IN THE HIGH COURT OF LESOTHO

In the matter between

Rex vs MASUPHA EPHRAIM SOLE

For the Director of Public Prosecutions: Mr G. H. Penzhorn, S.C.,
Mr H.H.T. Woker.

For the Accused: Mr E. H. Phoofolo.

Before the Hon. Mr Acting Justice B. P. Cullinan on 5th, 6th and 7th November, 2001.

ORDER

Mr Phoofolo has made application that the Swiss bank officials, whose affidavits are before the Court, be called to give oral evidence. In a ruling delivered yesterday I refused the application for reasons which now follow.

Mr Phoofolo submits at the outset that the effect of the relevant legislation is that the accused is being denied his constitutional right to have the Crown witnesses presented before him, so that he may cross-examine them. This submission is a repetition of a submission made in the application for a ruling that the amended provisions of sections 245 to 248 of the Criminal Procedure and Evidence Act, 1981 ("the Code") were inapplicable to the present trial. I have delivered a ruling in that application, reserving reasons, holding that such amended provisions were applicable. Suffice it to say that I did not find such provisions to be unconstitutional.

Mr Phoofolo then submits that if the Swiss bank officials do not give oral evidence, the accused will be materially prejudiced. Mr Phoofolo invokes the provisions of section 246 (6) of the Code in the matter. Those provisions, which find their origin in sections 212 A (3) and 236 A (5) of the Criminal Procedure Act, 1977, of the Republic of South Africa, read thus:

> "(6) A court before which an affidavit contemplated in subsections (2) and (3) is placed may, in order to clarify obscurities in the affidavit, on the request of a party to the proceedings, order that a supplementary affidavit be submitted or that oral evidence be heard and that oral evidence shall only be heard if the court is of the opinion that a party to the proceedings would be materially prejudiced should oral evidence not be heard."

As I see it, the sub-section is so constructed that the word "order" where used as a verb above, is so placed that it applies to both "a supplementary affidavit" and "oral evidence". Quite clearly a supplementary affidavit may only be ordered "*in*

order to clarify obscurities in the affidavit"; further, that prequisite also governs any "order ... that oral evidence be heard". In other words, the sub-section reads thus:

> A court ... may, *in order to clarify obscurities in the affidavit* ... order
>
> (i) that a supplementary affidavit be submitted or
>
> (ii) that oral evidence be heard where the court is of the opinion that a party to the proceedings would be materially prejudiced in the absence of such evidence.

It will be seen that under section 245 (4) of the Code any person against whom it is intended to adduce evidence under that section may, upon the Court's order, inspect the original bank records and make copies thereof. Section 246 of the Code, before its amendment by Act No3 of 2001, made similar provision in respect of "any bank". The Court of Appeal in *Letsie & Others v R*, 1995 - 1996 LLR - LB 28, per van den Heever AJA (as she then was) (Browde and Leon JJA concurring), at pp47/48 construed the word "bank" to include a foreign bank. At the same time van den Heever AJA indicated that (under the old section 246 (1)) a party was but "at liberty", upon the Court's order, to inspect the originals: it could then well be that a foreign bank might not permit the party to do so, but "the fact that section 247 [under which a court could order the production of originals] has no extra-territorial validity is accordingly no ground for limiting the word bank in sections 245 and 246 to mean by necessary implication "bank in Lesotho" ". Under the amended legislation, while provision for ordering the production and inspection of originals is repeated in respect of a bank in Lesotho, it is not enacted in respect of a foreign bank. It seems to me therefore that it was in view of the impracticability of any Court order for the production and inspection of the originals in a foreign bank, that the legislature has

made provision for the supply of a supplementary affidavit or the rendering of oral evidence.

There are of course practical difficulties in securing compliance by a foreign bank of an order for the supply of a supplementary affidavit or the rendering of oral evidence. It may be that the legislature considered that, where an affidavit had already been supplied, the supply of a supplementary affidavit, or the attendance of a foreign bank official to render oral evidence, did not place too great a strain on the comity of nations. In contrast, considering the whole century-old purpose of bankers' books' evidential provisions, and the fact that the old section 247 (1) required a 'special' court order in the matter, against a local bank, legislation providing for an order for the production in Lesotho of foreign bank originals, might well lead to such strain.

As to the burden of proof in the matter, Mr Penzhorn submits that the applicant must bear it. Quite clearly, if the Crown sought to adduce oral evidence it would bear the burden of establishing material prejudice. It might be said that as the Crown bears the overall burden, with the accompanying criminal standard, that of beyond reasonable doubt, where the accused is the applicant the Crown must satisfy the Court, beyond reasonable doubt, that material prejudice does not arise. But the first objection to that situation is that at this stage, before the Crown has closed its case, it does not have to *prove* anything, but merely to establish on a *prima facie* basis. Secondly, if the Crown failed to prove the absence of material prejudice beyond reasonable doubt, so that the Court was in reasonable doubt in the matter and ordered the rendering of oral evidence, that would be contrary to the provisions of section 246

(6). Those provisions enact that the Court can *only* make such order where it is "*of the opinion*" that material prejudice would otherwise arise. That wording connotes satisfaction and not doubt. The Court must then be *satisfied* in the matter, that is, that material prejudice would arise. Quite clearly, if the accused makes application, it is in his interest to satisfy the Court in the matter. In the least therefore an accused must bear an evidential burden. In this respect Mr Penzhorn submits that the standard must be an objective one. Inasmuch as the Court must entertain an opinion in the matter, I respectfully agree.

Section 246 (6) provides for two applications, that is, for a supplementary affidavit, or for oral evidence. In the case of *either* application the applicant must satisfy the Court that there are obscurities in the affidavit before the Court, which require clarification. Further, I consider that, in the case of either application the Court, in the exercise of its discretion, must be satisfied that the order prayed is in the interests of justice and is not unfair to the accused, with the additional requirement, of course, concerning material prejudice in the case of an application for oral evidence.

Mr Phoofolo has referred to two examples of what he considers to be "obscurities in the affidavit". He refers to the evidence of PW13 Mr Roux, where the witness dealt with joint contribution by Contractors/Consultants to the bank account of an intermediary, and thereafter a payment by the intermediary to the accused. Mr Roux came to a conclusion as to which Contractor/Consultant had, in effect, made the payment to the accused. Mr Phoofolo submits that the evidence of Mr Roux in the matter is, in effect, confusing and that only the Swiss bank officials can resolve such

confusion.

Mr Penzhorn submits that if the evidence of a Crown witness is confusing, any doubt in the matter must be resolved in favour of the accused. He submits that section 246 (6) envisages that an application may be made by either party in a criminal trial, and indeed that where obscurities arise in an affidavit it is surely a matter for the Crown to seek to resolve any such obscurities by a supplementary affidavit or oral evidence. Further, he submits, it is difficult to conceive of a situation where there are obscurities in an affidavit where there is not also a resultant doubt, that is, favouring the accused. As instances of "obscurities" he refers to the case where, say, the defence put to Crown witnesses is that the bank records refer to an account which is not held by the accused or where the records are in conflict with records held by the accused. With those submissions I respectfully agree. I have to say that hence some of Mr Phoofolo's submissions were more appropriately addressed to an application for the discharge of the accused on particular counts.

Mr Roux's evidence was based on the contents of bank records. His evidence was adduced by the Crown as that of an expert witness, in conducting a forensic investigation involving thousands of bank documents, in order to render the Court's task in the matter less onerous. His evidence constitutes opinion evidence, no more than that, representing his own conclusions in the matter. If any Swiss bank official were called to give oral evidence, he would no doubt go through the same process as Mr Roux has gone through, which same process must be followed by the Court. The banker would interpret the records before him. He would no doubt draw the inference, where a transfer was effected from one account to another, that such

transfer was effected upon the instruction of the former account holder, as the specific bank documents would reveal. What such documents would reveal, either directly or by inference, would be the particular account holder's instructions: they would not necessarily reveal the *reasons* for such instructions. That is a matter of inference to be drawn by the Court.

In any event, the question still arises, whether there are any obscurities in the affidavits, including of course the annexures thereto? Mr Phoofolo refers, as I have said, to obscurities in the evidence, but not in the affidavits. Mr Roux has placed his interpretation on the bank records. Nowhere did he refer to any obscurities therein. Nowhere have I encountered any such obscurities.

I cannot then appreciate the basis upon which the accused might seek to question the Swiss bank officials. That being the case I cannot see how any question of material prejudice to the accused arises. For that matter I cannot see that the order sought would be in the interests of justice or that any unfairness to the accused would be involved if the order were not granted. Accordingly the application is refused.

Delivered This 7th Day of November, 2001.

B. P. CULLINAN
ACTING JUDGE