CRI/T/111/99

IN THE HIGH COURT OF LESOTHO

THE COMMISSIONER OF THE LESOTHO MOUNTED POLICE SERVICES	**First Applicant**
THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS	**Second Applicant**

AND

STANDARD BANK LESOTHO LIMITED	**First Respondent**
LESOTHO BANK (1999) LIMITED	**Second Respondent**
NEDBANK (LESOTHO) LIMITED	**Third Respondent**
HIGHLAND WATER VENTURE	***Fourth Respondent***

IN RE: REX VS MASUPHA EPHRAIM SOLE AND 18 OTHERS

For the Applicants:	**Mr G.H. Penzhorn, S.C.,** **Mr H.H.T. Woker**
For the 1st, 2nd and 3rd Respondents:	**Mr P.U. Fischer**
For the 4th Respondent:	**Mr G. Farber, S.C.**

Before the Honourable Mr Acting Justice B.P. Cullinan on the 24th, 26th and 31st Days of May, 2000.

ORDER

Cases referred to:
(1) *Letsie & Others v R 1995 - 1996 LLR -LB 28;*
(2) *S v Harper & Another* 1981 (1) SA 88 (D);
(3) *S v De Villiers 1993* (1) SACR 574 (NM);

(4) *R v Dadson* (1983) 77 Cr. App. R. 91, CA;
(5) *Williams v Williams* (1988) QB 161 CA (Civ. Div.);
(6) *Narlis v South African Bank of Athens* 1976 (2) SA 73 (A);
(7) *Venter v R* 1907 TS 910;
(8) *R v Allen* (1872) LR, CCR 367;
(9) *Williams v Summerfield* (1972) 2 QB 512;
(10) *R v Grossman* (1981) 73 Cr. App. R. 302 CA (Civ. Div.);
(11) *Chunguete v Minister of Home Affairs and Others* 1990 (2) SA 836 (W);
(12) *Wright v St Mary's Hospital, Melmoth, and Another* 1993 (2) SA 226 (D & CLD);
(13) *Sefatsa and Others v Attorney General, Transvaal and Another* 1989 (1) SA 821 (A);
(14) *S v Safatsa and Others* 1988 (1) SA 868 (A);
(15) *Cerebos Foods Corporation v Diverse Foods SA* 1984 (4) SA 149 (T);
(16) *S v Absalom* 1989 (3) SA 154 (A);
(17) *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A);
(18) *Van Den Berg v Schulte* (1990) 1 SA 500 (C);
(19) *Smith v Smith* 1992 (1) SA 415 (T);
(20) *Krygkor Pensioenfunds v Smith* 1993 (3) SA 459 (A).

The fourth respondent is the third accused in the above-mentioned criminal trial, which is pending before the Court and which is due to commence on 5th June. For the purpose of such trial the fourth respondent is represented, under the provisions of section 338 of the Criminal Procedure and Evidence Act, 1981 ("the Code")"by its director or servant, namely R. Bestagno." The fourth respondent has filed an application seeking an order declaring that it had been "irregularly and improperly cited as an accused." One of the grounds for such application is that Mr Riccardo Bestagno ceased to be a servant of the fourth respondent on 15th May, 1998, that aspect being grounded by the former in an affidavit, wherein he deposes that "I have, since the 15th May,1998 had no involvement with the Applicant, whether as a director or servant or, for that matter, in any other capacity."

On 5th May, 2000, Senior Superintendent B. Matsoso, Deputy Head of C.I.D., a member of the Police investigation team involved in the trial, wrote to the three respondent Banks ("the Banks") in identical terms. The letters in part read:

> "In terms of Criminal Procedure and Evidence Act No.9 of 1981
> Section 247 (2) you are requested to provide the Investigating
> Officer with the following information relating to the accounts of
> LHWV [the fourth respondent].
> 1. Bank Statements
> 2. Names of previous and current Signatories of the accounts."

The Senior Superintendent addressed a further letter to the Banks on 10th May. It reads in part:

> " While still working on the production of Bank Statement can you
> please as a matter of urgency find out whether Mr R. Bestagno
> or Mr Francois Berretta who are in the centre of our investigation
> have ever signed anything for Highlands Water Venture after the
> 15/05/98 up to date."

The third respondent ("Nedbank") replied to that letter on 11th May, in the following terms:

> " We thank you for your letter dated 10th May 2000 and advise
> that both Mr R. Bestagno and F. Berretta are signatories to the
> account of Highlands Water Venture. Mr R. Bestagno was
> appointed from 12th December 1996.
> Mr F. Berretta was appointed during March 1998."

The first and second respondents however, replied to the Senior Superintendents' letters on 15th May in separate letters, which were in practically identical terms: The letters read thus:

> " We refer to your letters dated 5th and 10th May 2000 and note your request.
> After obtaining a legal opinion on the matter from our Legal Advisor we have
> been informed that section 247 (2) obliges the Bank to do more than allow a
> police officer of the rank of Lieutenant or above, to peruse "bank ledgers,
> day-books, cash-books or other account books".
>
> Further more the Bank is not obliged to produce copies of the documents for
> the police officer to take away and peruse. The Bank is not obliged to
> necessarily explain the contents of "Bank ledger, day-books, cash-books or
> other account books" to the police officer or do anything other than make them
> available to him to peruse on the premises.
>
> In terms of the legal opinion obtained the Bank is not obliged, in terms of
> the Act, to allow the perusal or inspection of documents other than those
> specifically specified in terms of the provision of Section 247 (2).

Therefore the Bank is not permitted or obliged to disclose the names of previous and current signatories of the account."

Consequent upon that letter the applicants filed the present application on 23rd May seeking an order *inter alia* in the following terms:

> "THAT in terms of Section 247 (2), alternatively 247 (1), of the Criminal Procedure and Evidence Act, 1981, alternatively in terms of this Honourable Court's inherent powers, the first, second and third respondents be and are hereby ordered to hand over forthwith to Senior Superintendent Matsoso of the Lesotho Mounted Police Services, alternatively the Registrar of this Honourable Court, the originals of all bank records in their possession relating to Highlands Water Venture (fourth respondent) for the period 15 May 1998 to date including but not limited to all documents which show:
>
> (i) which officers/servants of Highlands Water Venture including Riccardo Bestagno had signing powers on any/all bank account(s) operated by Highlands Water Venture with the various respondent banks over the mentioned period:
>
> (ii whether one or other of such officers/servants, including Riccardo Bestagno did indeed sign cheques and/or other documents for and on behalf of Highlands Water Venture over the mentioned period."

Meanwhile in an affidavit filed by a Director of Nedbank, the latter bank resiled from its letter of 11th May, stating that it was "ill-advised" and was communicated "before the bank had taken the opportunity to consult with its legal advisors."

It proves necessary to quote the provisions of Section 245 to 248 inclusive of the Code:

> "SPECIAL PROVISIONS AS TO BANKERS' BOOK [S]
>
> 245 The entries in ledgers, day-books, cash-books and other account books of any bank shall be admissible as prima facie evidence of the matters, transaction [s] and accounts recorded therein, on proof being given by the affidavit in writing of a director, manager or an officer of that bank or by other evidence-
>
> (a) that the ledgers, day-books, cash-books or other account books-
>
> (i) are or have been the ordinary books of that bank;
>
> (ii are in or come immediately from the custody or control of that bank; and

(b) the entries have been made in the usual and ordinary course of business.

246 (1) Copies of all entries in any ledgers, day-books, cash-books or other account books used by any bank may be proved in any criminal proceedings as evidence of any such entries without production of the originals by means of the affidavit of a person who has examined them, stating the fact of the examination and that the copies sought to be put in evidence are correct except that -

(a) no ledger, day-books, cash-books or other account book of any such bank and no copies of entries therein contained, shall be adduced or received in evidence under the Act, unless 10 days' notice in writing or such other notice as may [be] ordered by the court or a magistrate holding preparatory examination, containing a copy of the entries proposed to be adduced, and stating the intention to adduce the same in evidence has been given by the party proposing to adduce the same in evidence to the other party; and

(b) the other party is at liberty to inspect the original entries and the accounts of which such entries form a part.

(2) On the application of any party who has received notice pursuant to sub-section (1) the court or a magistrate holding a preparatory examination may order that such party be at liberty to inspect and take copies of any entry in the ledgers, day-books, cash-books or other account books of any bank relating to the matters in question in the criminal proceedings, and such order may be made by the court or magistrate in its or his discretion, either with or without summoning before it or him such bank or other party, and shall be intimated to such bank at least 3 days before the copies are required.

(3) On the application of any party who has received notice the court or a magistrate holding a preparatory examination may order that the entries and copies mentioned in the notice shall not be admissible as evidence of the matters, transactions and documents recorded in the ledgers, day-books, cash-books and other account books.

247 (1) Subject to sub-section (2) no bank shall be compelled to produce the ledgers, day-books, cash-books or other account books, of the bank in any criminal proceedings unless the court or the

magistrate holding the preparatory examination specially orders that the ledgers, day-books, cash-books or other account books shall be produced.

(2) The police officer of the rank of lieutenant or above may demand the production of bank ledgers, day-books, cash-books or other account books notwithstanding that there are no criminal proceedings pending.

248 Sections 245 to 247 shall not apply to any criminal proceedings to which any bank, whose ledgers, day-books, cash-books or other account books are required to be produced in evidence, is a party."

Those provisions find their origins in the legislation of the Republic of South Africa, which in turn is based on the provisions of the Bankers Books' Evidence Act, 1879 of Great Britain. The provisions of sections 245/248 were considered by van den Heever AJA (as she then was) (Browde and Leon JJ A concurring) in the Court of Appeal case *Letsie & Ors v R (1)*. In the trial before the High Court an affidavit by a bank official, deposing as to lodgments in a particular bank account, was admitted in evidence. Van den Heever AJA observed at p35:

"The affidavit however goes further, and annexes documentation which does not accord with the description, in section 245 and 246 of the Criminal Procedure and Evidence Act ("the Act") of the type of documents which, containing hearsay evidence are nevertheless admissible as *prima facie* evidence."

and again at p36:

"Clearly neither the certified true copy of the deposit slip which [the bank official] annexed .... and the information it contained, nor the certified true copy of the Central Bank of Lesotho ("CB") cheque .... referred to in the deposit slip, were either "ledgers, day-books, cash-books or other account books" of [the particular bank] nor entries in such books".

With regard to withdrawals to which the official deposed, he also annexed slips to his affidavit seeking to connect such withdrawals with deposits into another account. Her Ladyship observed at p37:

"The annexures here too clearly do not fall within the parameters of the benefit conferred on both the prosecution and bank officials by sections 245 and 246 (1) of the Act.

> Subject to what is said below, there is no problem in regard to [the bank official's] setting out of the entries relating to withdrawals ..... in the sense that no corroboratory document was annexed relevant to those."

As to another bank official, who had annexed a deposit slip to his affidavit, in support of an averment that an account had been opened, her Ladyship observed that he had done so "unnecessarily and so harmlessly, in corroboration of the date which must obviously have appeared in the statement itself." Further on, the judgment reads at p38:

> "In his judgment ultimately, the trial judge seems to have held that he was prepared to ignore the "illustrative annexures" to the affidavits. He stated that "the essential averments in these affidavits established a *prima facie* case against the accused regarding the entries mentioned in the affidavits."

Her Ladyship indicated at p39 that the trial Judge was correct in that finding. I shall have the occasion to refer again to the *Letsie (1)* case. Suffice it for the moment to say that the Court of Appeal were there not prepared to enlarge the ordinary meaning of the words"ledgers, day-books, cash-books and other account books" so as to include deposit slips and cheques.

The definitions contained in the dictionaries are of assistance:

" book": " a written or printed work consisting of pages glued or sewn together along one side and bound in covers" (Concise Oxford Dictionary, 9 Ed)

"book" : a volume prepared for written entries or words: as a note-book; cash-book; day-book (Standard Dictionary of the English Language Vol. 1- 20th Century Subscription Ed)

"books": "a set of records or accounts."(Concise Oxford Dictionary)

"account book": "a book in which accounts, as of receipts and expenditures, are kept" (Standard Dictionary)

"account book":"a book in which accounts are kept" (Webster's New Collegiate Dictionary)

"cash-book": " a book in which receipts and payments of cash are recorded" (Concise Oxford Dictionary)

"day-book":	"an account book in which a day's transaction are entered, for later transfer to a ledger" (Concise Oxford Dictionary)
"day-book":	"the book in which the particulars of transactions are recorded in the order of their taking place, either immediately or from a record called a *blotter*" /North American, a temporary recording book] (Standard Dictionary)
"ledger":	"the principal book containing the record of all the financial transactions of a company etc., classified under the appropriate headings"(Concise Oxford Dictionary)
"ledger":	a book containing accounts to which debits and credits are posted from books of original entry"(Webster's Dictionary)
"ledger :	the principal book of accounts of a business establishment, in which all the transactions of each day are entered under appropriate heads so as to show at a glance the debits and credits of each account." (Standard Dictionary)

It will be seen that the word "book" ("or volume") recurs throughout the above definitions. Clearly, when the present phraseology was introduced over 120 years ago, in the then prevailing system of book-keeping, the word "book" was used in its ordinary sense denoted above. Accordingly, the bankers' books provisions avoid, *inter alia,* the sheer physical inconvenience of producing books of account in court, not to mention the accounting inconvenience to the particular bank and indeed the inconvenience to the community (see *South African Criminal Law and Procedure* by Gardiner and Lansdown Vol. 1 (1957) at p585), occasioned by the removal of the bank's books. More importantly, such provisions enable the proof, on a *prima facie* basis, of "the matters transaction [s] and accounts" contained in the entries in such books, without production of the originals. As van den Heever AJA. observed in *Letsie (1)* at pp38/39:

> "Section 245 merely sets out prerequisites to proof by affidavit of hearsay upon hearsay evidence of facts that would, were direct evidence to be required, be virtually impossible to prove: the teller who received a cheque among hundreds if not thousands of others, would be required to testify that on a specific day a specific person handed a cheque (or cash) to him for deposit into that clients account."

The learned Senior Counsel Mr Penzhorn, who has placed *Letsie v R (1)* before the Court, fully acknowledges the effect of sections 245 and 246 and indeed the plain meaning of the phraseology thereof. He submits, however, that though the same phraseology is used in section 247, it "stands on a different footing to sections 245 and 246." Whatever about section 247 (2), I cannot with respect agree that section 247(1) stands on a different footing. For one thing, section 248 indicates a clear association between "sections 245 to 247"

The present provisions, subject to further observation, repeat the provisions of section 241 to 244 of the Criminal Procedure and Evidence Proclamation No.59 of 1938, which in turn were based on the relevant provisions of the Criminal Procedure and Evidence Act, 1917 of the Union of South Africa. The latter provisions were repeated in sections 264 to 267 of the Criminal Procedure and Evidence Act, 1955 of the Republic of South Africa. In the commentary on section 264 of the 1955 Act, contained in *The South African Law of Criminal Procedure* (1957) by Swift and Harcourt (General Editor), there appears at p 402 the comment that "This section must be read with the three sections which follow."

Further, it will be seen from the present section 246 before the Court that an accused is entitled to ten days notice in the matter of the production of copies of entries in books of account. Secondly, he is "at liberty to inspect the original entries": to that effect he may apply (section 246 (2)) for a court order enabling him to inspect and take copies of the original entries. Apart from the Court's power under section 246 (3), upon application, to order that such entries and copies thereof shall *not be admissible* as evidence of their contents, it may well be that such inspection indicates that the production of the originals themselves in court is necessary, when a "special" court order under section 247 (1) is required. It may be also that the prosecution itself requires such an order.

Such considerations (apart from an order under section 246 (3))do not apply where the bank itself is "a party" to the proceedings, that is, as Gardiner and Lansdown *op. cit.* observe at p585, a "complainant, private prosecutor, or defendant". Swift and Harcourt observe *op. cit.* at pp 403/404:

> "The provision of the last three [sections] which constitute an exception to the rules as to hearsay do not apply where the bank is a party. There is no definition in the Act of a "party" and the use of the word is not usual in relation to criminal proceedings where the "parties" are normally the Crown and the accused in so far as the term is properly applied. It is submitted that the intention is, and the rule should be, that the statutory exception to the exclusionary hearsay rule should only apply *so long as the bank has no interest in the proceedings*. Thus proof in terms of the preceding sections cannot be allowed if the bank is a private prosecutor and, it is submitted, should not be permitted where the bank is the complainant in the prosecution nor where, by virtue of a compensatory fine or an order for disposal of property, the bank may gain consequent upon the conviction and sentence of the accused."

All of which indicates that, in such circumstances, the production in court of even the original books of account, the entries therein constituting hearsay, will not suffice, and that direct evidence of transactions is required. Those considerations are far removed from the issue before this Court, but they serve to illustrate that there is a constant and unchanging link between the provisions of sections 245 to 248, that is, that they concern "bankers' books" as such, namely, "ledgers, day-books, cash-books and other account books."

Mr Penzhorn submits that the Court of Appeal placed "a restrictive interpretation" upon the provisions of sections 245 and section 246. Such interpretation might be described as "restrictive" when compared, as the learned Senior Counsel Mr Farber submits, with the interpretation of section 247 which the applicants urge upon me. As I see it, the Court of Appeal was restricted to the plain and ordinary meaning of the words, because of the canons

of construction. Mr Penzhorn submits that that Court was also so "restricted"because of the sweeping effect of sections 245 and 246. But that, in my view was the plain intention of the legislature, namely that the evidential provisions of section 245 would extend only to the books of account of a bank, and not to assorted documents, for a number of reasons. Those reasons I perceive were the difficulty of proving transactions by direct evidence, the inconvenience to banks and the public in producing original books of account and the general reliability of books of account, in comparison to assorted documents, such accounts, in any event, constituting a summary or directory of the multifarious separate transactions represented by assorted documents.

Mr Penzhorn submits nonetheless that the words, "other account books", are capable of an extended meaning, that is, "any other records in the bank's possession." He refers to the cases of *S v Harper & Anor.* (2) and *S v De Villiers* (3): but those cases are authority for the proposition that the word "document" should be given its ordinary grammatical meaning, and includes a business computer print-out (see section 221 (5) of the Criminal Procedure Act, 1977 of the Republic of South Africa). The word "document", however, nowhere appears in the provisions of sections 245 to 248 of the Code.

Section 9 of the Bankers' Books Evidence Act, 1879 defined "bankers's books" as including "ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank". That definition was changed in 1979 to:

> "include ledgers day books cash books, account books and other *records* used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism."
> (Italics added)

In the case of *R v Dadson* (4) it was held that, prior to the coming into force of the above extended definition, copies of letters by a bank and contained in a file of its correspondence were not "bankers' books." The learned Editors of *Archibold Criminal Pleading Evidence and Practice* (1998 Ed.) observe at para. 9 - 124, p1034:

> "Whether the new provision will be held to embrace such documents remains to be seen - the reasoning in *Dadson* (4) suggests that it is doubtful. The use of the words "records" as offered to "books" was presumably deliberate on the part of the legislature, but "record" is hardly the most apt word for describing a file of correspondence."

Again, in the case of *Williams v Williams* (5) Sir John Donaldson M.R. held at p168 that paid cheques and paying-in slips retained by a bank after the conclusion of a banking transaction to which they relate are not "bankers' books," because even if bundles of such documents can be treated as "records used in the ordinary business of the bank", the act of adding an individual cheque or paying-in slip cannot be regarded as the making of an "entry" in the records. Further, the learned Master of the Rolls observed that:

> "other records" in the new definition, has, I think, to be construed ejusdem generis with "ledgers, day-books, cash-books and account books and unsorted bundles of cheques and paying-in slips are not "other records"within the meaning of the Act."

The learned authors of *Blackstone's Criminal Practice* 8 Ed. (1998) observe at F8.27, p1998:

> "It is submitted that similar reasoning may be used to justify the decision reached in *Dadson* (4)."

Again, Professor Tapper in *Cross and Tapper on Evidence* 8 Ed. (1995) at p 758 with reference to the extended provisions concerning "bankers' books" and the decisions in *Dadson (4)* and *Williams (5),* observes:

> "The application of these provisions has been very sensibly extended to modern forms of book-keeping such as microfilmed and computerised records. This reform however *does not, however, extend beyond the form of*

> *the records to their substance,* and it seems that copies of letters sent by the bank, or of cheques and paying-in slips would still not be covered by the provisions." *(Italics added)*

The South African provisions have also undergone change. The learned Counsel Mr Fischer, submits that one aspect of such change may well have been given impetus by the case of *Narlis v South African Bank of Athens (6)* where Holmes JA, in considering the bankers' books provisions of the Civil Proceedings Evidence Act, 1965 observed that section 5 of the Civil Evidence Act, 1968 of England made provision for the admissibility in evidence, subject to certain conditions, of statements produced by computer. The learned Judge of Appeal observed at p578 that "[t] his is perhaps a matter which might well engage the attention of the Legislature in South Africa."

Be that as it may, the provisions of sections 264 to 267 of the Criminal Procedure Act, 1955 were repeated in section 236 of the Criminal Procedure Act , 1977 which section was still confined to entries in "account books, including any ledger, daybook or cash book". In 1993 section 236 was amended. It now refers in subsection (1) to:

> "The entries in the accounting *records* of a bank and any *document* which is in the possession of any book and *which refers to the said entries or to any business transaction of the bank..." (Italics added)*

Again, section 236 (5) provides that:

> "'document' includes a recorded or transcribed computer printout produced by any mechanical or electronic device and any device by which information is recorded or stored: and 'entry' includes any notation in the accounting records of a bank by any means whatsoever"

Section 236 (4), to which section 247 (1) of the Code equates, when enacted in 1977 referred to "any account book," and "book". Those words were replaced in 1993, the subsection now reading:

> "(4) no bank shall be compelled to produce any *accounting record* referred to in subsection (1) at any criminal proceedings, unless the court concerned orders that any such *record* be produced." (Italics added)

The italicized words above indicate the 1993 amendments. Section 236 (1) does not indicate that "any document" referred to therein forms part of any "accounting record" of the bank. It is a moot point therefore whether section 236 (4) then embraces any such document.

Whatever about section 236 (4), clearly section 247 of the Code refers to no such document, but only to the account books of the bank. Mr Farber submits that the interpretation which the applicants advance is contrary to the canons of construction. The first of those is the literal rule. In the case of *Venter v R* (7) Innes CJ observed at p913:

> "By far the most important rule to guide courts in arriving at [the legislature's] intention is to take the language of the instrument ...... as a whole, and, when the words are clear and unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect."

The literal rule may only be departed from where it would lead to an absurdity or when ambiguity is present (see Professor Devenish's work *Interpretation of Statutes* (1996) at p28, *Maxwell on the Interpretation of Statutes* 11Ed (1962) at p3 *et seq.*, and Dr Cockram's Work *The Interpretation of Statutes* 3 Ed (1990) at pp36/44). I observe no ambiguity in the provisions before me. The aspect of absurdity can be deferred.

Mr Farber also refers to the presumption that the same words in the same statute have the same meaning. In some cases the presumption is rebutted, even where the same word is used twice in the same section, so as to avoid injustice or absurdity: see the old English bigamy case of *R v Allen* (8), which turned on the use of the word "marry", twice in section 57 of the Offences Against the Person Act, 1861, and see Maxwell *op. cit.* at p311 *et seq.*, Devenish *op. cit.* at pp 217/218 and Cockram *op. cit.* at p143. In the present case, however, the same phraseology has been used for over 120 years. In that time it has been given a

standard interpretation in other jurisdictions, not to mention the Court of Appeal. It is contained in a particular segment of the Code with a heading referring to "Bankers' Book [s]". The phraseology, apart from a sole rendering in the singular, is repeated nine times in four sections. In those circumstances I cannot see that the presumption is rebutted.

There is also, as Mr Farber submits, the "golden rule" of interpretation, namely to give effect to the intention of Parliament. Mr Penzhorn submits that it could never have been Parliament's intention to confine a police officer's demand under section 247 (2) to account books as such, and that it is merely fortuitous that the same phraseology is used in section 247 as in sections 245 and 246. I cannot say that it was fortuitous. To me it seems quite deliberate, certainly where the provisions of section 247 (2) are concerned. I observe that such provisions were not contained in the Criminal Procedure and Evidence Proclamation 1938(see section 243 thereof) nor in the Criminal Procedure Act, 1955 of the Republic of South Africa (see section 266 thereof). They were therefore introduced into the Code when passed in 1981. They were not to be found in the South African Criminal Procedure Act, 1977, nor are they to be found in section 236 thereof as amended in 1993. The provisions of section 247 (2) are not to be found in the Bankers' Books Evidence Act, 1879: application for access to bank documents may, however, be made by the Police in England before a Circuit Judge, under sections 9 and 14 of and Schedule 1 to the Police and Criminal Evidence Act, 1984, (see *Phipson on Evidence* 14 Ed (1990) at p 792 at n.98 and see *Archbold* at p1228 *et. seq., andpp1236*/1237. Those are statutory provisions, however, expressly providing for the Court's intervention and supervision in the matter. For that matter the Courts in South Africa and England are fully concious of the inroads made by applications, to produce and inspect etc., marked by references to , " a fishing expedition", "an instrument of oppression" *(Williams v Summerfield* (9) at p518), "the confidence of a bank account", " the private interest of confidentiality" *(R v Grossman (10)),* " a serious invasion of privacy", " the most careful consideration "(Cross & Tapper at p758). The

learned authors (Etienne Du Toit *et al.)* of *Commentary on the Criminal Procedure Act* (1993) observe at p24 -112 (Service 13, 1994) that "strict compliance with the requirement of section 236 is necessary."

In all the circumstances, therefore, it seems to me that the Legislature in 1981, no doubt concious of the further inroads upon the subject's privacy in the provisions of the proposed section 247 (2), whereby the Courts' supervision in the matter was not required, quite deliberately chose to follow the time - honoured phraseology and not to provide a police officer with a *carte blanche.* Nothing could have been simpler than for the Legislature to have discarded the old phraseology and to have broadened the scope thereof. The Legislature quite simply chose not to do so.

The learned Counsel Mr Woker submits that the resultant situation amounts to an absurdity: firstly under section 247 (1) a bank can only be compelled to produce "account books" as such: secondly, a police officer is entirely hampered in his investigation, inasmuch as under section 247 (2) he can only demand the production of such books and is denied access e.g. to a cheque, which he suspects is a forgery.

I do not, with respect, agree with Mr Woker's first submission. For his part, Mr Farber quite properly submitted that section 247 did not create any privilege for a bank. I observe that all that section 247 (1) says is that a bank cannot be compelled to produce the *(original)* "ledgers, day-books, cash-books or other account books," no doubt because of the grave inconvenience to the bank and its clients, unless the court *"specially"* orders such production. That does not mean, however, that all documents in bank's possession excluded by the phraseology of section 247, are privileged, in the sense that a bank is not obliged to produce them. Clearly the bank, and this has always been the respondent's position, can be compelled to do so by *subpoena duces tecum.* Indeed, section 247 (1) contemplates existing

criminal proceedings so that a *subpoena duces tecum* might be indicated . I am fortified in this view by observations contained in Du Toit *ibid.*:-

> "No bank shall be compelled to produce any accounting record referred to in s.236 (1), unless the court concerned orders that any such record be produced (s.236 (4)). Section 236 (4) does not create any 'bankers' privilege' in the sense that relevant information may lawfully be withheld from a court of law. Section 236 (4) merely creates a procedure for the convenience of banks."

As to Mr Woker's second submission, the courts frown upon a "fishing expedition": presumably a Police Lieutenant is armed with some evidence before he approaches a bank under section 247 (2). The account books of the bank represent a summary of all transactions, so an inspection thereof will no doubt reveal the nature or identity of the particular document supporting the particular transaction, such as a deposit slip or paid cheque. The production of such document, if resisted by the bank, can then be achieved by a *subpoena duces tecum* under section 199 of the Code. Mr Woker points out however that it would first be necessary to institute criminal proceedings to issue such *subpoena* and it might be that, upon sight of the particular document, the prosecution would be abandoned, in which case an innocent man would then have been needlessly exposed to a criminal prosecution. That proposition sounds attractive, but I imagine that in the vast majority of such cases, where innocence prevails, the particular bank account holder would not resist production. Nonetheless, I could forsee that there might be cases where resistance to production might hamper the very process of deciding upon a prosecution. Such aspect does not arise in the present case, however; a criminal prosecution has already been initiated.

In any event I am being asked to place an interpretation upon the provisions of section 247 which I consider, on all the canons of construction, they plainly do not bear. There may be a case for the enlargement of the provisions of section 247 (2), but that, I have no doubt, is clearly a matter for the Legislature. Suffice it to say that I am satisfied that

there is no power in the Court to invoke the provisions of section 247 and make the order prayed thereunder.

Mr Penzhorn then prays in aid the Court's inherent jurisdiction and it is to that aspect that I now turn. Mr Penzhorn refers to the work of Dr Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) at page 97, wherein the learned author quotes the concluding extract from Master Jacob's Lecture *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 23 at p51. Reference to Master Jacob's lecture was also made by Flemming J, in quite a remarkably learned and illuminating judgment, in the case of *Chunguete v Minister of Home Affairs and Others* (11) to which I shall subsequently refer.

There is a plethora of cases dealing with inherent jurisdiction and Mr Farber has referred me to a number of them. He submits that the cases illustrate that four principles apply. Firstly, Mr Farber submits, the inherent jurisdiction is of limited application. In the case of *Wright v St Mary's Hospital Melmoth & Another (12), Magid J quoted at p 233 the following extract from Dr Taitz op. cit.* at pp11/12:

> " The inherent powers of the Court are diverse and cover a wide range of circumstances, concerning as they do the independent regulation by the Court of its function in accordance with justice and good reason. Whether through its inherent jurisdiction the Court may adapt, adopt or create relief to meet a remediless cause is a contentious subject and one which will be considered separately .... Save for this contentious aspect, for the purpose of analysis, contained below, the inherent powers have been classified under the following headings:
>
> Regulating its proceedings and preventing the abuse of its process:
>
> Imposing sanctions for the impairment of its dignity or for failure to comply with its lawful orders:
>
> Controlling and supervising its officers:
> Restraining irregularities in the proceedings of lower (or inferior) courts: and

> Restraining irregularities in the proceedings of administrative (and like) authorities, or judicial review of administrative (and like) action."

Magid J. observed at page 233:

> "Nowhere does the learned author suggest that the Supreme Court is at large to right wrongs or to prevent injustices save in the specified spheres. Indeed he states positively to the contrary, at 1:
>
> > 'the inherent jurisdiction of the Court should not be regarded as an equitable jurisdiction in terms of which the Court dispenses Solomon - like judgments based upon subjective notions of simple justice between man and man.'
>
> And even the 'contentious subject' referred to by the learned author can have no bearing on the present enquiry in the light of the fact that the applicant is not remediless."

Magid J concluded that the Court had no inherent jurisdiction to grant a substantive remedy and that, in any event, as the applicant had an alternative remedy, he would decline to exercise the Court's discretion in his favour.

Secondly, Mr Farber submits that the Court has no inherent jurisdiction in the field of criminal justice. In the case of *Sefatsa and Others v Attorney General, Transvaal and Another* (13) an application was made to the Appellate Division for leave to appeal against the dismissal of an application, made to the trial Judge, to re-open the trial, the appeals against conviction having been dismissed by the Appellate Division (*sub nom. S v Safatsa and Others* (14). The submission was advanced that the Supreme Court had an inherent jurisdiction in the matter. Rabie ACJ described the submission as "untenable" (p838). In the course of his judgment (in which Corbett JA (as he then was), Joubert, Hoexter and Van Heerden JJ A concurred), Rabie ACJ observed at p834:

> "..... it is the settled view of this Court that its jurisdiction in criminal matters is determined by statute, i.e. the Criminal Procedure Act and such other relevant statutory provisions as there may be. The

position would *a fortiori* be the same in the case of other courts."

and again at p838:

> "I have already indicated that it is to be inferred ...... that the powers of this Court are governed entirely by the provisions of the Criminal Procedure Act ...."

and again at p839:

> "It hardly needs saying that a Court cannot have an inherent jurisdiction which would entitle it to act contrary to an express provision of an Act of Parliament."

Thirdly, Mr Farber submits that the Court's inherent jurisdiction cannot be exercised so as to create rights where none exist. In the case of *Cerebos Food Corporation v Diverse Foods SA* (15) the question arose as to whether the Supreme Court had the inherent jurisdiction to introduce the English remedy of an *Anton Piller* order, inasmuch as the Rules of the Supreme Court "do not provide for any procedure remotely resembling" such order. Van Dijkhorst J (Boshoff J P and O' Donovan J concurring) observed at p172:

> "It follows that the Court engaged in its task of enforcing rights must grant a remedy where a right exists. The obverse is also true. Where there is no right the Court has no function. Moreover, the Court cannot override a right where no stronger right exists. It cannot usurp the function of Parliament and become law-maker, attractive as that course may be."

and at p173:

> "I conclude that the Court does not have an inherent power to create substantive law whereby the applicant obtains a right to attach the property of another in which he has no interest .....merely for the purpose of its production as evidence."

To the same effect was the decision in *S v Absalom* (16) wherein the Appellate Division held that a Full Bench of the Supreme Court of South West Africa (as then named) had no inherent jurisdiction to hear an appeal (against refusal of condonation of the very late noting of an appeal to the Appellate Division) which, being regulated by statute, lay to the

Appellate Division.

Which brings me to the judgment of Flemming J in the case of *Chunguete* (11). The learned Judge was faced with an application for bail by a prohibited immigrant, pending determination of his application for permanent residence. The relevant Act made no provision for bail, so the Court's inherent jurisdiction was invoked. In his judgment at page 841 Flemming J quoted the features of the Court's inherent jurisdiction as summarised by Master Jacob in his 1970 Lecture at p 24:

> " (1) The inherent jurisdiction of the Court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law: it is invoked in relation to the process of litigation.
>
> (2) The distinctive and basic feature of the inherent jurisdiction of the Court is that it is exercisable by summary process ...
>
> (3) Because it is part of the machinery of justice, the inherent jurisdiction of the Court may be invoked ..... in relation .... to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.
>
> (4) The inherent jurisdiction of the Court is a concept which must be distinguished from the exercise of judicial discretion ......
>
> (5) The inherent jurisdiction of the Court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case........"

Flemming J continued at p841:

> "He [Master Jacob] says (at 27) that the exercise of these powers was derived simply from the very nature of the Court as a superior Court of law. It is for that reason that the jurisdiction is 'inherent.' He also says (and I italicise):
>
> 'The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill *the judicial function* of administering justice according to law in a regular, orderly and effective manner.'

I comment that this does not connote any idea of adding
to or otherwise deviating from the substantive law. The
independent doctrine about 'inherent jurisdiction' has the object (at 51):

> 'To prevent oppression or injustice in *the process of litigation* and to enable the Court to control and regulate its own proceedings.'

His concluding sentence, when saying that

> 'It operates as a valuable weapon in the hands of the Court to prevent any clogging or obstruction of the stream of justice,'

proves that the term refers to those orders which care for the
fairness and effectiveness of the administration of justice, i.e.
the process of deciding."

It is difficult in the course of this decision to do full justice to the depth and scope of the judgment of Flemming J. I content myself with here reproducing some concluding extracts therefrom:

> "I conclude that reception of British law or spontaneous developments in South Africa have not brought about an 'inherent jurisdiction' extending beyond the innate jurisdiction and that the term is correctly used for purposes of distinguishing only, to describe orders in the 'procedural field." (at p 847)
>
> "In the *Universal City Studios* case [17] portion of what the Court said in the judgment of Corbett JA (at 754G) is as follows:
>
> > 'There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its *procedures* in the interests of the proper *administration of justice* ... It is probably true that ..... the Court does not have an inherent power to create substantive law, but the dividing line ... is not always an easy one to draw.'
>
> The *dictum* does not doubt that once the dividing line is drawn and it is known that the substantive law is involved on a particular point, a Court cannot ignore the law on that point because it believes that a different order is more equitable. A jurisdiction to deviate from the substantive law does not exist. The lack of any source of such a jurisdiction does not become less

> established by using an undefined word such as 'inherent jurisdiction' in a loose manner." (at p849)
>
> "What is appropriately called the 'inherent jurisdiction' is related to the Court's functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the Court may make after due process has been achieved. That is a function of the substantive law. The Court - always - is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law." (at p848)

Mr Farber then submits that the Court's inherent jurisdiction is exercised sparingly and then only in certain circumstances. For example, the Court will not exercise its discretion in favour of the applicant where e.g. there is an alternative remedy, as was the position in the *Wright* (12) case and also the case of *Van Den Berg v Schulte* (17). In that case the inherent jurisdiction of the Supreme Court was invoked in an application to arrest and detain a recalcitrant witness before a Commissioner. The relevant legislation however, provided (in effect) for the trial of such witness before a Magistrate. Tebbutt J observed at 511 that the inherent jurisdiction is granted "sparingly and only when no other appropriate statutory remedy or one in the Rules of Court exists". Accordingly the application was dismissed.

Again, in the case of *Smith v Smith* and Another (18) Goldstein J in the exercise of his inherent jurisdiction granted an order to a divorced wife compelling her husband's pension fund to disclose the amount of his pension. On appeal by the pension fund *sub nom. Krygkor Pensioenfunds V Smith (19)* the Appellate Division assumed, without finding, that the Supreme Court had the jurisdiction to make the order but that nonetheless in view of the fact that the wife had alternative remedies, such as by *subpoena*, discovery etc., the Supreme Court should not have granted the order, which was reversed.

In the present case Mr Penzhorn has referred the Court to section 119 of the Constitution, the section confess "unlimited original jurisdiction to hear and determine any civil or criminal proceedings", the power of review and "such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law." I have always understood "unlimited" to mean that the High Court may entertain *all* civil matters and *all* criminal matters without e.g. any limit upon the amount of the monetary claim or (subject to statutory penal provisions) upon the quantum of the criminal sanctions imposed, such as statutorily limit the powers of inferior Courts. Nonetheless, to some extent it is inevitably a creature of statute: for example an extra - territorial jurisdiction is conferred by the provisions of section 2 (1) (b) of the High Court Act, 1978. That statute sets out the Court's powers on appeal (section 8) and review (section 7) and indeed its declaratory powers (section 2 (1) (c)).

As for the Court's inherent jurisdiction, that can only be determined, as its very description indicates, by the case law in the matter. Such cases permit of only one interpretation: the Court's inherent jurisdiction cannot be invoked to create substantive law, to provide a substantive remedy where none exists, where the substantive law in the matter is considered to be in adequate. As I observed above, that is a matter for the Legislature.

Further, even if this Court had a jurisdiction in the matter, the applicants have a clear alternative remedy in the issue of a *subpoena duces tecum* and I would decline to exercise my discretion in their favour. Further again, the banks have indicated that they have no objection whatever to the supply of the bank statements requested, as they fall within the description of "ledgers," referred to in section 247 (2). The present application, of course, goes beyond such statements, but as I have said, the applicants have their remedy in the matter.

As to costs, both Mr Farber and Mr Fischer ask for a special order as to costs. They point to the fact that all along, a criminal prosecution having been initiated, the applicants' remedy lay in a *subpoena duces tecum*. Suffice it to say that I consider that a special order as to costs would be inequitable. The duration indeed intensity of the argument, the very number of authorities placed before the Court indicate that the matter was not without its difficulties. If nothing, else this application has served to assist in the interpretation is of the particular provisions. Further, this is not a civil application *inter partes*. This is a criminal application where the applicants are pursuing what they perceive to be their statutory duties in the matter. In all the circumstances, therefore, I consider the only equitable order to be one in which each party bears its own costs.

The application is dismissed. Each party shall bear its own costs.

Delivered this 31st Day of May, 2000.

B.P. CULLINAN
ACTING JUDGE

Attorneys for the 1st, 2nd and 3rd Respondents:
Harley & Morris, Maseru.

Attorneys for the 4th Respondent:
Routledge - Modise, Johannesburg,
M.T. Matsau & Co., Maseru.