - see also section 133 (2) (e) of the Code). That of course is the phraseology used in section 381, as no reference to a "company" was there made, but instead to a "corporate body". The words, "that corporate body", were quite clearly intended to refer, and intrinsically refer, at least in subsection (1) and (2), to the "corporate body" mentioned in the opening line of section 381. No attempt whatever was made by the draftsman, having introduced a wide definition in section 3, to accordingly tailor the provisions of section 338.

Mr Penzhorn submits that the correlation between the expressions, "company" and "that corporate body", can only mean that a partnership is included in the term "corporate body". That interpretation is quite clearly contrary to the law as we know it, common and statutory. Secondly, faced with such an inherent contradiction, why did not draftsman remedy the situation? More importantly, the definition of "company" is so wide as to include "any other association of persons", which words could embrace a society or a club. If we are to give the word "company" in section 338 such wide meaning, why then, as far as subsections (1) to (6) are concerned, should we in turn restrict the definition to include only partnerships? Why not include all forms of associations? To do so, of course, would be to render completely nugatory the provisions of subsections (7) to (9). Those subsections refer to "an association, not being a corporate body". A corporate body is of course also an association. Thus the words refer to an unincorporated association, which clearly embraces a partnership.

As indicated, the word "company" appears five times in section 338, that is, in subsection (1) and in subsection (3), where reference is thereafter made to "that corporate body". In subsections (5) and (6) however reference is first made to a"corporate body",

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thereafter reference being made to "the company" or "that company": surely the word "company" can there mean only a corporate body? In subsection (10) the word "companies" can only be construed as excluding "associations [of] persons." More importantly, wherever the words, "corporate body", or "company" appear they are invariably linked to the words, "director or servant", and in subsections (3) and (5) to, "director, servant or agent". Clearly the word "director" applies to a corporate body and not a partnership. When it comes to subsections (7) to (9) however, the word "director" gives way, appropriately so, to "member", e.g. a partner, in the case of a partnership.

Mr Penzhorn submits that the Legislature must have intended that the definition of "company" in section 3 should apply to section 338, as apart from that section, it appears in only one other section in the Code, namely in section 134. That section reads:

"134. It shall be sufficient-

1) in every case in which it is necessary in any charge to name any company, firm or partnership, to state the name of the company or the style or title of the firm or partnership without naming any of the officers or shareholders of the company, or any of the partners in the firm or partnership, and one individual trading under the style or title of a firm may be described by the style or title;

2) where two or more persons not partners are joint owners of property, to name one of such persons adding the words "and another" or "and others", as the case may be, and to state that the property belonged to the person so named and another or others, as the case may be." (Italics added).

Those provisions, incidentally, are procedural only, e.g. as to the naming of a partnership, and are not authority for the proposition that a partnership may be charged in the name of the partnership: see South African Law of Criminal Procedure by Swift and Harcourt (General Editor) 1957 at p466. Such provisions find their origin in section 133 of the 1917 Act, section 133 of the 1938 Proclamation and section 321 of the 1955 Act.

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Mr Penzhorn submits that the Court simply cannot ignore and must apply the definition of "company" contained in section 3. Before that definition was introduced, presumably that found in the Companies' legislation prevailed; e.g. in section 2(1) of the Companies Act, No.25 of 1967, "company" is defined as meaning:

> "a company limited by shares or a company limited by guarantee as in section nine described, or an unlimited company or an existing company" [one formed and registered under former legislation].

That definition clearly envisages incorporation under Companies' legislation. As the definition in section 3 of the Code envisages, however, incorporation can also take place

under a special enactment, Letters Patent, or Royal Charter. The definition then embraces a corporation or "corporate body" or "body corporate" (see the Concise Oxford Dictionary 7 Ed under "corporate "). The term "body corporate" is not defined in the Code. In the case of Ngcwase and Ors v Terblanche N.O. and Ors (9), however, Joubert AJA (as he then was) at p803 observed that a body corporate was "a statutory juristic person {persona juris) .... an abstract legal entity which exists as a juristic reality in the contemplation of the law despite the fact that it lacks physical existence."

The definition of "company" in the Code, however, also embraces, and this is where the difficulty lies, unincorporated associations. In the case of Shillings CC v Cronje and Ors (10) Nestadt AJA (as he then was) observed at p419:

> "'Unincorporate' refers to an association 'which does not have a legal persona separate from its constituent members' (per Ogilvie Thompson JA in CIR v Witwatersrand Association of Racing Clubs [11] at 302 A - B). 'Corporate' would have a correspondingly opposite meaning."

How then is the definition of "company" in section 3 of the Code, embracing both corporate bodies and unincorporated associations, to be applied to section 134 of the Code,

wherein the word, "company", clearly excludes a "firm or partnership", wherein a clear distinction is made between a "company" with its "shareholders" and a "firm or partnership" with its "partners", not to mention an association of "two or more persons", joint owners of property? The word, "company", appears, as indicated, in only two sections of the Code. The definition of the word is clearly inapplicable to one of those sections. That aspect does not engender in me any confidence as to the draftsman's intentions - that it should apply to the other section, section 338.

The main thrust of Mr Penzhorn's submissions, in the face of the obvious difficulties in applying the definition contained in section 3, is that all such difficulties are resolved by the fact that the South African decisions in the matter are largely irrelevant, due to the separate course taken by legal developments in Lesotho. Mr Penzhorn refers in particular to the Partnerships Proclamation No. 78 of 1957. I observe however that the very definition of partnership" contained in section 1 thereof "includes a limited partnership, but does not include a company incorporated by law". Section 4 of the Proclamation 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 observe that a partnership under its registered "style or firm name", may "sue and be sued". Section 4 (a), however, clearly contemplates civil and not criminal

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proceedings. Mr Penzhorn places reliance on section 4 (e), which provides that a partnership may, under its registered "style or firm name" 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

I cannot see that those provisions take the matter any further. Indeed I cannot see that they are executory in nature. Everything depends on the provisions of "any [other] law", in this case section 338 of the Code, and to that extent the debate is circular.

One is then cast back on the provisions of the Code. Clearly the definition of the word, "company", in section 3 is not accommodated in the provisions of section 134. Thereafter it could be said that that is a pointer to the construction of section 338, that is, a construction ex visceribus actus.

It will be seen that in the definition of "company", the word is first given its ordinary meaning, namely that of a corporate body. Thereafter the word is said to "include" unincorporated associations, and so the meaning is extensive. The learned author of Craies On Statute Law 7 Ed (1971) observes at p213 that:

> "Interpretation clauses frequently fall under severe judicial criticism from failure to observe the valuable rule never to enact under the guise of definition."

In the case of R v Commissioners under the Boilers Explosion Act 1882 (12) at p716 Lord Esher M.R. observed that:

> "This third section of the Act is a peculiarly bad specimen of the method of drafting which enacts that a word shall mean something which in fact it does not mean."

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Ten years before that, in the case of Bradley v Baylis (13) the same Judge had observed:

> "It seems to me that nothing could be more difficult, nothing more involved, than these statutes, and that that difficulty arises from the fact of Parliament insisting upon saying that things are what they are not by saying that "a dwelling-house" shall mean "a part of a part dwelling house".

Be that as it may, the learned author of Craies observes at p214 that, "[a]n interpretation clause which extends the meaning of a word does not take away its ordinary meaning ." In the case of Robinson v Barton Eccles Local Board (14) at p801 Lord Selborne observed:

> "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable."

The learned author of Craies observes at p216:

> "Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration."

The case of London School Board v Jackson (15) per Coleridge J. at p504 is cited as authority for the above observations. Of course, the difficulty in the present case is that the extended definition is not applicable to any section under consideration. In this respect, the learned Editors of Halsbury's Laws of England 4 Ed Vol 44 observe at para

845 p513 that,

"[i]f a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning."

That observation was quoted with approval by Watermeyer C.J in the case of Commissioner for Inland Revenue v Simpson (16) at p692. In the case of Brown v Cape Divisional Council and Anor (17) at pp600/601 Hofmeyr JA observed:

> "It is generally accepted that an interpretation section or definition does not necessarily apply in all possible contexts in which the word may be found in a statute. This qualification is sometimes expressly so stated in the enactment. But in a clear case this is not necessary. If a defined word or expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning" (Italics added).

In the case of Canca v Mount Frere Municipality (18) Davies J at p832 held that:

> "The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, and deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply (Italics added)"

In his work Interpretation of Statutes (1996) Professor Devenish observes at p116 that the Court in the Canca (17) case, after an examination of the relevant case law (at p832) found that the above stated principle applied, whether or not the qualifying words, "unless inconsistent with the context", formed part of the definition section. The learned author goes on to observe:

> "This is a clear manifestation of unqualified contextual interpretation, but it is indeed more than this since the formula 'injustice or incongruity or absurdity as to lead to a conclusion that the Legislature could never have intended the statutory definition to apply' adds a significant teleological or value-coherent dimension to the interpretative process."

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(See also Craies at p101 and pp212/216, Maxwell on The Interpretation of Statutes 12 Ed. at - pp 270/271, and Dr Cockram's work Interpretation of Statutes 3 Ed at pp29/32.)

All of which observations above must surely apply a fortiori to the present case, where the Court is concerned, not so much with a statutory definition in its entirety, as with the extended arm, thereof, the definition itself containing, and giving prominence to, the ordinary meaning of the word concerned.

To summarise therefore, I find that the statutory definition, that is, in its extended form, is inapplicable to section 338 and that any attempt to apply it, if it does not result in injustice, clearly results in incongruity, indeed absurdity.

Further, the common law in the matter is beyond doubt. It is trite that the common law can only be altered by express provision (and see section 338 (10)). I cannot imagine that the statutory definition in this case, in its extended form, could ever be regarded as fulfilling that requirement.

Further again, while the provisions before the Court are contained in a procedural enactment, they nonetheless contain measures impinging upon the criminal liability of officers and members of corporate bodies and associations, which are far reaching in effect, as demonstrated by the case of Coetzee (8). I conclude therefore that it is the Court's duty to construe such provisions strictly, that is, in favorem libertatis.

Consequently 1 am satisfied that the Legislature could never have intended the extended sense of the statutory definition to apply to section 338 and that the word "company" in that section should be given its ordinary meaning, namely as meaning a

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corporate body. Accordingly I hold that the applicant has been irregularly cited as an accused in these proceedings.

I see no need to make the other orders sought. An irregular citation has its inevitable consequence: the Court simply has no jurisdiction, in these proceedings, over the applicant.

The Director of Public Prosecutions is dominus litis in criminal proceedings, however, at least before plea, and it is now a matter for the Director as to what course he proposes to take.

Delivered this 12th Day of June 2000.

B.P. CULLINAN
ACTING JUDGE

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