CRI/T/111/99

IN THE HIGH COURT OF LESOTHO

In the matter between

The Director of Public Prosecutions	**Applicant**
and	
Masupha Ephraim Sole	**First Respondent**
Godfrey Siphosihle Mdhluli	**Second Respondent**

In re:

Rex vs MASUPHA EPHRAIM SOLE

For the Director of Public Prosecutions:	Mr G. H. Penzhorn, S.C., Mr H.H.T. Woker. Miss K. Bheemchund
For the First Respondent:	Mr K. Sello Mr E. H. Phoofolo.
For the Second Respondent	In Person

Before the Hon. Mr Acting Justice B. P. Cullinan on 14th, 27th and 28th August, 3rd, 4th , 12th, 17th, 18th and 24th September, 2001.

ORDER

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Cases referred to:

(1) *Cholmondeley (Earl) v Clinton (Lord)* (1815) 15 Ves. Jun. 262; 34 ER 515;

(2) *Bricheno v Thorp* (1821) Jacob' s Rep. 300; 37 ER 864;

(3) *Robinson v Mullett* (1817) 4 Price 353; 146 ER 488;

(4) *Johnson v Marriott* (1833) 2 Cr & M183; 3 LJ Ex 40; 44 Digest 125, 1253;

(5) *Grissell v Peto* (1832) 9 Bing; 1 LJCP 139; 131 ER 514;

(6) *Davies v Clough* (1836) 8 Sim 262; 6 LJ Ch 113; 59 ER 105;

(7) *Lewis v Smith* (1849) 1 Mac & G 417; 41 ER 1326, LC;

(8) *Hutchinson v Newark* (1850) 3 De G & Sm 727; 64 ER 679;

(9) *Re Holmes, Re Electric Power Co Ltd* (1877) 25 WR 603; 44 Digest 129 1260;

(10) *Rakusen v Ellis Munday & Clarke* (1912) 1 Ch 831; (1911 -13) All ER Rep 813;

(11) *Ram Dall Agarwallah v Moonia Bibee* (1880) ILR 6 Calc 79;

(12) *Hobhouse v Hamilton* (1821) Sau & Sc 359, n(IR);

(13) *Hutchins v Hutchins* (1825) 1 Hog 315 (IR);

(14) *Biggs v Head* (1837) Sau & Sc 335 (IR);

(15) *Farmers Mutual Petroleums Ltd v United States Smelting, Refining & Mining Co and Agawam Oil Co Ltd* (1961) 28 DLR (2d) 618; 34 WWR 646 (CAN);

(16) *Robinson v Van Hulsteyn Feltham and Ford* 1925 AD 12;

(17) *R v Gluckstad* (1972) 116 Sol Jo 445; 56 CR App R 628, CA;

(18) *R v Smith* (1975) 61 Cr App R 128;

(19) *R v Sussex Justices*, ex p Mc Carthy (1924) 1 KB 256;

(20) *R v Dann* (1997) Crim LR 46;

(21) *S v Marutsi* 1990 (2) ZLR 370 (SC);

(22) *S v Memani* 1993 (2) SACR 680 (W);

(23) *Ebrahim v Van Rooyen NO and Another* 1917 CPD 296;

(24) *Cressey v Magistrate of Richmond* 1918 CPD 495;

(25) *S v Hollenbach* 1971 (4) SA 636 (NC);

(26) *S v Jacobs* 1970 (3) SA 493 (E);

(27) *Law Society of the Cape of Good Hope v Tobias* (1991) 1 SA 430 (C);

(28) *State of Missouri v Crockett and Edwards* 419 SW 22; 1967 Mo LEXIS 794;

(29) *Gideon v Wainright* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799;

(30) *United States ex rel. Miller v Myers*, ED Pa 1966, 253 F Supp 55;

(31) *Glasser v United States* 315 US 60; 62 S Ct 457; 86 L Ed 680;

(32) *MacKenna v Ellis* 5th Cir, 280 F 2d 592;

(33) *State of Arizona v Latigue* 108 Ariz 521; 502 P 2d 1340; 1972 Ariz LEXIS 385;

(34) *Petition of Pepperling* 162 Mont 524; 508 P 2d 569; 1973 Mont LEXIS 556;

(35) *State of New Jersey v Jaquindo & Others* 138 NJ Super 62; 350 A 2d 252; 1975 NJ Super LEXIS 497;

(36) *In re Biederman* 63 NJ 396 (1973);

(37) *United States v Kitchin* 592 F 2d 900; 1979 US App LEXIS 15558;

(38) *Gandy v Alabama* 569 F 2d 1318 (5th Cir 1978);

(39) *United States v Dinitz* 538 F 2d 1214 (5th Cir 1976);

(40) *Kremer v Stewart* 378 F Supp 1195 (ED Pa 1974);

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(42) *United States v Trafficante* 328 F 2d 117 (5th Cir 1964);

(43) *American Roller Co v Budinger* 513 F 2d 982 (3rd Cir 1975);

(44) *Hull v Celanese Corp* 513 F 2d 568 (2nd Cir 1975);

(45) *Cord v Smith* 338 F 2d 516 (9th Cir 1964);

(46) *American Can Co v Citrus Feed Co* 436 F 2d 1125 (5th Cir 1971);

(47) *Schloetter v Railoc of Indiana Inc* 528 F 2d 706 (7th Cir 1976);

(48) *Cinema 5 Ltd v Cinerama Inc* 528 F 2d 1384 (2nd Cir 1976);

(49) *W E Bassett Co v H C Cook Co* 201 F Supp 821; (D. Conn) Aff'd *per curiam* 302 F 2d 268 (2nd Cir 1962);

(50) *Woods v Covington County Bank* 537 F 2d 804 (5th Cir 1976);

(51) *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593; 1996 (1) SA 725 (CC);

(52) *Molapo v Director of Public Prosecutions* 1997 (8) BCLR 1154 (Les);

(53) *S v Sefadi* 1994 (2) SACR 667 (D);

(54) *Commonwealth v Rocco A Balliro et al* 14 ALR 3d 640;

(55) *Argersinger v Hamlin* 407 US 25 (1972);

(56) *Cuyler v Sullivan* 446 US 335, 64 L ED 2d 333, 100 S Ct 1708;

(57) *US v Morrison* 449 US 361; 66 L Ed 2d 564, 101 S Ct 665; reh den (US) 67 L Ed 2d 385, 101 S Ct 1420;

(58) *Re Regina and Speid* (1983) 3 DLR (4th) 246 (Ont CA); 8 CCC (3d) 18; 43 OR (2d) 596;

(59) *Re Regina and Robillard* (1986) 28 CCC (3d) 22 (Ont CA); 23 CRR 364; 14 OAC 314, 16 WCB 467;

(60) *R v S. (A.)* (1996) 28 OR (3d) 663 (Ont Ct GD);

(61) *R v Leask* (1996) 140 DLR (4th) 176 (Man Prov Ct);

(62) *MacDonald Estate v Martin* (1990) 3 SCR 1235; (1990) 77 DLR (4th) 249, SCC;

(63) *Baader Raspe v Federal Republic of Germany* (7572/76, 7586,76, 7587/76), 8 July 1978 14 DR 64;

(64) *X v Federal Republic of Germany*(5217/71, 5367/72) 20 July 1972, 42 Coll; Dec 139;

(65) *Croissant v Germany* (62/1991/314/385), 25 September 1992;

(66) *S v Safatsa* 1988 (1) SA 868 (A);

(67) *Baker v Campbell* (1983) 49 ALR 385;

(68) *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C);

(69) *Heiman, Maasdorp & Barker v Secretary for Inland Revenue and Another* 1968 (4) SA 160;

(70) *R v Fouche* 1953 (1) SA 440;

(71) *R v Davies and Another* 1956 (3) SA 52;

(72) *Calcraft v Guest* (1898) 1QB 759; (1895-9) All ER Rep 346;

(73) *Auten v Rayner* [No2](1960) 1 QBD 669;

(74) *Buttes Gas & Oil Co v Hammer* (No.3) (1981) QB 223 (CA);

(75) *Rowe and Another v United Kingdom* (2000) 8 BHRC 325; E Ct HR (App no. 28901/95) (16/2/2000);

(76) *Brandstetter V Austria* (1991) 15 EHRR 378;

(77) *Edwards v United Kingdom* (1992) 15 EHRR 417;

(78) *S v Naidoo and Others* 1974 (3) SA 706 (AD);

(79) *Robinson v R* (1986) LRC (const) 405 (PC);

(80) *Ricketts v R* (1998) 2 LRC 1 (PC);

(81) *Estrella v Uruguay* (74/1980), 29 March 1983, 2 Sel Dec 93;

(82) *Burgos v Uruguay* (R12/52), 29 July 1981, Report of the HRC, (A/36/40), 1981;

(83) *Acosta v Uruguay* (110/1981), 29 March 1984, 2 Sel Dec 148;

(84) *Karim v Law Society of Lesotho* 1979 (2) LLR 431;

(85) *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (AD);

(86) *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401;

(87) *Re Cairncross* 1877 Buch 122;

(88) *Attorney-General v Tatham* 1916 TPD 160;

(89) *Society of Advocates of Natal v Knox & Others* 1954 (2) SA 246 (N);

(90) *De Villiers & Another v McIntyre NO* 1921 AD 425;

(91) *Ex parte Stuart & Ceerdts* 1935 NPD 57;

(92) *Legal Practitioners Committee v Karim* (1979) CIV/APN/85/79, 15/6/79, Unreported (HC);

(93) *South Cape Corporation (Pty) Ltd v Engineering Management Services* 1977 (3) SA 534 (A);

(94) *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (AD);

(95) *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 393 (DCLD);

(96) *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A);

(97) *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A);

(98) *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC);

(99) *R v Mtabela* 1958 (1) SA 264 (AD);

(100) *R v Werthern* 1956 (2) PH H240 (AD);

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(102) *S v Mkwanazi* 1966 (1) SA 736 (AD);

(103) *S v Mnyaka and Others* 1990 (4) SA 299 (SECLD);

(104) *Molapo (Mohato) v Director of Public Prosecutions and Another* C of A (CRI) REV 1 of 1999, (16/4/99), Unreported ;

(105) *S v Mangcola and Others* 1987 (1) SA 507 (C);

(106) *S v Mushimba en Andere* 1977 (2) SA 829 (A);

(107) *S v Moseli en'n Ander* (2) 1969) (1) SA 650 (OPD);

(108) *R v Price* 1955 (1) SA 219 (AD);

(109) *S v Gqeba and Others* 1989 (3) SA 712 (A).

The Application

When the Court sat on the morning of 14th August, I observed that the accused was, as before, represented by Mr Phoofolo, accompanied, however, by Mr Godfrey Siphosihle Mdhluli. Mr Mdhluli is an Attorney of this Court. Further, for many years he appeared before this Court as an officer of the Crown and in particular served as Director of Public Prosecutions ("Director" or "DPP") from 1988 up to the end of 1999, when he left the public service.

Mr Penzhorn informed the Court that he had learnt the previous afternoon that Mr Mdhluli would be joining the defence. He indicated his objection thereto, saying that he did not wish to make any formal application in the matter, which would delay the trial; he submitted however that Mr Mdhluli "cannot charge the accused and then defend him", that it was self evident that it was "grossly improper", and that the Court should not allow it.

For his part Mr Mdhluli saw nothing improper in the situation. Indeed, he submitted, there was a precedent in the matter inasmuch as a former Director had retired and commenced private practice: there had been no objection by the Crown to his representing accused persons whose indictments he had signed as Director, as apart from that aspect, "he knew nothing about those matters."

Mr Mdhluli acknowledged that he had represented the Crown at the accused's first court appearance before the Magistrate's Court. He had not, however, signed the indictment. Apart from the court appearance, he observed, to condense what he said,

> "The fact of the matter is that I do not know anything about this matter other than the documents which have been disclosed. I do not know anything about this matter .....

> I am not privy to any information that would be prejudicial to the State in this matter, to the Crown or Prosecution, nothing, nothing .... I know nothing about this case. There is nothing that is prejudicial to the interest of the Prosecution which I know, that is the long and short of it, ... I am not privy to anything. I repeat. I am not privy to anything that would be prejudicial to the interest of the State."

After a brief adjournment, the Court ruled as follows:

> "Mr Mdhluli has right of audience in the Court, but only in this trial if it is the case that he represents the accused. Such representation is the very issue before the Court, and hence it was in fairness to the accused that I heard Mr Mdhluli himself in the matter. The Crown's objection comes as no surprise to the Court. Mr Mdhluli first appeared for the Crown when the accused was first charged before the subordinate court. There is an affidavit before the Court in which Mr Mdhluli avers that he was involved in some early investigation in the matter. To say the least of it, it is then highly irregular that he should now represent the defence. I would, however, allow him to represent the defence on two grounds. Firstly, Mr Mdhluli states that he is not privy to any information in possession of the Crown. Secondly, and more importantly, the accused has a constitutional right to representation by a legal practitioner of his own choice. It seems to me to stretch the very limits of that constitutional right to say that he is entitled to have the previous Director of Public Prosecutions, involved in some investigation in this matter, to represent him. Nonetheless, I consider that the constitutional issue must tip the scales in favour of the accused's choice in the matter and consequently I will grant Mr Mdhluli audience."

The trial then proceeded. Later that morning, Mr Penzhorn pointed out that he had made no formal application in the matter and, arising out of a brief discussion he had had with the Acting Attorney-General and the Director, he wished to take further instructions. At the adjourned hearing that afternoon, Mr Penzhorn informed the Court that the Crown now wished to bring a formal application in the matter: principally the Crown regarded the Court's earlier ruling as being conditional, that is, conditional upon whether or not Mr Mdhluli was privy to any information prejudicial to the prosecution of the case: the Crown wished to contest this aspect. The application has now been placed before me: it is grounded by an affidavit from the Acting Attorney-General Mr KRK Tampi, in answer to which the defence have

filed affidavits by the accused and by Mr Mdhluli, in reply to which the Crown has filed an affidavit by Mr Tampi.

Mr Phoofolo had initially queried whether, in view of the Court's earlier ruling, the Crown could bring an application. Mr Penzhorn submitted that the earlier ruling was plainly conditional, that is, conditional upon the aspect of whether or not Mr Mdhluli was privy to any information prejudicial to the prosecution. Mr Sello, who was instructed, as recently as 23rd August, and was thus unable to file heads of argument, submitted that the Crown had placed no new material before the Court to challenge such statement and that in any event the Court was simply *functus officio* in the matter.

That was on 28th August. On 3rd September, however, Mr Phoofolo appeared in Chambers and indicated that he intended to make application in court on the following day for leave to file heads of argument, as he considered that certain matters of law had not been fully canvassed. That application was brought in Court on 4th September, when I granted leave to the defence to file such heads by 6th September. They were in fact filed on 7th September, the Crown filing heads in response that same afternoon. On 10th September I ordered that the application be amended to include Mr Mdhluli as a party. The Court sat on 12th September and ultimately on 17th and 18th September when it heard very full submissions from Mr Mdhluli in particular. The argument in the matter is inextricably connected with the facts of and law relevant to this case, to which facts I first turn.

The Facts

Mr Mdhluli served as Crown Counsel in Lesotho from December 1979 to August 1981. He rejoined the public service in March 1987 as Crown Attorney. In May 1988 he was appointed Director of Public Prosecutions, which post he held until 31st December, 1999, when he left Lesotho. As I indicated in a ruling delivered on 21st August, 2001, Mr Mdhluli became involved in the prosecution of the accused no later than August, 1997, as appears from a letter he wrote as Director on 25th June, 1999 to Cornelia A. Cova, an Examining Magistrate in Zurich, wherein he referred to the request for mutual legal assistance (in securing bank records) which he had made to the Examining Magistrate in August 1997. The purpose of the letter was to acknowledge receipt of banking documents and to thank the Examining Magistrate therefor. The letter continues:

> "Now that I have received the documents I had requested, the matter is now at an end insofar as I am concerned: consequently, the delegation I had granted to Mr Penzhorn S C and Mr J T M Moiloa to represent me in matters relating to the request for mutual legal assistance is now terminated. If in the future I need their further assistance I shall issue them with a fresh delegation. I shall in any event keep you advised of further developments in the case I am in investigating against Mr M.E. Sole."

Previous to that, on 1st April, 1999 Mr Mdhluli wrote to Dr Fluri of Kammermann and Fluri, the legal representative in Zurich of the 4th , 5th and 6th accused ultimately charged under the original indictment, that is, Universal Development Corporation ("UDC"), Electro Power Corporation ("EPC")and the beneficial owner of both Corporations, Mr Max Cohen. The letter reads in part:

> "In the light of *certain information* given to me in my capacity as the chief prosecuting authority in Lesotho, I have made a request to the Swiss authorities for an order directing certain banks in Switzerland to produce and make available to the Swiss authorities all bank documents in their possession relating to payments to Mr Sole's UBS Zurich account. Our interest in the accounts of the Universal Development Corporation and the Electro Power Corporation arises because the corporations deposited certain moneys into Mr Sole's account. To put it another way, my interest in Mr Sole and those who deposited moneys into his account are the

> subjects of criminal investigations that have been *initiated at my instance*. It is *my contention* that the acceptance of payments by Mr Sole from persons who had contractual obligations with Lesotho Highlands Developments Authority constitutes a criminal offence under the laws of Lesotho."(Italics added)

The letter goes on to indicate that the Director had had discussions with Mr Cohen with a view to offering the latter an indemnity, which was "within my [the Director's] competence to grant", in return for Mr Cohen giving evidence for the prosecution, which evidence could be "taken on commission either in Johannesburg or Zurich"; it would be necessary to first obtain a statement from Mr Cohen, in which case, the Director suggested, it was desirable to interview him in the presence of the legal representative, at the latter's office in Zurich in late April, 1999.

That letter was followed by a further letter, of 29th June, 1999, addressed by the Director to Kammermann and Fluri, stating "certain uncontroverted facts" which he had gleaned from an examination of the relevant bank documents received, and "*all other information* made available" to him and also stating that he had "examined and scrutinized, with utmost case, all the documents that relate to your clients and *other information* brought to my attention." The Director concluded therefrom that there was "no case of any criminal wrongdoing" against the three accused and that accordingly he declined to prosecute them.

On 29th July, 1999 the Director wrote to the Prime Minister (copying the letter to the Attorney-General) informing him, "pursuant to our *telephonic discussion*", of the "holding charges" against the accused, that is, in the Magistrate's Court, Maseru. He observed:

> " I expect additional charges to be preferred against him after *we* have carefully

scrutinized all the bank documents made available to *us* by the Swiss authorities."

The letter sets out the ingredients of the offence of bribery and continues

"In respect of Mr Sole's case I have *no doubt in my mind* that he committed *bribery* but it remains to be considered whether it can be said that the evidence available so far, and I stress so far, goes anywhere near proving the elements of receipt of a consideration, in return for action or inaction by him in his official capacity."(Italics added)

The letter continues in that vein, canvassing the desirability of securing evidence from intermediaries, referring at one point to the writer "as a person who [has] been involved in the investigations against Mr Sole, albeit to a limited extent." The penultimate paragraph then reads:

"In sum, Your Excellency, I am saying that *I am convinced* that Mr Sole was engaged in *corrupt practices* but I am mindful of the fact that the onerous burden of proving the case against Mr Sole Sole remains with the prosecution. I am saying further that the international spotlight is focused on us as to how we handle the case we have instituted against Mr Sole and that therefore we should ensure that we build up a strong case against him. I am prepared to meet and *discuss with my colleagues who have been involved in investigations*, I suggest *in your presence* and of other role-players, if need be, with a view to deciding how best to proceed against Mr Sole from this point onwards."(Italics added)

As appears from the Court's ruling of 21st August, the Director represented the Crown when the accused made his first appearance before the Magistrates' Court, Maseru, on 28th July, 1999, when Mr Phoofolo appeared for the accused. The Director applied to the Court that the accused be remanded on certain bail conditions. On the following day, the Director wrote to the Attorney-General, advising him of the proceedings in the Magistrates' Court and stating,

"I wish to emphasise that the charge-sheet served on him at this point in time is nothing but a holding charge. A detailed indictment will be served on him probably within the next six to eight weeks. Obviously the drawing of a detailed indictment will take some time. In *discussions which I have had* with His Excellency the Right Honourable the Prime Minister, I have intimated to him that it may be necessary to

> brief counsel to draw the indictment and appear on behalf of the Crown to prosecute the case against Mr Sole."(Italics added)

The Attorney-General replied on 30th July to confirm a telephonic discussion of that date to the effect that "Messrs Webber Newdigate and Co. should be briefed to prepare and appear on behalf of the Crown to prosecute the case against Mr Sole." The Director in turn wrote to Webber Newdigate on 3rd August, 1999, addressing Mr Moiloa of that firm, instructing him to represent the office of the Director of Public Prosecutions in the "pending High Court trial against Mr Sole" and also to brief Advocate Penzhorn SC to represent the Crown at the trial.

Mr Mdhluli filed an affidavit, on 4th May, 2001, in an earlier application (see ruling of 21st August 2001 at p13) in which he deposes that although he "instructed Mr Moiloa to brief Mr Penzhorn and Mr Woker I know nothing about the conduct of the case after I had done so." It may well be that Mr Mdhluli made no executive decisions with regard to the prosecution of the present accused after August 1999, but he was nonetheless involved to some extent in the case concerning all nineteen accused, as a letter from Routledge-Modise, a firm of Attorneys in Johannesburg, dated 26th November, 1999, indicates. The letter, exhibited to Mr Tampi's replying affidavit, is addressed to "The Senior Prosecutor, Magistrate's Court of Maseru." It is copied to "Mr LL Thetsane," but is endorsed "Your Ref. Mr Mdhluli". The letter stated that the writers represented the third accused (in the original proceedings) and also confirmed (apparently upon request) that another firm represented the eighth accused in such proceedings. The letter continues:

> "We refer to the several conversations our Mr du Preez had with your Mr Mdhluli during the period 23 November 1999 to 26 November 1999. We specifically refer you to our conversation on 26 November where you informed us that it is not necessary for our clients to appear and you gave your undertaking that none of our

clients would be arrested and that no warrants of arrest will be issued. Our clients will then appear on the date to be arranged on the 29th November 1999.

Our clients will not be attending court but Mr du Preez from our offices will appear on their behalf."

In his answering affidavit, dated 23rd August, filed in the present application, Mr Mdhluli deposes that it was "Prosecuting Counsel [who] solicited the cooperation of my office in securing documents from certain banks in Switzerland." The correspondence indicates that he granted a delegation to Counsel in the matter. Mr Tampi in his founding affidavit then deposes:

"8. The Swiss bank records which form the basis of this case were obtained from the Swiss authorities at the instance of Mr Mdhluli. In doing so he engaged the services of counsel and attorney. He himself was however also involved in the various discussions and negotiations with the Swiss authorities resulting in the release of the bank records in question. This involved him travelling to Switzerland on two occasions."

There is no answering averment. Mr Tampi then deposes

"10. At the time the accused was first charged and in fact at all relevant times Mr Mdhluli was clearly convinced of the guilt of the accused. After all, had this not been so he would not have charged him. This view was held by Mr Mdhluli upon a consideration of all the evidential matter in possession of the Crown at the time. I find it hard to accept that, holding this belief, Mr Mdhluli can now in all conscience defend the accused."

To which Mr Mdhluli answers:

"7. I at no stage was convinced of the guilt of the accused. On the contrary, as documents placed before the court in previous applications will show, I had serious misgivings regarding the prospects of a successful prosecution. To start with there was never a police docket before me. All the investigations were being carried out by Mr Penzhorn, his junior and their instructing attorneys. Whatever assistance I provided was in those situations where countries such as Switzerland would only co-operate with a person in a position such as mine at the time namely a Director of Public Prosecutions."

There is no doubt that the Director's letter to the Prime Minister indicates his

reservations about the prospects of a successful prosecution. At the same time there is no doubt that the letter nonetheless indicates that he was "convinced" of the accused's guilt.

Mr Tampi then deposes thus:

"11. Whilst in Switzerland in November 1998 Mr Mdhluli also was involved in the interviewing of witnesses from ABB Germany and the taking of their depositions before the Swiss examining magistrate, Mrs Cova. This was in the context of Mr Mdhluli having granted an indemnity to ABB in return for ABB making a full disclosure and testifying in the case against the present accused. The indemnity was in fact granted by Mr Mdhluli. The conditions attaching to the indemnity were however not met and ABB was charged. Today the material dealt with in these dealings with ABB forms part of the evidential material relating to counts five and six.

12. Prior to the events sketched in the aforegoing paragraph Mr Mdhluli had communications not only with Mrs Cova but also with the attorney representing ABB Germany and ABB Sweden.

13. Mr Mdhluli also had various discussions with the Examining Magistrate to whom I have referred, Mrs Cova. Mrs Cova is a witness for the Crown in this case.

14. Mr Mdhluli was also present when statements were taken from witnesses representing ABB Sweden. This was done in Stockholm. Once again this was done in the context of a possible indemnity for ABB Sweden. This also involved discussions with ABB Sweden's in house lawyer.

15. Mr Mdhluli was involved in discussions with Mr Max Cohen, the erstwhile [sixth] accused, and his lawyer. These discussions concerned a possible indemnity to Mr Cohen and using him as a Crown witness. This has not been finalised and Mr Cohen is still a potential Crown witness."

Mr Mdhluli in answer avers:

"8. Whatever role I may have played *as alleged* only served to entrench my misgivings regarding the prospects of a successful prosecution as will be apparent from a perusal of the last paragraph of Annexure "KRKT2" to the founding affidavit."

The reference there is to the last paragraph of the Director's letter of 29th June, 1999 addressed to Kammermann and Fluri in Zurich, in which he advised that he declined to prosecute UDC, EPC and Mr Max Cohen. Nonetheless, there is no denial of the role played by the Director, as depicted in Mr Tampi's affidavit.

Mr Tampi further deposes:

> "16. Mr Mdhluli was generally involved in numerous discussions, consultations and deliberations in connection with this case and the *manner* in which it was to be prosecuted. This also involved privileged communications with myself, the Attorney General, Mr Maema, counsel who are presently involved in the prosecution of this matter, officers of the complainant, the LHDA, as well as senior members of government. These latter officials would have been concerned with policy considerations relating to the prosecution of the present accused as well as the others originally charged with him. This is in the context of the government's firm official policy to combat corruption in all its facets. For the very reason that such communications are privileged I do not propose setting these out in detail." (Italics added)

To which Mr Mdhluli answers:

> "9. I am completely unaware of any policy to combat corruption on the part of government, firm or otherwise. What I became aware of was the determination by all concerned to single out the accused to the exclusion of many cases well known even to members of the public. I challenge Mr Tampi to make available solely to the court the alleged privileged communications to enable it to form its own impression thereanent."

Whatever may be said of the observations in that paragraph, the point is that the paragraph contains no averment denying participation in the "numerous discussions, consultations and deliberations" and "privileged communications." There is a challenge to Mr Tampi to produce evidence of the communications, not, as I see it, as proof of their existence, but simply in order to enable the Court "to form its own impression thereon."

Mr Tampi's affidavit continues thus:

"17. The knowledge so gained by Mr Mdhluli is privileged and this privilege attaches to the Crown, more particularly the Attorney General. The DPP carries out his functions under the ultimate authority of the Attorney General as provided for in section 98 (2) of the Constitution. Mr Mdhluli cannot be allowed, in my respectful submission, to take this knowledge with him and with it defend the accused."

Mr Mdhluli answers thus:

"10. There is in my respectful submission, no knowledge that I can take with me other than the witnesses' statements and other documents copies of which have all been supplied to the accused. It remains to be seen whether prosecuting counsel have other information up their sleeves with which they intend to surprise the accused. The prosecution, I submit, is at liberty at any stage in the trial to object to anything I say which, in its view, I acquired as part of privileged information. It is a matter of public knowledge, I have since ascertained, certainly Mr Tampi is aware, that I resigned my post because I would not succumb to pressure from senior members of government, to prosecute the accused and to delegate my powers to conduct that prosecution to the present prosecution team and no one else."

Mr Tampi in his replying affidavit denies "that Mr Mdhluli resigned due to pressure to prosecute the accused." In his founding affidavit he points to a clash of interests, that is, Mr Mdhluli's duty not to reveal privileged information and "his duty to represent the accused, unfettered." For his part, there is Mr Mdhluli's submission that the prosecution is at liberty to object to any breach of privilege during the course of the trial.

In particular, in the course of his submissions, Mr Mdhluli submitted that much of Mr Tampi's founding affidavit was hearsay. That may well be the case in respect of the investigation overseas, as there is no indication that Mr Tampi was involved therein. The point is, however, that there is no averment, as to hearsay, in Mr Mdhluli's affidavit. On the contrary, as indicated above, he did not deny Mr Tampi's

averments. Indeed Mr Mdhluli's paragraph 8 *supra* constitutes an acceptance thereof. In submissions he stated that he denied the contents of paragraph 14 of Mr Tampi's affidavit *supra*. That he did not do in his answering affidavit, and he clearly may not give evidence from the Bar.

That is a summary of the facts and the averments. I turn now to consider the relevant authorities. Before doing so, I wish to express my appreciation of the research displayed in the heads of argument and formidable array of authorities placed before me by the Crown. I am very grateful for such assistance. As indicated, the defence did not initially file any heads. Ultimately heads were filed, but I am constrained to say, while "comparisons are odious," that there was little or no reference to adverse authority.

The Authorities

South Africa, United Kingdom and Commonwealth

A very old authority, in somewhat stark terms, is that of Voet (*Commentary on the Pandects*, 3 1 4, Gane's Translation Vol I, p501):

> "*Can advocate leave one side after learning its case, and go over to the other? Discussion. Voet says No.* - It has however been doubted whether one who has first lent his efforts to one side and learnt its case from the proofs can forsake it as having no foundation in law and bestow his patronage on the opposite side as nursing more just ideas.
>
> They who consider that this is allowable set up that it is like a wise man to reshape one's plans for the better; that it savours of honesty to change one's view like Papinian, and to be drawn to an opposite view, induced by the stronger weight of reasons, in accord with the law cited below. Many things, they say, are oft concealed, others invented, and stories framed on lying assertions set up by those who first seek advice; and when the falsity of such things is uncovered the worshipper of justice cannot but take his stand on the opposite side. Thus, they declare, the very praetor not seldom recalls later what he had first forbidden or ordered in his provisional

> decree, and does away with it by contrary definitive judgment. Lastly, they say that a written answer was given that a guardian was not prevented from supporting his ward in a matter in which he had been advocate against the ward's father.
>
> Now I would indeed readily grant that a sensible man should approve what he sees to be better and cast aside what is worse. I would say that the need for that course is laid on the patron of causes by that solemn oath of good faith which he has given as to forsaking at one a lawsuit which as the struggle went on he has found to be shameless and bare of truth and right. But in the same way I would hold that *it hardly suits the honour and propriety of an advocate,* nay that it is not free from the stigma of snatching at dirty profit for him to lend assistance in treacherous wise to the opposite side, and perchance to turn the discovered secrets of his of his former client to that person's undoing and overwhelming.
>
> This is more especially so if there is *no lack of other highly learned gentlemen* and no fear that prejudice to truth or justice may be created by neglecting the protecting of the juster cause."(Italics added)

An early (1815) English decision is that of *Cholmondeley (Earl) v Clinton (Lord)* (1). Speaking of Counsel offered a brief by a client opposing Counsel's first client, Lord Chancellor Eldon observed at p519:

> "I do not admit, that he is bound to accept the new brief. My opinion is, that he ought not, if he knows anything, that may be prejudicial to the former client to accept the new brief, though that client refused to retain him."

The question before the Court was in fact "whether the attorney of the Plaintiff, being removed, not by the discharge of the Plaintiff, can, in that very cause, in which he had been employed by him, become the attorney for the Defendant." The Lord Chancellor consulted all the Judges in the matter. The judgment thereafter reads at p520:

> "The Lord Chancellor [Eldon] declared the unanimous opinion of all the Judges and the Barons of the Exchequer, the Master of the Rolls, and the Vice Chancellor, agreeing with his Lordship's, that an attorney or solicitor is not at liberty to act in the manner proposed by Mr Montriou; and that, having thus left the cause, he is not in the situation of a solicitor discharged by the client; and therefore cannot become the solicitor for the other party in the same cause."

In a subsequent (1821) case *Bricheno v Thorp* (2) Lord Chancellor Eldon observed at p304 (see 34 ER p1231 and 37 ER pp865/866):

> "a [solicitor] going into business for himself, must not carry important secrets out of his master's office and employ them in the service of others; but, on the other hand, he ought not to be prevented from engaging in any business that he might fairly and honorably undertake. His Lordship added, it was incumbent on the court, in such a case, to see that *something more than hypothetical mischief* was to be guarded against."(Italics added)

There are a number of old English cases to much the same effect such as *Robinson v Mullett* (3), *Johnson v Marriott* (4) and *Grissell v Peto* (5). In the case of *Davies v Clough* (6) Sir L Shadwell VC observed at pp106/107:

> "The cases ... appear to afford this general principle, namely, that all Courts may *exercise an authority over their own officers* as to the propriety of their behaviour; for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and those applications have failed or succeeded upon their own particular grounds, *but never because the Court had no jurisdiction.*
>
> The question therefore is whether the circumstances of this case furnish a ground for interference. For my own part, I cannot consider anything to be *a greater breach of professional duty* than for a solicitor, first of all, as the solicitor of one party, to carry on a negotiation for the benefit of that party and have it completed, and, afterwards, to act as the solicitor for other parties in order, by his own personal knowledge of the transaction, to destroy that which he had done for his former client; and that, not because he was discharged by his former client, but because he made an exorbitant demand which was resisted and ultimately defeated; so that he virtually discharged himself. Such conduct appears to me to be such a *flagrant breach of that duty* which a solicitor owes to his client that the Court is bound to interfere."(Italics added)

In the result, the Court restrained the Plaintiffs from employing the particular solicitor in that suit, and also the solicitor from communicating privileged information to the plaintiffs. Another case where an injunction of restraint was granted was that of *Lewis v Smith* (7); it was refused in the case of *Hutchinson v Newark* (8) where the opposing parties were an administratix and the next-of-kin; it was also refused in the case of *Re Holmes, Re Electric Power Co Ltd* (9) where the

solicitor, who had acted in the formation of a company, thereafter represented a petitioner seeking to wind up the company, when all the facts upon which the petition was based might have been ascertained by any person in the position of the petitioner.

In the prominent case of *Rakusen v Ellis, Munday and Clarke* (10) the plaintiff consulted Mr Munday, one of two partners in the firm named Ellis, Munday and Clarke, as to his claim for wrongful dismissal against a company. He then changed solicitors, who issued a writ against the company. The matter was referred to arbitration. Munday's partner Mr Clarke had been on leave when Mr Rakusen consulted Mr Munday. Munday and Clarke operated somewhat independently. In any event, Mr Clarke was completely unaware of the consultation with Mr Munday. On his return from leave, he was appointed by the company to represent it, under the name of his firm, at the arbitration. Mr Rakusen sought and was granted an injunction restraining the firm from representing the company. The injunction was discharged by the Court of Appeal (Cozens-Hardy MR, Fletcher Moulton LJ and Buckley LJ). Cozens-Hardy MR at p835 stated the following general principle:

> "I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, *human nature being what it is, he cannot clear his mind* from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former [sic] acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that *real mischief* and *real prejudice* will *in all human probability* result if the solicitor is allowed to act." (Italics added)

As to the facts of the case, the learned Master of the Rolls observed at pp835/836:

> "[I]f this had been a case of Mr Munday having obtained from the plaintiff, who said that he had been wrongfully dismissed, confidential information bearing upon the

> circumstances or the alleged justification of the wrongful dismissal, and if it had been a case of Mr Munday afterwards appearing in the action for the defendants, speaking for myself, I should have said that that was a case in which he was putting himself 0in a position in which he could not as an honest man discharge his duty to the defendants without *consciously or unconsciously* availing himself of information which he had obtained while acting for Mr Rakusen. That would be a typical case in which a person ought not to be allowed to put himself in a position in which he could not *clear his mind* from the knowledge he had obtained. I cannot bring myself to doubt that any respectable solicitor would in those circumstances have said at once, "I am very sorry *I cannot act for you* because I am familiar with the circumstances alleged by the other side, which circumstances have been communicated to me confidentially."(Italics added)

Cozens-Hardy M R observed at p836 that Munday "was really a complete stranger to the matter" and that "[t]here is no prejudice, there is no mischief." Further, in view of the undertaking that Mr Clarke would become the solicitor of record, rather than his firm, there was no ground for the injunction.

The other two Lord Justices were of the same view, Fletcher Moulton LJ observing at p841:

> "As a general rule the Court will not interfere unless there be a case where *mischief* is rightly *anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove*, but where there is such a *probability* of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever." (Italics added)

Earlier cases, decided in India and Ireland, did not reflect the subsequent approach in *Rakusen* (10). In the Indian case (1880) of *Ram Dall Agarwallah v Moonia Bibee* (11), the Court held that an attorney for a party to a suit who *discharges himself* cannot thereafter act for the opposite party, and the court if moved will restrain him from doing so. To the same effect were the earlier Irish cases of

Hobhouse v Hamilton (12) (1821)and *Hutchins v Hutchins* (13)(1825). Again, in the Irish case of *Biggs v Head* (14) (1837) the solicitor of a deceased client, who had acted for his executrix and devisee, and who was it seems then discharged, was restrained from acting for a creditor of the deceased's estate in filing a claim against the estate for a judgment debt, although the creditor had become his client even before the deceased had. The general principle enunciated in *Rakusen* (10) was, however, adopted in Canada in 1961 in the case of *Farmers Mutual Petroleums Ltd v United States Smelting, Refining & Mining Co and Agawam Oil Co Ltd* (15).

In particular, the general principle in *Rakusen* (10) was adopted as early as 1924 by the Appellate Division in the case of *Robinson v Van Hulsteyn, Feltham and Ford* (16). Wessels JA (Innes CJ, Solomon, de Villiers and Kotze JJ A concurring) quoted with approval the dicta of Cozens-Hardy M R and of Fletcher Moulton LJ. In the *Robinson* case (16), the former client had consented to the attorneys (a firm) representing a group of companies, the other party in a suit against him. Objection was apparently taken after the proceedings had terminated, when the appellant applied for an order suspending the attorneys from practice, on the ground of unprofessional conduct, which was refused by the Supreme Court. On appeal Wessels JA ultimately held (Innes CJ, Solomon, de Villiers and Kotze JJ A concurring) at p23 that *in such circumstances* it was " *incumbent* upon a complainant to show that as a matter substance real mischief [had] been done". For our purposes the following dicta of Wessels JA (as he then was) at pp21/22 are instructive:

> "According to our law a solicitor is an officer of the Court; the Court exercises a jurisdiction over him and will see that in the conduct of his professional work he displays towards the Court and towards his clients a very high standard of conduct. In order to advise a client as to his legal position the solicitor must know all the circumstances of his client's case, and therefore a client is often compelled to reveal

> to his solicitor the most intimate circumstances of his life. The solicitor may thus become the repository of the *most vital secrets* of his client. These confidences reposed in him he may not divulge, and if he does the Court will punish him for his breach of duty towards his client. If a solicitor who in the course of advising a client had become possessed of his client's secrets is engaged by another person to act against his former client, his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavour to do his duty to his new client without revealing the secrets of his old client, yet he may find himself in an *invidious position* and his knowledge of he secrets of his former client may *unconsciously affect him* in doing his duty towards the other. In order *to avoid such a dilemma* the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court in the words of COZENS-HARDY, M.R., "that real mischief and prejudice will *in all human probability* result if the solicitor is allowed to act." (Italics added)

Those authorities concern attorneys and solicitors,. When it comes to advocates and barristers, reliance is placed in particular in England upon the dicta of Lord Chancellor Eldon in *Cholmondeley* at p519 (ER) reproduced *supra*.

In the case of *R v Gluckstad* (17), Counsel, a Mr Canham, received a brief to prosecute in a criminal trial, which he accepted. Before the trial commenced his clerk placed a brief for the defence on his desk, which he never read and of which he was unaware. The double briefing was discovered by the clerk at a late stage and he gave the defence brief to another Counsel. The solicitors for the defence were appraised of a double briefing, no earlier than the night before the trial: they were not informed, however, that the Counsel of their choice was prosecuting in the case, which they discovered on entering court. The appellant was convicted and on appeal raised the issue of the identity of the prosecutor as a "material irregularity". The Court of Appeal (Criminal Division) (Widgery LCJ, Karminski LJ and Bean J) dismissed the appeal, apparently on the basis that Counsel "had not looked at the defence brief, he had no sort of knowledge which he should not have had, by reason of his contact with

the papers". Widgery LCJ in delivering the judgment of the Court observed at p631:

> "The position, as we see it, is that the proper course for Mr Canham or his clerk to have taken, when the discovery of the double briefing was made, was that he should have written to the solicitors who sought to instruct him on behalf of the defence, and should have said: "I cannot take your brief for the defence because I am already briefed for the prosecution, and I would like you to tell me whether in the circumstances *you have any objection to my appearing for the prosecution.*" If the solicitors replied saying they did not object, that would have put an end to the whole thing. If they replied saying that they did object, it would, in our view, have been perfectly open to Mr Canham in the circumstances of this case, in which he had not looked at the brief, for him to say: in the circumstances I feel it right for me to proceed. In these circumstances, and since at the most the only requirement on Mr Canham was that as a matter of etiquette he should consult with the solicitors for the defence to see if they had an objection, we find it quite impossible to say that that which followed was in any sense a material irregularity in the course of the trial." (Italics added)

Those dicta were apparently the basis of an insertion in the Annual Statement of the Bar Council for 1971-72 at p36. While the decision turns on the basis of Counsel's involvement with one brief only, it nonetheless serves to emphasise the material irregularity of familiarity with both briefs.

In 1975 the case of *R v Smith* (18) came before the Court of Appeal (Orr LJ, Caulfield and Talbot JJ). Some weeks before the appellant's trial, a newly-admitted member of the Bar, who was a pupil in Chambers, was seen by the appellant's landlady to spend some hours with the appellant, discussing papers laid out before them, including a prepared proof of the appellant's proposed evidence. The clerk to the appellant's solicitors also observed such matters. Four days before the trial, the pupil barrister informed the appellant's landlady that the brief for the prosecution of the appellant had been delivered to and accepted in his chambers. On the day of the trial, the pupil sat in court, in wig and gown, behind prosecuting Counsel. The latter, being appraised of the situation, gave an undertaking that any knowledge in the

matter acquired by the pupil would not be divulged. The appellant was convicted of assault with intent to rob, wounding and possessing an offensive weapon. On appeal against convictions and sentence, the Court of Appeal gave the appellant leave to adduce the evidence of the landlady, and that of the clerk, and heard such evidence. The Crown submitted that for the appeal to succeed, it must be shown that the pupil barrister communicated to prosecuting counsel some information disadvantageous to the appellant's case, and that such information had in fact been used to the appellant's disadvantage. The Court of Appeal (per Orr LJ) observed at pp130/131:

> "With reference to the well-known statement of Lord Hewart CJ in *R v Sussex Justices, ex p. McCarthy* [19] at p259, that justice should not only be done but should manifestly and undoubtedly be seen to be done, he [Counsel for the Crown] pointed out that Lord Hewart CJ, a little lower on the same page of the judgment, added the qualification that a conviction would not be quashed on this ground where the applicant or his legal representative was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts.
>
> In the present case we readily assume that no information obtained by the pupil was divulged to counsel for the prosecution or used at the trial, but on the basis of that assumption *it seems to us impossible to say that in the circumstances justice was seen to be done,* and as to Lord Hewart CJ's qualification we are not prepared to make the assumption that counsel for the defence, if he was informed of the undertaking, was fully aware of what had in fact happened. We are therefore satisfied that in this case there was a *material irregularity* in the course of the trial which requires that we should allow the appeal and quash the convictions."(Italics added)

In the case of *R v Dann* (20) decided by the Court of Appeal (Criminal Division) (Hobhouse LJ, Ebsworth and Sachs JJ) in 1996, the facts were that the appellant had been defended by X in a trial at Chelmsford in 1993, where the appellant was convicted on a plea of guilty. Subsequently X appeared as junior Counsel for the Crown in the appellant's trial in 1995 at Woolwich, on unrelated matters. The appellant made no objection and appeared unconcerned. Following conviction at Woolwich, the appellant appeared at Snaresbrook on other matters:

again X appeared for the Crown, his Senior having returned the brief. The appellant informed his Counsel (who had not represented him at Woolwich) of the situation. Ultimately the Judge said it was "*not acceptable*" for X to continue prosecuting the appellant, and discharged the jury in respect of the appellant, the trial continuing against his co-accused. The appellant agreed to plead guilty to a robbery charge, which charge was "left on the file", the appellant being advised to apply for leave against the Woolwich conviction.

When such appeal came on, the appellant had left the country and had not bothered to supply his legal representative with any evidence in the matter. X's senior (at Woolwich) submitted that had he known that X had once represented the appellant, he would not have had him as his junior, and had he discovered such aspect after the commencement of proceedings, he would have insisted that X cease to act. The Court of Appeal adverted to para 501 (now 603) of the Code of Conduct, for the Bar, observing that it was the *risk* that the barrister might have confidential information or special knowledge, disadvantageous to the accused, which was material. Nonetheless the Court observed that the appellant (at Woolwich) had "felt no grievance, made no complaint, nor even remarked about X's appearing for the Crown." Counsel for the appellant submitted that "the appearance of injustice was there." However, the appellant himself did not perceive any injustice and had adduced nothing to support any such perception. The inevitable conclusion was that "there was no basis for arguing that any injustice was done or *could be perceived to have been done* and [the appellant] had no arguable basis on which to present an appeal.

It would seem that there the Court of Appeal distinguished the case of *Smith* (18), where the pupil barrister was possessed of confidential information, disadvantageous to the appellant, within the particular proceedings, whereas in *Dann* (20) X was aware of no more than the appellant's previous conviction at Chelmsford, which aspect he did not apparently communicate to his senior. It might be said that the approach of the Court of Appeal contrasted with that of the Judge in the trial at Snaresbrook, but then defending Counsel had raised objection in the matter at that trial. Since 1995 the ground for allowing an appeal against conviction is that the conviction is "unsafe". The case of *Dann* (20) is reported in the Criminal Law Review, where the commentary (Professor Sir J. C. Smith and Professor D. J. Birch) observes that the word "unsafe" is "apparently the most heavily pregnant word in the history of legislation". "If that is right," concludes the commentary, then the *Sussex JJ* case (19) "as applied to appeals from conviction on indictment [as] in *Winston Smith* [18], remains a valid precedent."

I turn to a decision in Zimbabwe, to which Mr Mdhluli refers, namely the case of *S v Marutsi* (21) decided by the Supreme Court in 1990. A ground of appeal raised in that case was that "both the prosecutor and defence lawyer were members of the Attorney-General's office." Manyarara JA (Korsah and Ebrahim JJ A concurring) observed at p371:

> "The practice of providing a law officer from the Attorney-General's office to defend an accused person in criminal proceedings is *clearly undesirable* as it may lead the uninitiated to *believe* (quite wrongly) that the accused cannot receive a fair trial. It is for that reason alone that the practice *should be abandoned.* In this case, *Mr Carter* [for the appellant] conceded, quite fairly, that no prejudice resulted. Perhaps, it may never result. But that is no justification for employing members of the Attorney-General's office as defence counsel in criminal proceedings when prosecutors are also employees of the same office." (Italics added)

As I understand Mr Mdhluli's submission, he finds support in *Marutsi* (21), as it revealed a long established practice, under which prejudice "may never result." It will be seen, however, that counsel for the appellant "quite fairly" conceded that no prejudice had resulted. Further, Manyarara JA considered the practice "*clearly undesirable*", on the basis of public perception. As I see it, that indicated that an irregularity had arisen, which was absolved by counsel's concession that no prejudice had resulted. In the result, the ground of appeal failed. It might well have succeeded, however, in the absence of counsel's concession.

To return to authorities in South Africa, the case of *S v Memani* (22) came before the Witwatersrand Local Division (Eloff JP and Le Grange J) in 1993. The appellant advocate, representing an accused, was convicted by a magistrate of contravening section 108 (1) of the Magistrate's Court Act, 1944 for not abiding by the Court's rulings. Subsequently, when the appellant failed to attend court, the magistrate ruled that the appellant would no longer be allowed to represent the accused in the trial. On appeal, Eloff JP (Le Grange J concurring) observed that the appellant had not been given an opportunity to show cause why he should not be convicted under section 108 (1) and set aside the conviction. The learned Judge President referred to the two old Cape cases of *Ebrahim v Van Rooyen NO and Another* (23) and *Cressey v Magistrate of Richmond* (24) decided in 1917 and 1918 respectively. In both those cases a magistrate had ruled that an attorney and law agent (respectively) would no longer be allowed to represent their client in the proceedings. The dicta of Gardiner J in *Cressey* (24) at p499 sets out the respective situations:

> "I quite agree that circumstances may arise where a magistrate would be justified, owing to a practitioner's conduct of a particular case, in refusing to hear him further

in that case. If a practitioner were wilfully to waste the time of the Court, or were to abuse the magistrate or the witness, it might be apparent that justice could not effectively be administered in a particular case, if the practitioner were to continue to take part in it. In *Ebrahim v Van Rooyen, N.O., and Another* [23], the Court refused to set aside on review a judgment, where the magistrate, owing to the fact that a practitioner persisted in disregarding the rulings of the Court and otherwise acted improperly, had refused to hear him any further, but had given the client an opportunity of obtaining the services of another legal representative. But, as I have said, I am not satisfied that such circumstances arose in the present matter."

In *Memani* (22) Eloff JP observed at pp685/686

"There is some early Cape authority which indicates that in a proper case a magistrate might direct that a particular practitioner is not to appear further in a case. I have in mind decisions such as *Ebrahim v Van Rooyen NO and Another* [23] and *Cressey v Magistrate of Richmond* [24].

In the former of these cases that principle was established. It was affirmed in the latter case. Whether that power still exists in present day circumstances, particularly, having regard to the provisions of s73 of the Criminal Procedure Act 51 of 1977, *is questionable*. Section 73 enshrines the right of an accused person to have the assistance of his legal adviser. The trend of authority is to the effect that an accused person *has the right of the choice of a legal adviser,* with the implication that that legal adviser is to stay on for the duration of the trial. I do not think it appropriate to express a view on whether these early Cape cases still apply. *I think it is doubtful. Even if that principle still holds good,* the present was not the most appropriate case for the invocation of that sort of power. Before invoking the power, if he had it, the magistrate should have called on the appellant to show cause why he should not make such an order. More appropriately, the magistrate should have invoked the power which he has of reporting the conduct of the appellant to the Bar Council. He should not in the circumstances of this case, have made the order which he did." (Italics added)

Those dicta were delivered in 1993, before the advent of the Constitutional dispensation, and no doubt would be strengthened by the provisions of the Constitution of the Republic of South Africa. It is of note that Eloff JP indicated at pp684/685 that he had "much sympathy for the magistrate", and that at one point the appellant's conduct constituted "a flagrant breach of duty to his client, disrespect of the court and an inexcusable impediment to the administration of justice." The

situation had deteriorated to such an extent indeed, that the magistrate at one stage had considered recusing himself. Eloff JP observed: at p686:

> "I do not think that the magistrate should withdraw. He must proceed with the case. But I think that in the interests of justice, the appellant should ... withdraw from the case."

The learned authors of *Commentary on the Criminal Procedure Act,* Etienne Du Toit *et al.*, refer at para 73 p11-10 to the dicta of Eloff JP *supra* as "the following cautious approach": Having quoted such dicta, they continue:

> "Having reached this conclusion Eloff JP nevertheless suggested that counsel concerned should in the interests of justice withdraw from the case. The cautious approach adopted by Eloff JP is in line with s35 (3) (f) of the Constitution, namely that an accused, who pays for his own legal representation, has the right to choose his own lawyer."

For my part I observe that the judgment in *Memani* (22), emanating from high authority, was apparently delivered *ex tempore*. It would seem that no authorities were placed before the Court, at least as to the relevant aspect. There was, for example, no reference to the Appellate Division case of *Robinson* (16). Again, the judgment was concerned with the powers of a magistrate in the matter, and dealt with the aspect of misconduct on the part of a practitioner, rather than the aspects arising in the present case. Such misconduct might always be cured by rebuke, or even contempt proceedings. Nonetheless, I can forsee circumstances, and I believe those in Memani (22) are illustrative thereof, where the situation has deteriorated to such an extent that adherence to the accused's right to counsel of choice would serve solely to frustrate the administration and ends of justice, when the particular practitioner should either withdraw from the case or be disqualified by the Court (on ethical grounds) from appearing therein.

I turn here to the various legal works and publications which summarise the relevant duties involved. Dealing first with attorneys and solicitors I reproduce an extract from *The Law of South Africa* ("LAWSA") (Repl) Vol 14 at p407":

> "*Conflict of interest*
>
> An attorney should not act for a client whose interests conflict with his (the attorney's) interests or those of another client. He must, while holding his position of trust and confidence, prefer the interest of his principal even to his own in case of conflict, and to his skill diligence and zeal must be added good faith."

A number of authorities are cited in support of the first sentence above, eg *S v Hollenbach* (25) (attorney's conflicting instructions from co-accused, father and son, in mitigation), *S v Jacobs* (26) (conflicting instructions from co-accused in defence) and *Law Society of the Cape of Good Hope v Tobias* (27) (two clients with conflicting interests). As to the position in England, the following is an extract from *Halsbury's Laws of England* 4Ed (Reissue) 1989 Vol 3 (1) at p101:

> **"133. Solicitor acting for opposing interests.** A solicitor who is or has been retained by a client is under an obligation not to disclose confidential information which has come his knowledge as solicitor for the client, and, like any other agent but in a higher degree because of his position as an officer of the court and the privileges which the law allows to legal professional confidence, he is bound to observe the utmost good faith towards his client. The court will grant an injunction to prevent any breach of these obligations and will award damages for an actual breach, but an injunction will not be granted unless *mischief will probably flow* from the acts which it is sought to restrain. There is, however, no general rule prohibiting a solicitor who has acted in a particular matter for one of the parties from acting subsequently in the same matter for the opposite party, although where a solicitor owes a duty to someone other than a particular client which conflicts with his duty to that client, he is *not thereby relieved* of any duties to the client." (Italics added)

The following extracts appear at pp64/65 of *Cordery On Solicitors* 8 Ed (1988) by Frederic T. Horne:

> "A solicitor who has been retained by a client is under an absolute duty not to

disclose any information of a confidential nature which has come to his knowledge by virtue of the retainer, and to exercise the utmost good faith towards his client not only for so long as the retainer lasts but *even after the termination of the retainer*, in respect of any information acquired during the course of and by virtue of the retainer; and the court will restrain the solicitor by injunction from any breach likely to injure the client, and award damages for breach. There is no absolute rule prohibiting a solicitor who has acted for one client in a matter subsequently acting for an opposite party in the same matter, but where a solicitor owes a duty to a third party which conflicts with his duty to a particular client he is *not relieved* of his duty to that client.....

Each case turns on its facts, and, while the court may require from solicitors a higher standard of conduct than from persons who are not its officers, yet the principle upon which it restrains a solicitor from acting against a former client is the *prevention of abuse of the confidence reposed in the solicitor by his former client;* accordingly, before an injunction can be obtained, the court must be convinced of the existence of such confidence and of the *probability of its being abused.* Whether the solicitor was discharged by the former client or withdrew is material only in so far as it throws light on the question whether confidence is likely to be abused. The principle applies both where one partner in a firm of solicitors has acted for a client and *another* partner proposes to act against the former client, and where a clerk formerly in the service of a solicitor sets up business on his own account and proposes to act against a client of his former master." (Italics added)

As for advocates, the following appears in LAWSA (*op. cit.*) at p286:

"**282. Breach of confidence** Advocates are not entitled to breach their client's confidence by going over to the other side after learning one side's case. The fact that the first side has no foundation in law makes no difference. The reason for this rule is to prevent the discovered secrets of the former client being utilised to the latter's undoing.

From this rule it follows that no counsel can be required to accept a retainer or brief or to advise or draw pleadings *if he had previously advised another person in connection with the same matter* and he may not do so if, by reason of *confidence imposed in him by such person* or a retention held by him for such person, the acceptance of such new instructions might be interpreted as a *breach of confidence.* It follows that where counsel has held a brief for a party in any proceedings, he is not entitled to accept a brief *on appeal* for the opposite side. An advocate may not appear for two defendants or for two accused if there is likely to be a *conflict* between them. These *principles of the common law* are reflected in more detail in the bar rules." (Italics added)

The reference there is to the *Uniform Rules of Professional Ethics* applicable to all Societies of Advocates throughout the Republic of South Africa. Rules 5.5.1 and 5.5.2 are relevant:

> **"5.5 Brief Which Could Cause Embarrassment**
>
> 5.5.1 Counsel is not obliged to accept a brief if he has previously accepted a brief to advise another person on or in connection with the same matter. He is *precluded* from doing so:
>
> (a) if *any confidential information* having any bearing whatsoever on the matter in question was disclosed to him as a result of his first brief; or
>
> (b) if it *might reasonably be thought* by the person first advised that, if counsel were to accept the second brief, he would be prejudiced.
>
> **5.5.2 Opinion Given to the Other Side**
>
> Where counsel has given an opinion to one side and is not briefed to argue the case for that side, he is not necessarily precluded from taking a brief to argue the case for the other side. If he has been placed in possession of facts *which would embarrass him* in the conduct of the case, he must refuse the brief. In *all* cases, however, he must obtain the *permission* of *both attorneys* before he can accept the brief. (Italics added)

The position as to barristers is summarised thus in *Halsbury* (*op. cit.*) at p425:

> **"524. Duty of Confidence.** The employment of a barrister as counsel places him in a confidential position, and imposes upon him the duty neither to communicate to any third person, nor to use either to the client's *detriment* or for his own benefit, information acquired by him as counsel. This duty of confidentiality continues *after the relation of counsel and client has ceased*, so long as the reasons upon which the duty is founded continue to operate. A barrister ought not to accept a brief to act against a former client, even if that client has refused to retain him, if by reason of his former engagement the barrister possesses any confidential information which *might be prejudicial* to his former client in the later litigation.
>
> The courts will interfere by injunction to prevent a barrister from disclosing secrets of the client, and will set aside any deed or transaction by which the barrister has, by making use of the confidence reposed in him, gained a benefit to himself."(Italics added)

The conduct of barristers is regulated under the *Code of the Bar of England and Wales* (amended on 24th March, 2001). The following paragraphs thereof are relevant:

> "603. A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:....
>
> (d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or *otherwise* it will be difficult for him to maintain professional independence or the administration of justice might be or *appear to be prejudiced*;
>
> (e) if there is or *appears to be a conflict or risk of conflict* either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions);
>
> (f) if there is a *risk* that information *confidential* to another client or former client might be communicated to or used for the benefit of anyone other than client or former client without their consent;....."
>
> "608. A barrister must cease to act and if he is a barrister in independent practice must return any instructions:
>
> (a) if continuing to act would cause him to be *professionally embarrassed* within the meaning of paragraph 603 ....." (Italics added)

United States of America

Mr Penzhorn, Mr Woker and Miss Bheemchund and have referred me to a number of American authorities. The first of those chronologically is *State v Crockett and Edwards* (28) decided in 1967 by the Supreme Court of Missouri (Stockard, Barrett and Pritchard JJ). After the conviction of the second accused Edwards, his Counsel filed a notice of appeal. He also filed a request that he be permitted to

withdraw, because of his status as a "special" Assistant Attorney-General, suggesting a "conflict of interests". Edwards had been unaware of this situation, and learnt of it only after the filing of the notice of appeal. The Supreme Court (per Stockard J) observed that Counsel's correct designation was Assistant Attorney-General, being paid an annual salary in monthly instalments. Stockard J at p28 referred to the watershed case of *Gideon v Wainright* (29) and an accused's constitutional right to representation. He observed that "[a] showing of *actual prejudice* is *not required*; all that is necessary is a showing of *conflict*" (*United States ex rel. Miller v Myers* (30) at p57), and again that "the right is too fundamental and absolute to allow courts to indulge in *nice calculations as to the amount of prejudice* arising from its denial" (*Glasser v United States* (31). Stockard J referred to the case of *Mackenna v Ellis* (32) where the fact that the court-appointed Counsel for an indigent accused had on file an application for employment with the office of the District Attorney, was held to result in "a conflict of interest". As to professional ethics, Stockard J observed that the Missouri Bar had recently rendered an opinion that it would *not be proper and ethical* for an Assistant Attorney-General to *represent a defendant* in a state criminal prosecution. In the result, despite favourable comments by Stockard J and the Court below as to Counsel's "highest motives" and ability, the conflict of interest was such that the conviction of Edwards was set aside.

The case of *State v Latigue* (33) was decided by the Supreme Court of Arizona (Hays CJ, Cameron VCJ, Struckmeyer, Lockwood and Holohan JJ) in 1972. There a Deputy Public Defender, co-Counsel for the accused, possessed of confidential communications from the accused, with access to all defence papers, was appointed Chief Deputy County Attorney. The Supreme Court (per Hays CJ) at p523 ordered

the appointment of a special prosecutor, that is, if the County Attorney wished to continue with the prosecution: such prosecutor might, on the directions of the Court below, have access to particular material obtained by the County Attorney "completely independent of his chief deputy", and there should be *no contact whatever* between the special prosecutor and the Chief Deputy County Attorney. Hays CJ quoted an Ethics Committee Opinion of the State Bar thus:

> "Ordinarily knowledge or information held by any one member of the County Attorney's office is tantamount to knowledge *of all such members*, and that public confidence in our judicial system may be undermined if the *appearance* of evil, as well as the evil itself, is not avoided." (Italics added)

Hays CJ observed at p523:

> "[I]f the County Attorney's Office is functioning efficiently, its staff has frequent meetings to discuss cases, and even without meetings, staff members often talk about their cases with one another.....
>
> We do not rest our decision only on the fact that the attorney involved here is the County Attorney's chief deputy; even if he were not, that office would have to *divorce itself from the prosecution* in this case. Because even the *appearance* of unfairness cannot be permitted. What must a defendant and his family and friends think when his attorney leaves his case and goes to work in the very office that is prosecuting him? Even though there is no revelation by the attorney to his new colleagues, *the defendant will never believe that.* Justice and the law must rest upon the *complete confidence* of the thinking public and to do so they must avoid even the *appearance* of impropriety. Like Caesar's wife, they must be *above reproach.*"(Italics added)

In the case of *Petition of Pepperling* (34) the petitioner's court-appointed defence attorney in a trial in 1973, resulting in a conviction and a term of 15 years imprisonment, was one and the same person as prosecuting counsel in the trial of the petitioner in 1965, which has also resulted in a conviction. The petitioner, seeking *habeas corpus* in respect of his imprisonment, claimed that his constitutional rights, both federal and State had been violated. The Supreme Court of Montana, dismissing the petition, observed that there was nothing to show that the defence attorney had

had any involvement with the County Attorney's office when the petitioner was prosecuted in 1973. The Court held that whereas attorneys may not defend cases they once prosecuted,

> "[i]t is not the law that the one-time prosecution of a defendant by a former county attorney forever prohibits that attorney from defending that individual on a *separate and distinct* criminal charge."(Italics added)

The case of *New Jersey v Jaquindo & Others* (35) came before the Superior Court of New Jersey, Appellate Division in 1975. The accused in that case were police officers charged with official misconduct. They were represented by Attorney Marra, who had been an Assistant prosecutor at a time when some of the allegations against the appellants had been investigated in the County Prosecutor's Office. The trial Judge "relieved [the accused's] attorney as counsel because his former position as a prosecutor was a conflict of interest." On appeal the Court (Michels, Morgan and Milmed JJ) quoted the following from the judgment in the case of *In re Biederman* (36) :

> "The ethical requirement that an attorney who has been a *public employee* may not, upon retirement, act on behalf of a private client in any matter upon which he was engaged in the public interest is neither new, ambiguous nor difficult to understand. In *Formal Opinion 134 of the American Bar Association* (1935) it was held that an attorney formerly employed by a state's attorney's office might not, after retiring to private practice, either defend cases that *originated* while he was *connected* with that office or defend persons *against whom he had aided in procuring indictments*. In *N. J. Advisory Committee on Professional Ethics*, Opinion 207, 99 [*sic*-94] N.J.L.J 451 (1971) the same result was reached upon substantially identical facts, even though the attorney *had played no part* in the investigation and prosecution which had taken place while he was an assistant county prosecutor".

The Court also quoted Opinion 134 (1935) of the Committee on Professional Ethics of the American Bar Association:

> "A lawyer retiring from public employ cannot utilize or *seem to utilize* the fruits of the former professional relationships in subsequent private practice involving a matter investigated or passed upon either by himself or *others* of the public legal staff

during the time he was identified with it."(Italics added)

The Court observed that the New Jersey Advisory Committee on Professional Ethics had opined that the American Bar Association had

> "[extended] the prohibition to any matter which originated in the office with which the attorney was connected where he was in a position of confidence and actually knew or *had the opportunity to know* facts because of his position in the said office. (Superior Court's italics)

The Court observed that while the accused had been charged long after Marra had left the prosecutor's office and some of the offences charged allegedly occurred after he had left that office, nonetheless "much of the *information relevant* to *the crimes charged* was gathered while Marra was assistant prosecutor." The Court then affirmed the decision to disqualify Marra, concluding thus:

> "Defendants of course are entitled to retain qualified counsel of their own choice. They have *no right*, however, to demand to be represented by an attorney *disqualified* because of *an ethical requirement*. And, we point out, the remaining choice of each is not a narrow one. There are many well qualified attorneys who are not affected by the disqualification which is the subject matter of this appeal."(Italics added)

Morgan J, as indicated, concurred, but dissented with regard to those offences which were allegedly *committed after* Attorney Marra had left the County Prosecutor's office. If a subsequent trial concerned *only* such offence or offences, he saw no impediment to Marra acting as defence counsel. Nonetheless, with regard to the other offences, it seems to me that Morgan J at pp68/69 took matters further. He agreed with the Court's decision concerning offences committed during Marra's period of office,

> "irrespective as to whether formal proof established that the investigation being conducted by the prosecutor's office at that time uncovered evidence of his client's criminality which later became the subject of the indictments in question. Formal proof of the connection, if any, between the investigation and the later indictments would require the trial judge to conduct plenary trial involving disclosure of the course the investigation took, when and how the evidence of criminality was

obtained, and which evidence was pertinent to which indictment. Adducing this proof would involve the trial judge in a formidable task of considerable magnitude which would only serve to determine whether or not counsel could properly continue representing his clients, and would in no way bear on the prime question with which the trial judge should be concerned – guilt or innocence of defendants charged with crime. Further, such a procedure would be tantamount to *trying the case in advance*. In my view such a procedure would be both unseemly and inappropriate where on the face of the matter *doubt arises as to the ethical propriety of a particular retainer*. Hence, whether or not, in point of fact, the investigation uncovered evidence suggestive of Marra's clients' criminal behaviour during Marra's tenure of office, which later became occasion for the late indictments, Marra *should have disqualified himself* from representing these clients because of the *very suspicion that such facts would engender without the necessity of proof* that such state of facts did exist.

Undoubtedly, disqualification of counsel for ethical considerations in the absence of formal proof and findings based thereon may work a hardship in a particular case to both the attorney and the clients who wish to retain him. On the other hand, the business of the trial courts is to provide the facilities for the determination of questions of guilt or innocence, *not to determine the ethical propriety of a particular retainer*. Where a *legitimate doubt* arises as to whether an attorney can, consistent with ethical consideration, represent a particular client, a doubt which can only be finally resolved in an extensive plenary trial, such counsel, sensitive to both the necessity for public confidence in the integrity of our judicial processes and the need of overburdened trial courts to proceed to the essential business of determining guilt or innocence, *should step aside* and permit other counsel, about whom there exists no ethical problem, real or *potential* to proceed with the essential problem to be resolved at trial. Attorneys are officers of the court and are required to be sensitive to matters affecting public confidence in our judicial procedures. Yielding in the face of *legitimate suspicion* as to ethics of a retainer is the *appropriate response* to the need for such sensitivity.

The client, represented by such an attorney, can legitimately expect no more than his attorney. If the attorney, due to *legitimate suspicion* engendered by the facts of a case, is ethically required to reject the retainer, the client, although entitled to counsel of his choice, *cannot insist on formal proof* of facts requiring disqualification." (Italics added)

The case of *United States v Kitchin* (37) takes matters even further again, the facts of which are very much on all fours with the present case. That was a case decided by the United States Court of Appeals, Fifth Circuit, in 1979. The accused was charged with bribery of a public official and obstruction of justice. One Steven

Ludwick, an Assistant United States Attorney and chief of the local Criminal Division, was given charge of the matter. Earlier he had been involved in investigations and an *in camera* hearing concerning the allegations, at which hearing the defendant had testified. Ultimately Ludwick assigned the case to two other assistant United States Attorneys, but nonetheless "at various times" discussed the case with the two assistants. The judgment of the Court of Appeals (Ainsworth, Godbold and Vance JJ) observes that "[t]herefore, Ludwick was significantly involved in the development of this criminal action prior to indictment and was privy to relevant information then possessed by the government." Three months before the indictment against the accused was filed, Ludwick left the United States Attorney's office and "accepted a position as an associate with [the accused's attorney] Jones." The judgment continues at p903:

> "There is no evidence in the record to imply that Ludwick's joining Jones' law firm or the defendant's employment of Jones was influenced by Ludwick's previous participation in the case on behalf of the government. Jones is the only attorney of record for the defendant and Ludwick states that he would not participate in the case."

The dicta in *Kitchin* (37) are very much in point in the present case, and it proves necessary to quote such dicta *in extenso*. The following extracts from the judgment at pp903/905 are relevant:

> "A defendant's right to counsel of his choice is *not absolute* and must yield to the higher interest of the effective administration of the courts. *Gandy v Alabama* [38]. The right is *specifically limited* by the trial court's power and responsibility to regulate the conduct of attorneys who practise before it. See *United States v Dinitz* [39]; *Kremer v Stewart* [40]. The determination of whether the defendant's Sixth Amendment right overrides the conduct of his attorney is committed to the *trial court's discretion. United States v Dinitz,* [39], at1219.....
>
> Under Canon 4 of the ABA [American Bar Association] Code and its predecessors, a lawyer may not accept employment representing interests adverse to those of a prior client. The purpose of this rule is to ensure the confidentiality of information

received in the service of a previous employer. So long as the affected party can show that the matters involved in the previous representation are substantially related to those in an action in which the attorney represents an adverse party, the former client is entitled to the disqualification of the lawyer.

In this case it is clear that these criteria have been met. Ludwick was actively involved on behalf of the United States in an early stage of this matter and is now associated with the defendant's attorney. The aggrieved party *need not prove* that Ludwick actually obtained confidential information nor that he had or will disclose it to his present employer. *In re Yarn Processing Patent Validity Litigation,* [41], at 89; *United States v Trafficante* [42] at 120; *American Roller Co v Budinger* [43], at 984; *Hull v Celanese Corp.* [44], at 572. The rationale for such a rule is obvious. A close examination of information Ludwick learned while an assistant United States Attorney might well *vitiate the secrecy* of the communications. See *Cord v Smith* [45] at 524. In addition, *public interest* in the confidence with which an attorney receives potential evidence from a client would soon disappear if the lawyer were permitted to establish the same fiduciary relationship with an adverse party. *In re Yarn Processing Patent Validity Litigation,* [41], at 89; *American Can Co. v Citrus Feed Co.,* [46] at 1128. That concern is even greater in a case involving the *public's interest in the prosecution of alleged criminal acts as opposed to civil litigation.*

Finally, given the presumed interplay among lawyers who practice together, the rule applies not only to individual attorneys but also requires *disqualification of the entire firm as well as all employees thereof. Schloetter v Railoc of Indiana,* Inc. [47]; *Cinema 5, Ltd v Cinerama, Inc.,* [48]; *W.E. Bassett Co v H.C. Cook Co.,* [49]; see *In re Yarn Processing Patent Validity Litigation,* [41], at 89; *American Can Co. v Citrus Feed Co.,* [46], at 1128. Thus it does not matter that Ludwick is *only an associate* to the defendant's counsel of record.

Considering the state of the case law which *precludes* an actual examination into the content of confidences which Ludwick may have obtained or disclosed, there is no doubt that Jones' representation of the defendant would result in a "specifically identifiable" violation of ethical precepts. *Woods v Covington County Bank,* [50], at 813. The remaining issue is whether the likelihood of public suspicion arising from the prohibited conduct outweighs the social interest in affording a criminal defendant the right to counsel of his choice *ibid.* at 810 and 813, n.12....."

The personal preference of the defendant for representation by Jones is *insufficient to outweigh the public suspicion* that would likely be aroused by denial of the government's motion. As mentioned previously, *more is at stake than the confidences of a private litigant.* The public has an interest in seeing that criminal laws are enforced. For a former prosecutor to be associated with the lawyer who represents a person he earlier *helped* prosecute, even if only at an embryonic stage,

would likely provoke *suspicion and distrust of the judicial process*." (Italics added)

Ultimately the Court of Appeals observed that "society's interest in fair but unimpeded prosecution of the criminal law outweighs the defendant's right to counsel of his choice under the circumstances of this case," and granted Government's motion to disqualify the accused's attorney.

Mr Phoofolo in his head of argument submits that "the legal position stated in the case of *Kitchin* [37] referred to by the Crown, would not pass constitutional muster in either South Africa or Lesotho." Mr Phoofolo then refers to the "open docket principle", based on the cases of *Shabalala and Others v Attorney-General of the Transvaal and Another* (51) and *Molapo v Director of Public Prosecutions* (52). The Crown's heads in reply submit that what is there suggested is that *Kitchin* (37) was decided in a different legal environment. The Crown then refers to the case of *S v Sefadi* (53), decided before *Shabalala* (51), wherein Marnewick AJ conducted a learned research into the prevailing position as to any docket privilege under English, American and German law. I respectfully and gratefully adopt his summary of the relevant American law at pp677/678:

> "American law is summarised in the *Corpus Juris Secundum* ('CJS') volume 22 A from para 467. The right of an accused to interview witnesses is stated in the following terms: 'The accused is entitled to interview witnesses before the trial, and is generally entitled to an order of the court directing the State to permit an interview with witnesses *in its custody*.' When this simple rule is explained in the body of that paragraph, the following is said:
>
> > 'As witnesses in a criminal trial belong *neither* to the government nor to the defendant, accused and his counsel have the right to interview witnesses before the trial, subject to the witness' right to refuse to be interviewed, and the State has no right to deny the accused or his counsel access to a witness material to the defence, or instruct a witness not to speak to the defendant or his counsel. This is the extent of its duty, however, and it does not have a duty, in the absence

of a court order, to present its witnesses for interviews.'

The court further has a discretionary power to order the State to permit the accused's counsel to interview witnesses in the *custody* of the State, such as prisoners in State prisons. See also *Commonwealth v Rocco A Balliro et al* [54] where the Massachusetts Supreme Judicial Court held (at 650) that:

> 'We think the better view is that the counsel for a defendant should be accorded, as of right, an opportunity to interview prospective witnesses held in the *custody* of the Commonwealth. Witnesses belong *neither* to the Commonwealth not to the defence. They are *not partisans* and should be available to both parties in the preparation of their cases.'

22A CJS para 486 also makes it clear that the discovery process 'is available to persons charged with crime.' Paragraph 488 of the same publication further states that an accused's right to discovery extends to evidence which is *exculpatory*, favourable to the defence, and material to the accused's guilt or punishment. The State, therefore, has the *duty* to make discovery, not only of inculpatory evidence but also exculpatory evidence. In 22A CJS para 489 the following is said:

> 'The government has a *duty* to disclose material which is in the possession of the police, an investigative or law enforcement agency, or the crime laboratory, to which the prosecutor has access, the existence of which could have become known to the prosecutor through the exercise of reasonable diligence, even though the prosecutor does not have the present physical possession, and even if the prosecuting attorney has *no knowledge* of the material.'

The material which has to be discovered is not defined but it is clear from the context that it includes statements made by witnesses to the police.

It is apparent from the aforegoing that in an American court the accused not only has the right to interview *all* witnesses, even those held in custody by the State, but he also has the right through the discovery process of gaining access to *all* the material available to the prosecutor, which would include statements made by the witnesses, exhibits, forensic reports and the like." (Italics added)

Paragraph 486 of Volume 22A of *Corpus Juris Secundum* in turn reads in part thus:

> "Discovery is available to persons charged with crime. Accused is entitled to any pretrial knowledge of any *unprivileged* evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist in preparing the defense, including information for possible use to impeach or cross-

> examine an adverse witness. Thus, after accused has shown that discovery is necessary to preparation of the case, it should be granted absent a more compelling showing by the government that such discovery would unfairly hamper the prosecution or do a disservice to the *public interest*.
>
> The prosecution is *not, however, required to disclose all minutiae of its evidence or reveal its trial strategy*. Discovery is not to be used for fishing expeditions, and cannot be relied upon as a total substitute for accused's own investigation. Accused is not entitled to obtain evidence that would only marginally impugn a witness' credibility but that would severely prejudice a *public interest requiring confidentiality*."(Italics added)

That is but a brief summary of the relevant American legal position, but it suffices to reveal, I respectfully observe, a finely honed system. That is not surprising. The Bill of Rights contained in the European Convention and the Westminister model Constitutions find their *fons et origo* in that contained in the father of all Constitutions. In particular, the hallowed Sixth Amendment, strengthened by the "due process" provision contained in the Fifth Amendment and subsequently by that contained in the Fourteenth Amendment, was enacted over two hundred years ago in 1791. It reads thus:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Almost forty years ago, in the *Gideon* case (29) (see "*Gideon's Trumpet*" by A. Lewis, 1964) the Supreme Court held that, in the case of an indigent accused, he was entitled to a State-appointed counsel, where he was charged with a felony. That standard was subsequently increased to all prosecutions which resulted in *any* term of imprisonment (*Argersinger v Hamlin* (55)), which effectively prohibited *any* imprisonment, in the absence of counsel, unless the accused had knowingly and

voluntarily waived the assistance of counsel. It was against that background that the *Kitchin* case (37) and other American cases *supra* were decided.

Mr Phoofolo in his heads and Mr Mdhluli have referred the Court to two other American decisions, namely *Cuyler v Sullivan* (56) and *US v Morrison*(57). I cannot see that those cases are relevant. The first was a case of multiple representation, by two privately retained lawyers representing three accused, who were tried *separately*. In the *Morrison* case (57) the accused, facing federal charges, was interviewed by two federal agents, in the absence of her counsel, during the course of which interview they spoke disparagingly of counsel, suggesting she seek the services of a public defender. The Court of Appeals held that there had been a violation of her Sixth Amendment right to counsel and dismissed the indictment. Upon *certiorari* the Supreme Court held that, upon the assumption (without finding) that there had been such violation, dismissal of the indictment was not the appropriate remedy, and remanded the case before the trial court. In brief, I do not appreciate the impact that those decisions might have upon the present case.

Canada

I have earlier made reference to Canada in the context of the *Farmers Mutual Petroleums* case (15). That, of course, was a civil case. Of more importance are four criminal cases decided relatively recently, which I consider merit separate consideration. In 1983 the case of *Re Regina and Speid* (58) came before the Ontario Court of Appeal. The applicant accused Speid was charged with the murder of the infant daughter of one Miss Nugent, with whom the accused was living at the time of the alleged offence. Miss Nugent was initially charged with the murder. She

retained the services of a solicitor, Mr Lockyer, for a few days only, during which time he discussed her defence with her on at least two occasions and also discussed it with his partner, Mr Pinkofsky. Miss Nugent changed solicitors and then pleaded guilty to manslaughter. Apparently as a result of information supplied by her, the accused was then charged with the murder of the infant.

Mr Pinkofsky was thereafter retained to act for the accused. It was well known to both that Miss Nugent would be the principal Crown witness. Objection was had to Mr Pinkofsky, as representative of the accused, at the preliminary hearing, apparently without success. When the matter came on for trial, the objection was renewed and Ewaschuk J directed that Mr Pinkfosky be removed as solicitor of record and be restrained from acting for the accused as his counsel in the pending trial. Before the trial commenced, an application for review of that ruling was made to the Ontario Court of Appeal (Dubin, Martin and Robbins JJ A). The Court (per Dubin JA) observed at p248:

> "The jurisdiction of this court to hear this matter has been put in issue by counsel for the Crown whose submission was that the issue could only properly be challenged following a trial and by way of appeal from a conviction if that were the result of the pending proceeding. The resolution of this jurisdictional issue is *not free of difficulty,* but in light of the view that we take of the merits of the matter, it is *unnecessary* to decide it in this case.
>
> *Assuming* that the matter is properly before us, we are all of the opinion that there is no merit in the challenge made as to the correctness of the order of Mr Justice Ewaschuk." (Italics added)

Dubin JA observed further at pp249/250:

> "It is common ground that nothing turns on the fact that it was Mr Lockyer who was first retained to act for Miss Nugent. The issue is the same as if Mr Pinkofsky had previously acted for Miss Nugent in the manner of Mr Lockyer and now proposes to act for Mr Speid with respect to the same subject-matter on which *he* had been

previously retained by Miss Nugent.....

The right of Mr Pinkofsky to act was challenged in the preliminary hearing. In those proceedings Mr Lockyer testified that Miss Nugent had not told him the truth during the instructions which he received from her, which fact is now denied by Miss Nugent. This unseemly contest formed a major part of the preliminary hearing proceedings. The very *disclosure* by Mr Lockyer of what was said to him while he was receiving instructions and volunteered by him at the preliminary hearing was, in our view, *a fundamental breach of his duty* to Miss Nugent. If she lied to him, *it in no way relieved him of his fiduciary duty towards* her, *nor did the fiduciary duty* of Mr Lockyer or of Mr Pinkofsky *cease* when the services had been terminated." (Italics added)

Dubin JA earlier observed at pp248/249:

"The right of an accused to retain counsel of his choice has long been recognized at common law as a *fundamental* right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the Charter of Rights which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay. However, although it is a fundamental right and one to be zealously protected by the court, *it is not an absolute right* and is subject to *reasonable limitations*. It was hoped that these limitations would be well known to the bar, but if not honoured, *the court has jurisdiction to remove a solicitor* from the record and restrain him from acting.

In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, *public policy* and the *public interest* in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are *compelling reasons*. This is clearly such a case and to do otherwise would result in real mischief or real prejudice.

We would have thought it axiomatic that no client has a right to retain a counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one. This has been demonstrably shown in the proceedings before Mr Justice Ewaschuk to be the case here. It is apparent from the very initial stage of Mr Pinkofsky's retainer that he was in an *untenable position* and ought not to have accepted the brief. It is to be regretted that Mr Speid was not so advised."(Italics added)

and at p250:

"Mr Speid has a right to counsel. He has a right to professional advice, but he has *no right* to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so

acts, the client is *denied professional* services." (Italics added)

Ultimately the Court dismissed the application, concluding at p253:

"The case was clearly one where the removal of Mr Pinkpfsky, as solicitor of record in this case, was not in any way a denial of the right of Mr Speid to have counsel of his choice within the *applicable limits* of that right.

The disqualification of the solicitor of record in this case vindicated a former client's trust in and reliance on her solicitor. Such an order promotes the use of the legal system for the adjudication of disputes by upholding the dignity of the legal profession." (Italics added)

There followed in 1986 another case *Re Regina and Robillard* (59) before the Ontario Court of Appeal (Lacourciere, Houlden and Morden JJ A) in which the facts were somewhat similar and in which the decision in *Speid* (58) was followed. The accused Robillard was charged with seven counts of robbery. The Crown applied to have defence counsel removed from the record, as she also represented the alleged receiver of the goods stolen by the accused, whom the Crown intended to call as a witness. Defence counsel obtained a written waiver from the witness, in explicit terms. The judgment of the Court of Appeal (per Lacourciere JA) states at p25 that Provincial Court Judge Paris, holding the preliminary enquiry, considered that

"there was a clear conflict of interest; the waiver and consent of the witness were incapable of removing the conflict, and in any event, the waiver was vitiated because counsel had not provided independent advice on the right of the witness to refuse to sign it. Also, in the opinion of Judge Paris, the witness could withdraw her waiver at any time during cross-examination and thus impair the effectiveness of counsel. For these reasons, he concluded that the situation was unacceptable for counsel, for the accused and for the public interest in the administration of justice."

Paris Prov. Ct. J. ordered the removal of defence counsel from the record. An application to the High Court to quash that order was dismissed. On appeal to the Ontario Court of Appeal, counsel for the appellant submitted that the witness' waiver was irrevocable, hence there was no conflict of interest. Lacourciere JA did not

agree, quoting at p26 the following dicta of Dubin JA in *Speid* (58) at p249, that is,

> "it [is] axiomatic that no client has a right to retain a counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one."

As to those dicta, Lacourciere JA observed at p26:

> "This flows from the accused's right to professional advice and services by one who has not placed himself or herself in a position where he or she cannot act professionally and ethically. The public respect for, and the societal interest in, the administration of justice would be reduced if it were otherwise. The right of an accused to retain and instruct counsel of his choice has long been recognized as a *fundamental* right at common law and is now inferentially entrenched in the *Canadian Charter of Rights and Freedoms* by ss.7, 10(b) and 11(d). It is however, *not an absolute right* and is subject to *reasonable* limitations." (Italics added)

The Court discounted the fact that during the interval between the adjournment of the preliminary enquiry and the application in the High Court, the witness had pleaded guilty and had been sentenced for her related offence, and went on at pp27/28 to observe:

> "We are all of the view that, even if the waiver of confidentiality had been obtained without being vitiated by the absence of independent legal advice, *it would still not provide a complete answer to the Crown's contention. The court is always required to consider the public interest and the need for public confidence in the administration of criminal justice.....*
>
> Public confidence in the criminal justice process would surely be undermined by any *appearance* of impropriety in the conduct of the trial or any lack of fairness in the cross-examination of a witness. The process by which the waiver was obtained in this case, the possibility that the witness may attempt to withdraw the waiver during cross-examination and *the very existence of the waiver can undermine the necessary public confidence* in the administration of justice. This confidence rests on the fundamental fairness of the preliminary inquiry and criminal trial process. It requires not only the avoidance of professional impropriety but also the avoidance of any *appearance* of impropriety." (Italics added)

In the result the appeal was dismissed. The dicta in *Speid* (58) and *Robillard*

(59) were applied by LaForme J in the Ontario Court (General Division) in 1996 in the case of *Regina v Allan S. (Sub nom. R. v S. (A))* (60). Again, the facts were that counsel, Mr Sosna, was involved in a conflict of interest; he represented the accused charged, in 1995, with indecent assault and assault of his step-daughter (Ms. S. (M.)) and her son, when his former law firm had represented the estranged husband (M.M.) of the complainant step-daughter, in 1992; on that occasion the husband (who was a crown witness in the 1995 proceedings) was charged with assault of and assault causing bodily harm to his wife; counsel had made but one court appearance in 1992 on behalf of the husband, in order to set a trial date.

LaForme J referred to *Speid* (58) as "the seminal case" in the matter, quoting also the dictum in *Robillard* (59) at p26 that the right to counsel of choice "is ... not an absolute right and is subject to reasonable limitations", observing also that the Court in *Robbilard* (59) "characterized the principle as being one of *public perception.*" The Crown submitted that the fact that the witness had complained to the Law Society of Upper Canada regarding Mr Sosna's representation of the accused was an instance of public perception. Mr Sosna submitted that the Law Society had addressed the issue of public perception and had advised him that "no ethical conflict was apparent", and that such opinion was reflective of public perception. LaForme J, however, observed at pp668/669:

> "In the case at bar, the potential to use confidential information must be, at least, *perceived to exist* in M. M's case, given the complainant in the 1992 action and one of the complainants in this action are one and the same, namely M. M.'s wife ..... And, as credibility is always in issue, the *possibility* of information obtained through the previous retainer with M.M. against Ms S. (M.) is *apparent and obvious*, whether or not it is factual.
>
> Additionally, while the facts in the S. matter [in 1995] and those in the M. matter in 1992 cannot be said to be the "same matter", they are at least related in appearance.

> In both matters Ms S. (M.) was and is a complainant, M. M. was and is a key party and each matter can be classified as being domestic assaults. Thus, while the matters may not be the same, they are so similar and involve some of the same central characters that any *objective* observer could not help but question them. A *reasonably informed* person would conclude, in the circumstances of this case, that Mr Sosna must have received from M. M. some confidential information attributable to their solicitor-client relationship relevant to at least part of the matter at hand. Additionally, that person would conclude that there is a *risk* that the information will be used to M. M.'s prejudice:"(Italics added)

LaForme J ultimately "disqualified" Mr Sosna from representing the accused, observing that the right of the accused to counsel of his choice "must yield to the necessity of the public to have confidence in our criminal justice process and to observe that the system is fair and proper."

In the same year, Provincial Court Judge Conner decided the case of *Re The Queen and Leask (sub nom. R v Leask)* (61) in the Manitoba Provincial Court. The accused, charged with murder, was represented by Mr Brodsky, Queen's Counsel. Before the commencement of the preliminary enquiry before Conner Prov. Ct. J, the Crown brought an application, seeking to remove Mr Brodsky as counsel of record, on the basis that a Crown witness, a Ms Thibert, had retained a Mr McAmmond, "a member of Mr Brodsky's law firm," to represent her in the matter of three charges against her, concerning narcotics. Mr McAmmond subsequently advised the Crown witness "that because he would be assisting Greg Brodsky in the defence of the Accused.... he would no longer be able to represent" her on the narcotic charges. Conner Prov. Ct. J relied heavily on the dicta of Sopinka J in delivering the majority judgment of the Supreme Court of Canada in the civil case of *MacDonald Estate v Martin* (62), observing at pp185/186:

> "Mr Brodsky is a senior, honourable and reputable member of the law profession in Manitoba. There is no reason for this Court not to accept his undertaking that he

would not use any relevant confidential information in the cross-examination of Ms Thibert. However, such an undertaking is not sufficient.

As Sopinka J put it, at p1261:

> "No assurances or undertakings not to use the information will avail. The lawyer cannot *compartmentalize* his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client....."

And at p1263, Sopinka J states:

> "A *fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, *the public is not likely to be satisfied* without some additional guarantees that confidential information will under no circumstances be used."

It is the public's perception of and confidence in the administration of justice which is paramount. In referring to the Code of Professional Conduct, Sopinka J states at p1246:

> "The statement in Chapter V [of the Code of Professional Conduct] should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an *appearance* of impropriety should be avoided." " [Italics added]

Mr Brodsky was prepared to retain independent counsel to cross-examine Ms Thibert. Conner Prov. Ct. J observed, however, that any such counsel could not operate "in a vacuum" and would have to be instructed, presumably by Mr Brodsky or Mr McAmmond, giving rise to the same difficulties. In the result, Judge Conner concluded that Mr Brodsky "cannot continue as counsel of record for Mr Leask in these proceedings."

Europe

The approach of the courts in the United States of America and Canada is also

apparently that of the European courts. The following extract appears at p104 of Amnesty International's *Fair Trials Manual* (1998):

> "Because of the importance of trust and confidence between the accused and their lawyer, the accused may *generally* choose which lawyer will represent them."(Italics added)

That observation is based upon Article 6 (3) (c) of the European Convention, the forerunner, as I observed in the ruling delivered on 21st August at p53, of section 12 (2) (d) of the Constitution, which provides that

> "(2) [e]very person who is charged with a criminal offence.....
> (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;"

The same provision is to be found e.g. in Article 14 (3) (d) of the International Covenant on Civil and Political Rights (1976), Article 7 (1) (c) of the African Charter on Human and Peoples' Rights (1986) and Article 8 (2) (d) of the American Convention on Human Rights (1978). It will be seen, however, that the application of Article 6 (3) (c) is qualified in the above extract from the *Fair Trials Manual* by the use of the word "generally". It is further qualified in the *Manual* at p104 thus:

> "The right to be represented by a lawyer of one's choice may be restricted, if *the lawyer is not acting within the bounds of professional ethics,* is the subject of criminal proceedings or refuses to follow court procedure.
>
> The European Commission did not find a violation of the European Convention in a case where the national courts prohibited the lawyers chosen by the accused from defending the accused because they were suspected of complicity in the same criminal acts as the accused; and in a case where the domestic court refused to allow the lawyer chosen by the accused because the lawyer refused to wear robes."(Italics added)

Authority for those observations is found in the cases of *Baader, Raspe v Federal Republic of Germany* (63)and *X v Federal Republic of Germany* (64),

decided in 1978 and 1972 respectively. In the case of *Croissant v Germany* (65), decided in 1992, the facts are not apposite, as there the legislation provided for the appointment by the court of up to three defence counsel on legal aid (costs to be repaid in the event of conviction, if the accused had sufficient means). The accused objected to the appointment of the third counsel. Ultimately counsel applied to be relieved of his duties. Both applications were dismissed. The accused was convicted. The European Court of Human Rights held unanimously that the obligation to pay the fees of the first two counsel was not in breach of Article 6 and (by a majority of eight to one) neither was the appointment of the third counsel nor the obligation to pay his fees also. The dicta of the European Court (at para 29 of the judgment) are instructive:

> "It is true that Article 6 (3) (c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right *cannot be considered to be absolute*. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts *must certainly have regard to the defendant's wishes*; indeed, *German law contemplates such a course*. However, they can *override those wishes* when there are *relevant and sufficient grounds for holding that this is necessary in the interests* of justice."(Italics added)

While the latter statement is made in the context of an appointment of legally-aided counsel, there is nonetheless the Court's earlier all embracing observation that the right to representation by counsel of one's choice "cannot be considered to be absolute." That dictum, to which I shall return, is clearly common to many of the authorities that I have examined.

Legal Professional Privilege

The aspect of privilege, that is, as to communications between legal adviser and client, arises. In the Appellate Division case of *S v Safatsa and Others* (66), the Court (per Botha JA) approved (at p886) of the view expressed in the Australian case of *Baker v Campbell* (67) that

> "[the] privilege is a mere manifestation of a *fundamental principle* upon which our judicial system is based." (Italics added)

Botha JA approved in particular of the following dicta of Dawson J in *Baker v Campbell* (67) at pp442/445:

> "The Law came to recognize that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of *giving and receiving legal advice* and for the purpose of litigation and that this entailed immunity from disclosure of such communication between them....."
>
> ".....[the privilege's] justification is to be found in the fact that the *proper functioning of our legal system* depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice..... The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance *because it is part of the law itself*....."
>
> "The privilege extends beyond communications made for the purpose of litigation to all communications made *for the purpose of giving or receiving advice* and this extension of the principle makes it *inappropriate to regard the doctrine as a mere rule of evidence.* It is a doctrine which is based upon the view that confidentiality is necessary for *proper functioning of the legal system* and not merely the proper conduct of particular litigation." (Italics added)

The learned authors Hoffmann and Zeffert in their work *The South African Law of Evidence* observe at p248:

> "The privilege exists in order to *promote the utmost freedom of disclosure* by persons who need to obtain legal advice. It is impossible for an advocate or attorney to advise a client properly unless he is confident that the client is holding nothing back, but such candour would be difficult to obtain if the client thought that his advisers

could be compelled to reveal everything that he had told them." (Italics added)

It is for that reason that section 253 of the Criminal Procedure and Evidence Act 1981 provides that no legal practitioner shall be *competent* to give evidence against a client, which evidence constitutes privileged information, that is, without the consent of the client. Once a communication is privileged, it remains privileged (*Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* (68). In the words of Snyman J in the case of *Heiman, Maasdorp & Barker v Secretary for Inland Revenue and Another* (69) at p162 E - F,

> "[t]his privilege accorded to litigants or possible litigants has been devised by the Courts and is based on *public policy*. It is *part of our common law*. The reason for it may be stated briefly as being *essential for the proper administration of justice* so that a litigant may be able to take his legal adviser fully into his confidence and to make full disclosure to him of the circumstances of his case without fear of betrayal. Furthermore, as a litigant cannot be compelled to give evidence against himself, he must know and be assured that his legal adviser also will not without his consent be able to give evidence against him in regard to disclosure made in the course of consultation. This well-established rule is to be found throughout our jurisprudence and has repeatedly been described as *sacrosanct and inviolate*." (Italics added)

See also the cases of *R v Fouche* (70)per Ramsbottom J at pp445/447 and *R v Davies and Another* (71) per Schreiner JA at p58. The question arises, of course, as to whether professional privilege can attach to the Director of Public Prosecutions. In this respect, it was decided as far back as 1898 in the case of *Calcraft v Guest* (72) that the privilege can be claimed, by the client, long after the relationship of client and legal adviser has come to an end: "once privileged always privileged" (and see Phipson on Evidence, 14 Ed (1990) p523 para 20-35. Professor John A. Andrews and Michael Hirst in their work *Criminal Evidence* 2 Ed (1992) at p356 para 12.38 observe that, in the context, of legal professional privilege,

> "[t]he expression "legal adviser" includes solicitors, legal executives, clerks and other employees of the firm, including interpreters employed in consultations and

> negotiations. It also includes barristers and extends to communications with salaried legal advisers and with the Director of Public Prosecutions."

The authority cited with regard to the latter category is that of *Auten v Rayner and Others* [No2] (73). In that case a *subpoena* was served on a member of the staff of the Director of Public Prosecutions with regard to certain classes of documents in his possession. The Attorney-General successfully claimed Crown privilege in respect of some classes of documents and professional privilege in respect of the remaining two classes. The judgment of Glyn - Jones J in the matter reads thus at pp680/681:

> "[T]he Attorney-General submits that the *Director of Public Prosecutions is entitled to claim a professional privilege analogous to the privilege claimed in respect of documents in the possession of a solicitor*. There is, perhaps, a little difficulty there, because the right to claim privilege is that of the client rather than the solicitor. The *Attorney-General says* that for the purpose of such a claim to privilege, the Director is his own client. *I am not sure that there is a precise analogy between the position of the Director and the position of a solicitor*; but those rules of *public policy* which have resulted in there being established a right of a client and solicitor to claim privilege as to documents and statements in the possession of the solicitor appear to me to *apply with equal, if not greater, force to the position of the Director of Public Prosecutions*." (Italics added)

Mr Penzhorn, Mr Woker and Miss Bheemchund in their written heads, submit that the privilege "extends also to the relationship between the Attorney-General, and probably also between members of Government and the like .... and the Director of Public Prosecutions"; they consider that the privilege is that of the Attorney-General, who has not waived the privilege. As I see it, the Attorney-General is the chief legal adviser to Government. The Director of Public Prosecutions may also be regarded as a legal adviser, that is, in criminal matters. In my view, Government is the client in the matter and it is for Government to waive any privilege, though clearly it is a matter for the Attorney-General to indicate Government's wishes in the matter.

Suffice it to say therefore that Government, through the Attorney-General, has not waived privilege.

Mr Mdhluli has referred me to extracts from *"Principles of Evidence"* (1997) by Professors Schwikkard, Skeen & Van Der Merwe, *Archbold, Criminal Pleading Evidence and Practice* (1998) and *Cross and Tapper on Evidence* 9 Ed (1999). Those extracts deal with State privilege, or Crown privilege as it used to be called in Britain, where it is now called "public interest immunity", as "it is not a matter of privilege and it is not confined to the Crown" (per Brightman LJ in *Buttes Gas & Oil Co v Hammer* No.3) (74) at p262). Mr Mdhluli also refers to the cases of *Shabalala* (51) and *Molapo* (52), which established the "open docket" principle in South Africa and Lesotho respectively. He submits that as the Crown is obliged to reveal the contents of the docket, he is consequently not possessed of any information which is not already in the possession of the accused. Secondly, he submits that, in accordance with *Shabalala* (51), where the Crown seeks to resist disclosure, it must place the material before the Judge (possibly supported by affidavit from the appropriate Cabinet Minister) when the Judge may decide for himself as to whether the material is privileged.

That may be the procedure to follow when the Crown seeks to invoke Crown privilege in any proceedings. It may also be the procedure to follow in resisting disclosure of the contents of a police docket. In this respect Schwikkard, Skeen & Van Der Merwe *op. cit.* observe (per Professor van der Merwe) at p137:

> "The prosecution's so-called docket privilege - which, as will be shown, has now shrunk drastically on account of constitutional provisions - was and is not really part of "state privilege" in the true sense of the word. In this work, however, it is dealt

> with in the context of state privilege because matters which fall under state privilege (the informer's privilege, state secrets, police methods of investigation) are now for all practical purposes the main (but most certainly not sole) grounds upon which the state can seek to withhold statements in the police docket."

Both Mr Penzhorn and Mr Mdhluli refer to the "C Clip" on a police docket, namely the third section of the docket containing correspondence, mainly between the prosecutor and the investigating officer, that is, the investigation diary (see *Shabalala* (51) at para 10 p734). Throughout his judgment in *Shabalala* (51) Mahomed DP referred to witnesses' statements and the "relevant" contents of a police docket. At para 57 p752 the learned Deputy President observed:

> "[57] In making this analysis I have substantially confined myself to the problem of access to *witnesses' statements* included in the police docket. There might be other documents in the docket such as *expert and technical reports*, for example, which might also be important for an accused to properly 'adduce and challenge evidence', and therefore for the purposes of ensuring a fair trial. Such documents would seem to fall within the same principles which I have discussed in dealing with witnesses' statements."(Italics added)

Mahomed D P concluded thus at para [72] 4, p757:

> "4. Ordinarily the right to a fair trial would include access to the *statements* of *witnesses* (whether or not the State intends to call such witnesses) and such of the contents of a police docket as are *relevant* in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. This would depend on the circumstances of each case." (Italics added)

Nowhere did the learned Deputy President indicate that the contents of the investigation diary would *ordinarily* be the subject of disclosure. The dicta in *Shabalala* (51) are directed at the information, that is, the *evidence* relevant to the conduct of a fair trial (and see *Molapo* (52) at p1161I - J, 1162B and 1164/5 J - A. It might be that in a particular case the contents of the diary might be *relevant* to the

conduct of the defence, but that as I see it would be a matter for an application by the accused, to be considered by the trial Judge, in the face of any Crown privilege or legal professional privilege raised by the Crown.

Mr Mdhluli refers to the case of *Rowe and Another v United Kingdom* (75) decided by the European Court of Human Rights in February, 2000. In that case the Crown had withheld information without first approaching the trial Court in the matter. The applicants referred to the information as "material evidence" (see para 54 p341) and submitted that Article 6 (1) of the European Convention had been violated. They recognized however that "the entitlement to disclosure of *relevant evidence* is not an absolute right". The Court held that articke 6 (1) had been violated, observing at para 60, p342:

> "The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the *observations filed* and the *evidence* adduced by the other party (see *Brandstetter v Austria* [76] at 413-414 (paras 66-67). In addition art 6 (1) requires, as indeed does English law ....., that the prosecution authorities should disclose to the defence all *material evidence* in their possession for or against the accused (see *Edwards v UK* [77] at 431-432 (para 36))."

The words "observations filed "give rise to query. An examination of the decision in *Brandstetter* (76), however, indicates that the phrase seemingly refers to a relatively limited practice. The reference there is to (*ibid.* at para 67, pp 413/414)

> "submissions - the so-called '*croquis*' - [which] were filed [in Court] according to a standing practice which enables the Senior Public Prosecutor to file such a *croquis* in such cases as he deems appropriate."

The European Court was

> "not satisfied that this practice sufficiently ensures that appellants in whose cases the Senior Public Prosecutor has filed a *croquis* on which they should comment are aware of such filing."

The practice is foreign to our procedure. It is significant that the *Edwards case* (77) refers only to "material *evidence*". Again, in *Rowe* (75) the European Court at paras 61/66 pp342/343 consistently refers to "undisclosed *evidence*". In brief, I cannot see that the case of *Rowe* (75) requires the prosecution to disclose all strategical discussions it has had concerning the trial.

The "open docket" principle clearly refers only to the police docket, which is surely not the sole repository of communications and consultations concerning a criminal trial, as the papers before the Court clearly indicate. Further again, such privileged communications are not necessarily all reduced to writing. As I understand it, the Crown has made full disclosure of witnesses' statements and forensic reports etc, which are on the police docket: there is no indication that relevant evidence has been withheld and neither the Crown nor the accused have made any application in the matter. Were the Crown to seek to withhold relevant evidence, it would be obliged to make application to the Court, when it might raise Crown privilege, or indeed professional privilege. In such circumstances Mr Mdhluli's submissions would be valid, that is, that the Judge would survey the material (perhaps on an *ex parte* basis) in order to exercise his discretion in the matter and to satisfy himself as to whether or not the material supported the Crown's claim to non-disclosure.

But that is not the case here. The Crown does not seek to withhold relevant contents of the docket *ordinarily* subject to disclosure. Instead, it seeks to prevent disclosure, by Mr Mdhluli, conciously or unconciously, of material which is not *ordinarily* disclosed to the defence, much of which it would seem, from the papers

before me, is not even to be found on the police docket. In this respect the Crown raises not Crown privilege, but legal professional privilege. The submission therefore that the Crown should now reveal such material seems to me to strike at the whole foundation of a sacrosanct privilege. As I see it, once the privilege is claimed, once the professional relationship is established and the Court is satisfied that the communication was in confidence for the purpose of legal advice, then that is the end of the matter.

I cannot but see that, in the context of a criminal trial, any inquiry by the Court as to the *content* of all Crown documents or communications covering the full course of an investigation and prosecution, would be a perilous voyage, serving only to cloud the issue, and the Judge's mind in the process, and as Morgan J observed, "would be tantamount to trying the case in advance". Indeed it will be seen that in all the authorities quoted, nowhere did any Court embark on such unchartered seas: once the relationship was established, it was a matter of *inference* that privileged communication had taken place.

As was said by the learned Editors of *Corpus Juris Secundum ibid. supra:*

> "The prosecution is not, ... required to disclose all *minutiae* of its evidence or reveal its trial *strategy*."(Italics added)

Whatever about the *minutiae* of evidence, clearly the Crown cannot be compelled to reveal its trial strategy. The "open docket" principle has not spelt the death knell in a criminal trial of the doctrine of legal professional privilege. If that were the case, it would also mark the end of our cherished adversarial system, the very touchstone of our criminal jurisprudence.

Extent of Director's Involvement

I turn then to a summary of Mr Mdhluli's involvement in the prosecution of the accused. Clearly, as Director, as he concedes, he initiated the prosecution, when he decided to prosecute and then issued summons against the accused (according to para 10 of his affidavit of 4th May, 2001), thereafter appearing for the Crown when the accused was first charged before the Magistrate's Court, and indeed requesting the bail conditions, agreed by Mr Phoofolo who represented the accused, which were imposed by the court. But his involvement commenced much earlier than that - at least some two years earlier when he first addressed an application for mutual legal assistance to Mrs Cova, in August 1997, subsequently addressing supplementary applications in October and November 1997. In this respect, the letter which he wrote to Mrs Cova on 25th June, 1999 is more suggestive of an executive, rather than a subsidiary role played by him.

That is also the clear impression I get from the correspondence with the legal representative of Mr Max Cohen. Again, though his letter to the Prime Minister indicates that he was involved in investigations in respect of the accused "to a limited extent" only, the letter itself reveals his grasp of the case and, no doubt arising from of his study of the case, his personal conviction as to the accused's guilt, and his preparedness to "meet and discuss with my colleagues who have been involved in investigations."

There are then the averments in Mr Tampi's affidavit. Mr Mdhluli was in communication with Mrs Cova and also the attorney representing Asea Brown Boveri Schaltanlagen, GmbH, Germany ("ABB Germany") and Asea Brown Boveri

Generation AG, Sweden ("ABB Sweden"), subsequently the 12th and 13th accused, respectively, on the original indictment. He was involved in discussions and negotiations with the Swiss authorities, resulting in the release of bank records, necessitating his travelling to Switzerland on two occasions, during one of which visits, in November 1998, he interviewed witnesses pertaining to the alleged involvement of ABB Germany, in respect of whom indeed Mr Mdhluli at one stage granted an indemnity. He also had various discussions with Mrs Cova. Mr Mdhluli travelled also to Stockholm where he was present when statements were taken from witnesses representing ABB Sweden. He also had discussions with the in-house lawyer of that corporation, all of which was done in the context of a possible indemnity to ABB Sweden.

There is then Mr Tampi's averment as to the discussions had by Mr Mdhluli with the Attorney-General, the Deputy Attorney-General, prosecuting Counsel, LHDA officials and senior members of Government in connection with this case "and the *manner* in which it was to be prosecuted." In the last paragraph of his affidavit of 4th May, 2001, Mr Mdhluli averred:

> "Speaking for myself I would not have considered briefing Mr Penzhorn and Mr Woker because I considered that they together with me were involved in investigations. I myself would not have considered it prudent to appear for the Crown in a matter in which I had been personally involved as an investigator."

There can be no doubt, therefore, of Mr Mdhluli's involvement in the investigation. It cannot be said that that was merely at the "embryonic stage". As late as 26th November, 1999, he was in contact with at least one firm of attorneys concerning another accused and indeed making executive decisions as to court appearances. That was but five days prior to the signing of the indictment. Mr

Mdhluli submits that the very fact that he did not sign the indictment, indicates that he was not involved in the investigation. It may well be that on 1st December, one month before his departure from Lesotho, his involvement had become peripheral. There can be little doubt, however, that his earlier involvement was substantial. Mr Mdhluli, therefore, in the words of the Court of Appeals in the *Kitchin* case (37) at p903,

> "was significantly involved in the development of this criminal action prior to indictment and was privy to relevant information then possessed by the government."

Impediments to Representation

Conflict of Interest

The representation of the accused by Mr Mdhluli gives rise to a conflict of interest. To put it at its very simplest, apart altogether from the aspect of privilege, I consider that he owes a duty of confidentiality to the Crown, as a former public officer, which inevitably conflicts with his duty towards the accused.

He has had discussions with a Crown witness, Mrs Cova. How then can he cross-examine that witness? The same consideration arises in respect of a potential Crown witness, Mr Max Cohen. For that matter, when it comes to the cross-examination of any Crown witness, how does he practically and successfully divorce such examination from matters gleaned in preparation of the prosecution? How can one predicate his degree of success in the matter? Conflict or irregularity is an aspect which may gradually develop in a criminal trial (see e.g. *S v Naidoo and Others* (78) at p713 C - D).

Prejudice to the Accused

There is also the aspect of prejudice to the accused. As Director, Mr Mdhluli categorically stated his conviction as to the accused's guilt. Clearly that must hamper his representation of the accused, as he may not then set up in defence an affirmative case inconsistent with his own knowledge.

Breach of Privilege

Quite clearly the most obvious impediment of all is breach of privilege. Mr Mdhluli submits that the Crown is always free to raise objection to any, "in its view," breach of privilege, during the course of the trial. The test is based, however, not so much on any deliberate breach of privilege, but on what the practitioner may "consciously or *unconsciously*" say or do. The real danger, as I see it, is always of inadvertent disclosure. In the present case Mr Mdhluli avers that "there is no [privileged] knowledge that I can take with me .....", that is, that no breach of privilege will occur. That averment must be qualified by other averments made in the affidavits of 4th May and 23rd August, 2001. In the former affidavit at para 10 he avers:

> "While I concede that I issued summons against the Accused, Mr Sole, when in fact I did not have any docket before me, I accept full responsibility for whatever shortcomings or irregularities there may be appertaining to the decision I took to institute a prosecution against Mr Sole.....
>
> If ... I acted contrary to the provisions of the law and the Constitution in basing my decision on the basis of information that had been properly presented to me I accept that it was irregular of me to do so."

In the latter affidavit at para 9 he avers:

> "I am completely unaware of any policy to combat corruption on the part of government, firm or otherwise. What I became aware of was the determination by all concerned to single out the accused to the exclusion of many cases well known

even to members of the public."

and at para 10

"It is a matter of public knowledge, I have since ascertained, certainly Mr Tampi is aware, that I resigned my post because I would not succumb to pressure from senior members of government, to prosecute the accused and to delegate my powers to conduct that prosecution to the present prosecution team and no one else."

As indicated in my ruling of 21st August, there is some dispute as to the circumstances in which Mr Mdhluli's appointment as Director came to an end. That aspect is simply not before me, in this criminal trial. In this respect, before the delivery of the ruling in the morning of 14th August, the record at one point reads (at p1338):

"Mr Mdhluli:
I do not want to make any lengthy statements regarding my knowledge of the matter now before Court. It is a fact that when the accused was first remanded before the Magistrate's Court here in Maseru I am the one who appeared for the Crown but then again, M'Lord, if I am going to explain how I appeared in that matter we will be getting into a lot of controversial issues. I do not want to go into that, M'Lord."

Later that afternoon the record at one point reads (at pp1384/5):

"Mr Mdhluli: ..... A lot of things have been said in my absence and when I joined my learned friend, I joined because I wanted to be around so that things should be said in my presence and I would welcome that and I will deal with those issues appropriately. Thank you, M'Lord.

Court: I trust that is not the reason for your joining in the defence. I presume that your reason for joining the defence is that you have been engaged by the accused and you wish to defend the accused to the utmost of your ability.

Mr Mdhluli: I may have refused, M'Lord, I am saying that I may have refused but in view of the fact that certain things have been ... maybe it motivated me to join. I agree with you that I joined because I had instructions from the accused, both of us, we are attorneys. Thank you, M'Lord ....."

Whether or not the wish to air or settle a grievance in part motivates Mr

Mdhluli's appearance for the defence, and whether or not any such aspect would only serve to increase, consciously or unconsciously, the likelihood of a breach of privilege, the point is that considerations of personal differences simply have no place in a criminal trial. As I see it, in order to be of best service to the Court and to the accused, the latter's legal representative, as an officer of the court, must approach the Court and his client unencumbered by any ill feeling, much less any personal agenda.

The Constitutional Right to Representation of Choice

Section 12 (2) (d) of the Constitution, as indicated *supra,* provides that every person charged with a criminal offence "shall be *permitted* to defend himself before the court in person or by a legal representative of his own choice." In the Privy Council case of *Robinson v R* (79), an appeal from Jamaica, both Counsel for the accused (charged with murder) withdrew from the case, apparently due to non-payment of their fees. The trial Judge suggested a legally-aided brief, which was declined. The Judge declined to further adjourn the trial (previously adjourned 19 times), carried on therewith, subsequently convicting the accused, imposing sentence of death. The majority of the Law Lords (Lord Keith of Kinkel, Lord Roskill and Lord Templeman) dismissed the appeal. In interpreting section 20 (6) (c) of the Jamaican Constitution, containing the right to counsel of choice, they observed (per Lord Roskill) at p412 that the word "permitted" is "the important word" in the provision, that is, meaning that,

> "[h]e must not be prevented by the State in any of its manifestations, whether judicial or executive, from exercising the right accorded by the sub-section. He must be *permitted* to exercise these rights."(Lord Roskill's italics)

In their minority opinion, Lord Scarman and Lord Edmund-Davies were of the same view, (as were the Privy Council in *Ricketts v R* (80)). The majority in

Robinson (79) were of the view at p415 that the learned trial judge exercised his discretion (it has to be said, in very trying circumstances) "with entire propriety". The strongly dissenting (and, I respectfully believe, correct) judgment of the minority considered at p419 that the learned Judge had failed to meet the constitutional requirement.

Much depends on the circumstances, of course. As Mahomed DP (as he then was) observed in *Shabalala's* case (51) at p777 b para 36:

> "The basic test in the present matter must be whether the right to a fair trial in terms of s25 (3) includes the right to have access to a police docket or the relevant part thereof. This is not a question which can be answered in the abstract. It is essentially a question to be answered having regard to the particular circumstances of each case."

The learned Deputy President was there dealing with a general constitutional provision (as to "the right to a fair trial") less precise than that under consideration. As to the latter provision, the majority opinion of the Privy Council in *Robinson v R* (79) reads thus at p413:

> "In their Lordships' view the learned judge's exercise of his discretion, which the learned counsel for the appellant rightly conceded to exist, can only be faulted if the constitutional provisions make it necessary for the learned judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships *cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse.*" (Italics added)

Their Lordships were there speaking of the right to representation *per se.* If they considered that such right was not absolute, then clearly the accused's right to representation by a legal practitioner *"of his own choice"* cannot be absolute. It is

clearly, on the authorities reviewed *supra*, not an absolute right where the practitioner is appointed by the Director of Legal Aid. Even where the accused can afford his own representation, the practitioner of his choice may simply be unavailable for months, in which case I cannot see that the Constitution requires an adjournment of that duration. If the Court in such circumstances refuses a lengthy adjournment, the accused is still free to appoint another practitioner. The point is that the latter is a representative of the accused's *"own choice"*. Were it the case, indeed, that the accused might have to appoint a practitioner ranking *third* in his preference, the said practitioner would nonetheless be a representative of the accused's "own choice." As I see it, therefore, what the Constitutional provision seeks to prevent, where the accused can afford representation, is the appointment of a practitioner (by Government or the Court) contrary to the accused's choice in the matter (see the cases of *Estrella v Uruguay* (81) at p95, *Burgos v Uruguay* (82) at p176 and *Acosta v Uruguay* (83). Indeed, where the accused cannot afford representation, I believe that all reasonable efforts must still be made to accommodate the accused's choice in the matter (see the dicta in the *Croissant* case (65)reproduced *supra*, and see Amnesty International's *Fair Trials Manual* at pp104/105).

Quite clearly however, where the accused can afford representation, the right to a practitioner of choice is not absolute: that is the view of the European Court of Human Rights, the Privy Council and a number of Courts in the United States of America and Canada. Just as the accused cannot appoint a practitioner who is simply unavailable, involving an unreasonably lengthy adjournment, similarly he cannot appoint a practitioner who is not qualified, where e.g. an annual licence or certificate has not been issued by the practitioner's controlling body. Equally, he is not entitled

to the services of a practitioner in conflict with accepted ethical standards of practice.

The Court's Powers

Parties to Application

Mr Mdhluli makes the following submission in paragraph 2 of his affidavit of 23rd August 2001:

> "The question of the propriety or otherwise of an attorney's conduct is a matter *solely* within the competence of the Law Society. For this reason it has to be a party to any court proceedings relating to the conduct of a legal practitioner. I, on my part, took the precaution of consulting the President of the Society who saw no problem in my appearing for the accused in this matter. It is my respectful submission that the Attorney-General has to bring a substantive application in separate proceedings in which the Law Society is cited and not by way of an interlocutory application."(Italics added)

I observe that Mr Sello in his address did not refer to that submission. Mr Phoofolo in his heads submits that the attorney involved was made a party to the proceedings in the *Kitchin*(37 and other American cases. I do not agree that that is the case: in the *Kitchin* case (37) and the *Jaquindo* case (35), for example, the particular attorneys appear as the attorneys of record for the appellants. The present application has arisen in the course of a criminal trial in which the parties are the Crown and the accused. The application concerns, as I see it, not Mr Mdhluli's right to represent the accused, but the accused's right to engage the services of Mr Mdhluli in this trial. Mr Phoofolo submits that if the Court were to determine that the accused, in the circumstances, has no right to engage the services of Mr Mdhluli in this trial, it would "materially affect the right of Mr Mdhluli to practice his profession." I cannot see how that could be. Mr Mdhluli's right of audience before the Court is not challenged. He is always free to practice his profession before the

courts, on an ethical basis. Any ruling this Court may make in this application cannot affect that position. As previously indicated, Mr Mdhluli, being a deponent in this application, wished to address the Court in the matter. He may not do so as a deponent, but he may do so as a party. Accordingly, in order to accommodate his wishes, in the interests of justice, I ordered the amendment of the application to include him as a party.

To return to the submission in paragraph 2 of Mr Mdhluli's affidavit, *supra,* the first sentence thereof, I respectfully observe, reveals a basic misconception of the role of the High Court in the matter. Dr Taitz in his work *The Inherent Jurisdiction of the Supreme Court* (1985) observes at pp11/12 that

> ".. [T]he 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;....."

In the case of *Karim v Law Society of Lesotho* (84), decided in 1979, the Court of Appeal was dealing with an order by the High Court, upon application, to remove an advocate from the roll, under the provisions of section 28 of the Legal Practitioners Act 1967 (since replaced by the Legal Practitioners Act, 1983). Maisels P had occasion to observe at pp436/437:

> "It must be borne in mind that proceedings of the kind presently under consideration are not in the nature of *a lis*. They are no more than a request to the Court by the *custos morum* of the profession to use its disciplinary powers over an officer of the Court who had misconducted himself, cf *Hassim v Incorporated Law Society of Natal* [85] at 767-8, *Solomon v Law Society of the Cape of Good Hope* [86] at 408-9. It must be emphasised that as an advocate is an officer of the Court the Court can act

> *mero motu* in regard to an advocate's misconduct, *Solomon* [86] at 409, *Hassim* [85] at 767, *Re Cairncross* [87], *Attorney General v Tatham* [88], *Society of Advocates of Natal v Knox & Others* [89] at 247-8-9. There can be no doubt that the High Court *has an inherent disciplinary jurisdiction* over practitioners in cases of misconduct or unprofessional conduct. Cp *Knox* [89] at 447, *de Villiers & Another v McIntyre, N.O.* [90] at 435, *Ex parte Stuart & Ceerdts* [91] at 81. The Legal Practitioners Act by no [91] means takes away this inherent jurisdiction of the Court and *in whatever manner* a practitioner's misconduct is brought before it, the Court if it thinks fit has *the right and indeed duty in the public interest and in the interests of the legal profession to deal with the matter.*" (Italics added)

Those dicta were concerned with the provisions of the 1967 Act, and while section 28 thereof enabled the Society, in dealing with a complaint of professional misconduct, referred to it by the Registrar of the High Court, to "take such action thereon as it shall deem fit," the Act otherwise conferred no disciplinary powers upon the Society, other than referring an application for suspension or striking off to the High Court. Section 35 of the 1983 Act, on the other hand, empowers the Society to impose "such penalty as it considers appropriate" in respect of misconduct, "or it may apply to the Court to impose a punishment prayed for by the Council." The power to suspend or remove a practitioner from the roll however, remains vested, in my view, under section 36 (1) of the 1983 Act, in the High Court, and in the normal course of events, the High Court acts upon the application of the Society in the matter, under section 36 (3).

That is not to say that the dicta of the learned Maisels P are not of equal force today. That the High Court has an inherent jurisdiction in the matter is self-evident. There are surely occasions when minor disciplinary infringements by practitioners call for rebuke by the Court, there and then. To suggest that the Society has a *locus standi* in such matters would render the regulation of the Court's processes unworkable. What if a practitioner is in contempt *in facie* the Court?: must the Court

abrogate its summary powers and await the motion of the Society in the matter?. What if the Society, in a clear case, fails or indeed declines to carry out its function under section 36 (3) of the 1983 Act?; is the Court then powerless to act in the face of such misfeasance?

Mr Phoofolo submits that it would not be proper to transplant the code of ethics "that appertains to a certain situation in the United States when no such code exists in Lesotho. Rather guidance should be sought from the Law Society of Lesotho or the supreme law of the land in Lesotho, the Constitution." Indeed, he goes as far as to say that any injudicious imposition of the Model Code referred to in *Kitchin* (37) would be in breach of the Lesotho Constitution. The Court in *Kitchin* (37) was faced with the Constitutional provision in the Sixth Amendment, and while that provision does not specify Counsel "of his own choice", that is clearly the import thereof, according to all authority, where the accused himself can afford to retain the services of a lawyer. The decisions then in *Kitchin* (37), *Jaquindo* (35) and Crockett (28) were made in the face of the Constitutional provision. In brief, the Court in those cases, in view of the Court's power and *duty* to control and regulate the conduct of its officers, interpreted the Constitutional provision as being other than absolute; so also did the other Courts to which I have referred. Similarly, section 12 (2) (d) of the Constitution of Lesotho has to be interpreted in the light of many factors, for example, the non-availability of counsel of choice, but in particular, in this case, the Court's power and duty over its officers.

I observe that the case of *Karim* (84), those cited therein *supra,* and *Tobias* (27) were applications by the Law Society to strike off or suspend. In all the other

cases which I have cited above, from different countries, nowhere does any governing body of practitioners appear as a party: the only exception is the case of *Speid* (58), where the Criminal Lawyer's Association was represented as an "intervenant", at the appeal proceedings in the Ontario Court of Appeal. I would, of course, have sought guidance from any Code of Ethics produced by the Law Society. It is a matter of regret, however, that since its establishment in 1983, it has not agreed upon and produced such a Code, for the guidance of the profession. The case of *Karim* (84) came before Rooney J in the High Court (*Sub nom. Legal Practitioners Committee v Karim* (92)). That was in 1979, before the Law Society had been established. The learned Judge was then faced with the situation where there was no Code of Ethics before the Court. He observed at p14:

> "I am not dealing here with a departure from professional ethics, which might be punishable by a reprimand or a period of suspension. I have before me in this case, admitted misconduct which clearly demonstrates that the respondent is not a fit and proper person to practise at the bar of Lesotho (or anywhere else for that matter)."

In effect, therefore, the learned Judge turned to the common law for guidance. While, as the learned editors of LAWSA *op. cit.* observe at p286 para 282 "[the] principles of the common law are *reflected* in more detail in the bar rules," such principles are nonetheless to be found in the authorities considered *supra*. They extend back as much as 300 years ago, to Johannes Voet's authoritative statement, throughout all of which authorities, in South Africa as well as the United Kingdom, the Commonwealth and the United States of America, a continuous thread is to be seen, namely and simply that an advocate or attorney may not change clients to the detriment of his former client.

Reconsideration of Ruling

Mr Sello submits that the Court, in view of its ruling on 14th August, is *functus officio*. Mr Mdhluli also makes that submission in the third paragraph of his answering affidavit. I respectfully consider, that in a matter of ethics, it were best if he were not seen to make such submission and it were best left to Mr Sello. I also respectfully observe that it would be an unusual state of affairs if the Court were ever *functus officio* in the matter of the standing or the conduct, ethical or unethical, of its officers. That, as I see it, is a matter ever and always open to consideration.

I consider that I delivered no more than an interlocutory ruling in the matter. The learned authors of *Jones & Buckle, The Civil Practice of the Magistrates' Courts in South Africa* 9 Ed (1996) Vol I, Professors Erasmus and Van Loggerenberg observe at p347:

> "The problem of where to draw the line between appealability and non-appealability has equally long constituted a difficult problem. The criterion usually adopted is that the rule or order sought to be appealed from should not be 'interlocutory' ie should not be merely *incidental* to a pending action, made in the course of its progress through the courts, and *without determining the main issue* in the action."(Italics added)

The learned authors then refer to the summary of the general effect of relevant judgments by Corbett JA (as he then was) in the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* (93) at pp 549F/551A which they, and I in turn, summarise thus:

> "(a) The term 'interlocutory' refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation. Orders of this kind are of two classes: (i)those which have a final and definitive effect *on the main action*; and (ii) those which do not (known as 'simple' (or purely) interlocutory orders' or 'interlocutory orders proper').....

(c) The test as to whether or not an order is a simple interlocutory one is the well-known one stated by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* [94] at p870:

> ".....[A] preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue *in the main action or suit*" or ... unless it "irreparably anticipates or precludes some of the relief *which would or might be given at the hearing.*""

(d) The question is whether the decision bears upon, and in that way *affects*, the decision in *the main suit.*

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the judge who granted it at any time before the final judgment. An order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata.*"

The learned authors then cite the case of *Schmidt Plant Hire (Pty) Ltd v Pedrelli* (95). Mr Sello submitted at one stage that my ruling of 14th August was *res judicata.* I respectfully cannot agree. To some extent, that approach begs the question: the point is whether or not the ruling in this case was of final and definitive effect upon the main action. The decision in the case of *Schmidt* (95) was in fact a judgment on *liability*, based on oral evidence and submissions, and even if interlocutory in form, was final and definitive in effect with regard to the issues thereby determined, which quite clearly *affected* the decision in the main suit. I cannot see that the present ruling has "a final and definitive effect on the main action." The ruling can in no way affect the decisions in the main trial: it is completely ancillary thereto.

Inasmuch as the ruling is a simple interlocutory one, it is then subject to variation. In the case of *Wallach v Lew Geffen Estates* CC (96) a Judge in motion proceedings ordered the hearing of *viva voce* evidence. When the matter came on for

hearing, before another Judge, the latter upon application (unsupported by affidavit) decided that there was no need to hear evidence and decided the case on the affidavits, granting judgment. On appeal Milne JA observed (Hoexter, Grosskopf & Goldstone JJ A and Howie AJA concurring) at pp262/263:

> "It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple interlocutory order of the kind referred to in *Pretoria Garrison Institutes v Danish Variety (Pty) Ltd* [*94*] at 870A. Furthermore this is not a case where
>
> > '... the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed...'
>
> as in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* [97] at 585F -G. The 'order' given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the Provincial Divisions."

Milne JA referred to a wealth of authority and continued at p263

> "It is clear that according to criteria there laid down the order of Coetzee J amounted to a non-appealable ruling.
>
> That being so, it was open to the Court *a quo* to hold, as it did, that it was unnecessary to hear oral evidence and to decide the matter on the papers."

Again, in the case of *President of the Republic of South Africa v South African Rugby Football Union* (98) the Constitutional Court observed at p108, para 248:

> "The first two costs orders are concerned with interlocutory applications concerning the referral to evidence. It is a well-established principle in our law that a referral to evidence constitutes a ruling, not an order, by a Judge. As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear the oral evidence. We have held that the referral to evidence was clearly wrong and constituted a misdirection by the Judge. The appellants were, therefore, entitled to make an interlocutory application to the Judge *seeking a reconsideration of the referral to evidence.*" (Italics added)

I appreciate that the authorities quoted deal with civil cases, but as I see it, the same principles apply to criminal cases. In the case of *R v Mtabela* (99) Ogilvie

Thompson AJA (as he then was) (Schreiner JA, de Beer JA, Reynolds AJA and Price AJA concurring) observed at p269:

> "It was further submitted by Mr Boshoff that, even if the learned trial Judge was correct in initially ruling the confession to be admissible, the evidence led subsequently should have caused him to *retract that ruling* and to discharge the jury. As was emphasised in this Court's decision in *R v Werthern* [100] (which, curiously enough, is only to be found reported in 1956 (2) P.H. H.240), it is solely the Judge's function, and not that of the full Court (or jury, as the case may be), to decide upon questions as to the admissibility of evidence; and if occasion should arise, as indicated in *R v Melozani* [101], at p644, during the trial for the *reconsideration of a prior ruling* admitting a statement or confession made by the accused, the *duty* of *deciding afresh* upon the admissibility of such statement or confession is that of the Judge alone."(Italics added)

In the case of *S v Mkwanazi* (102) the trial judge, upon a *voir dire*, in the absence of the assessors, ruled a confession to be admissible. In delivering judgment, the learned Judge once again referred to the admissibility of the confession. In the Appellate Division Williamson JA (Ogilvie Thompson JA (as he then was) and Holmes JA concurring) observed at pp742/743:

> "He [the trial Judge] then referred to the question as to whether, in the light of all the evidence, it still appeared to him that the confession was rightly before the Court, the responsibility being his throughout the trial to decide whether the confession should be admitted in evidence. In this connection he quoted the remarks of this Court in *R v Mtabela,* [99] at p269 D - F. In the light of those remarks, the presiding Judge duly *reconsidered the matter* and said that he had no reason to come to the conclusion on all the evidence that the State had failed to prove beyond reasonable doubt that the confession had been made by the appellant while in his sound and sober senses, freely and voluntarily, and without being unduly influenced thereto. Up to that point the learned Judge was *perfectly correct* in the procedure adopted by him. I make mention of this matter, however, because of a phrase appearing in the remarks attributed to him when he gave his ruling on admissibility at the earlier stage during the presentation of the State case. As set out above, he said that his ruling was only interlocutory and that
>
> > "the reliability and, therefore, the admissibility of this statement is to be decided by the full Court, namely when I am sitting again with my assessors."
>
> That is clearly not the position; the question of admissibility, as stated by the learned Judge himself in his main judgment, must be decided by, and remains throughout the

> sole responsibility of, the presiding Judge. If other factors touching upon the question of admissibility appear later in the trial *he can and should reconsider any earlier decision*, as he rightly did in the present case."(Italics added)

In the case of *S v Mnyaka and Others* (103), Counsel for the defence cross-examined a State witness, asking questions about what he had told Counsel for the State in pre-trial consultations. The judgment, per Jones J, reads at p300:

> "An objection was made on the ground of privilege. In the brief argument which ensued it became clear that counsel for the defence also intended asking the witness what he had said in his statement to the police. Counsel for the Stated indicated that his objection extended to that line of questioning as well. I ruled in favour of the State but intimated that I would reconsider the matter, if called upon to do so, in the light of further argument. This was because counsel for both parties had quoted no authority and had not prepared argument.
>
> William's cross-examination lasted some days. During this time I began to doubt the correctness of my initial ruling. I consequently called upon counsel to re-argue the matter. They have done so, this time with reference to the authorities."

Ultimately Jones J, in effect, rescinded his earlier ruling, concluding thus:

> "The ruling is that defence counsel may cross-examine Williams and any other independent witness about what he said in his statement to the police or to counsel, and about what he said in pre-trial consultations with counsel."

The case of *Shabalala* (51) provides another example of an interlocutory order which can be rescinded or varied. In dealing with the aspect of an application by the prosecution to withhold certain documents on the police docket, Mahomed DP observed at p752, para 56:

> "[I]f the prosecution succeeds in justifying its assertion that there is a reasonable risk that the disclosure of such material at that stage might impede the proper ends of justice and the Court does not exercise its discretion in favour of the accused at that time, *it does not follow* that the relevant statements or documents will necessarily *remain forever protected* during the course of the prosecution. There is a need to assess the extent of the risk *at all relevant times during the prosecution.* It may be possible to disclose certain parts and not others or some parts earlier than others. There may, for example, be adequate and demonstrable justification for the apprehension that, if the statement of a particular witness is disclosed, there is a

> reasonable risk that such a witness would be intimidated and would thereafter refuse to testify if his or her identity became known. That objection would, however, not necessarily apply *once the witness has given evidence in chief* because by that time his or her identity will obviously be known in any event." (Italics added)

Mahomed DP at p757 para 72.5 and 6 held that the State was entitled to resist a claim by the accused for access to documents on specific grounds, but that nonetheless the Court had a discretion in the matter. The learned Deputy President concluded at para 72.6:

> "A ruling by the Court pursuant to this paragraph shall be an *interlocutory* ruling *subject to further amendment, review or* recall in the light of the circumstances disclosed by the further course of the trial." (Italics added)

In England under section 40 of the Criminal Procedure and Investigations Act, 1996, a Judge may conduct pre-trial hearings and, upon application or *mero motu* make rulings as to the admissibility of evidence and any other question of law. Again, upon application or *mero motu* he (or another Judge) may discharge or vary (or further vary) such ruling in the interests of justice, provided that such *application* is based upon "a material change of circumstances." (See *Archbold, Criminal Pleading Evidence and Practice* 1998, pp 310/311 para 4-84 p and Blackstone's *Guide to the Criminal Procedure & Investigations Act,* 1996, Chapter Four). It will be seen therefore that a Judge may discharge or vary *mero motu*, in the interests of justice, even where there has been no "material change of circumstances". I appreciate of course that we are here dealing with statutory provisions, but as *Blackstone ibid.* observes, pre-trial hearings "have been developed by court practice rather than by statute."

Mr Sello refers to the case of *Molapo (Mohato) v DPP and Another* (104)

decided by the Court of Appeal in April 1999 (as yet unreported). In that case a bail application was adjourned by a Judge ("the first Judge") to a particular date, in order that the Crown might serve papers in opposition. On the appointed day, Crown Counsel was due to appear before another Judge ("the second Judge") in other matters, which Judge was also hearing other bail applications. Counsel then placed the particular bail application before the second Judge: at that stage the Crown had withdrawn its opposition to bail and so the learned Judge granted bail by consent on agreed terms. Later that same day, before the bail bond was issued, the second Judge rescinded his order and ordered that the matter be placed before the first Judge.

The Court of Appeal (Steyn P, Friedman JA and Beck AJA) held (Per Steyn P) that the second Judge was *functus officio,* and reinstated his order granting bail. Mr Sello then submits that this Court is similarly *functus officio*. But as Mr Penzhorn submits, an application for bail is hardly an appropriate application for the purposes of comparison. As I see it, a bail application is *sui generis*. An order granting bail is not an interlocutory ruling within a criminal trial. Where bail is granted pre-trial, it bears no relation to the trial, that is, until such time as the accused pleads before the High Court. Bail may be granted to an accused who, if the Crown withdraws, may never enter upon a trial.

Even so, it seems to me that an order granting or refusing bail may still be discharged or varied. The Crown may withdraw its opposition, or there may otherwise be a change of circumstances, and the Court may rescind a refusal of bail and grant it on terms. Again, the Court may rescind an order granting bail, where e.g. the Court is satisfied that the accused is not complying with the conditions thereof.

In brief, circumstances may change, necessitating discharge or variation. This I believe is what Steyn P had in mind, Mr Penzhorn submits, when he held in the *Molapo* case (84) at pp3/4:

> "He [the second Judge] had no power to rescind the order, *more especially* in view of the fact that *no facts were placed before him* which could possibly have induced him to cancel his order. It is to be noted that he cancelled the order without affording the Applicants or the Crown an opportunity to be heard." (Italics added)

Which brings me to another reason why I consider that the Court has power to reconsider the ruling of 14th August, if it considers it in the interests of justice to do so. The authorities indicate that the Court may do so where fresh matters are placed before it. When the matter first arose, no application was brought by the Crown, no authorities were placed before the Court by either party, and the argument was brief in the extreme. That I was in some doubt is indicated, I believe, by the fact that I described the situation as "highly irregular", but nonetheless decided that the constitutional issue must "tip the scales" in favour of the accused's choice. In arriving at that conclusion I was influenced, as indicated by the ruling, by Mr Mdhluli's statement that he "was not privy to any information in possession of the Crown." The ruling also indicates that I recalled that Mr Mdhluli had been involved in "some early investigation," but nonetheless there was Mr Mdhluli's statement in the matter. The Crown adopts the position that the ruling is consequently conditional upon that statement. That certainly was my intention, but more importantly, I believe that, objectively, that is the correct interpretation to place upon the ruling.

Mr Sello submits that nothing new has been placed before the Court, but I cannot agree. I was aware of the Director's appearance in the Magistrates' Court, of his letters to the Prime Minister, Mrs Cova and the legal representative of Mr Max

Cohen. I was not aware however of his second letter to Mr Cohen's lawyers, nor was I aware of the communications with the attorneys in November, 1999, concerning court appearances. While I attach importance to those latter two aspects, I certainly place greater importance on the contents of paragraphs 8, 11 to 14 inclusive and 16 of Mr Tampi's founding affidavit. As to paragraph 15 thereof, I was not aware that Mr Cohen "is still a potential Crown witness."

I place particular importance on the fact that Mr Mdhluli had discussions with Mrs Cova, that he interviewed employees of ABB Germany and was present when employees of ABB Sweden gave statements. I place the most importance on the contents of paragraph 16, that is, on the numerous discussions and consultations in which Mr Mdhluli was involved with *inter alios* senior members of Government and the Law Officers.

Applicable Test

The Authorities

On examination, it will be seen that little separates the trilogy of American cases *Kitchin* (37) *Jaquindo* (35) and *Crockett* (28) from the Canadian cases of *Speid* (58) *Robillard* (59), *R v S. (A.)* (60) and Leask (61). The sanctions imposed, disqualification or removal from the record, differed only in name. No doubt the facts of the American cases were unique, that is, in the sense that in no other criminal cases had counsel, to put it briefly, changed from the prosecution to the defence. Secondly, while in the *Crockett* case (28) the anomaly came to light *after* conviction (warranting the quashing thereof), it was only in the cases of *Kitchin* (37) and *Jaquindo* (35) that the anomaly was revealed pre-trial, in such circumstances warranting the

disqualification of counsel. Similarly, in the Canadian cases the anomaly came to light pre-trial, warranting removal of counsel from the record. More importantly, while Counsel in the Canadian cases had not conciously crossed the floor, so to speak, from the prosecution to the defence, a previous retainer had the subsequent effect of placing them in association with a Crown witness. On those facts, the Canadian courts were prepared to remove counsel from the record. I have little doubt that they would readily have done so, on the facts of *Kitchin* (37) and *Jaquindo* (35). It can be said, therefore, that the Canadian cases, if anything, take matters further than the American cases, and are clearly supportive thereof.

It will be seen that there are numerous civil authorities in South Africa and in England where the remedy of an injunction or interdict was either contemplated or actually imposed. *A fortiori* such remedy is available in a criminal trial. In the two prominent English cases of *Smith* (18) and *Dann* (20), the reverse situation applied, namely Counsel changed from the defence to the prosecution. In both cases such aspect was raised on appeal, warranting the quashing of the convictions in *Smith* (18). In *Dann* (20) the particular facts did not warrant that remedy. I have little doubt that had the anomaly been revealed pre-trial, or even during the course of the trial in *Smith* (18), counsel would have, in the least, been required to withdraw, or if the trial had commenced, that the jury would have been discharged. That applies also to the trial at Woolwich in *Dann* (20); indeed, it will be recalled, that that was the approach of the trial Judge at Snaresbrook in the case of *Dann* (20). It will be seen further that in the American case of *Latigue* (33) the reverse situation also applied, where counsel had changed from the defence to the *office* of the prosecuting authority: there the court required the appointment of "a special [independent] prosecutor."

In brief, in reality there is nothing in principle separating the English and the American and Canadian decisions. What further emerges is that there is nothing in principle separating the two situations depicted. What if the situation (as in the present case) were the reverse? What if a defence counsel, who had represented an accused in the Magistrates' Court and pre-trial, were to withdraw and thereafter, after the commencement of trial, had joined the office of the DPP or even appeared as prosecutor in the trial? Is there any doubt but that the accused would have justifiable grievance and that the Court would come to his aid? The Court holds the scales of justice and must administer justice equally. In the present case why should not the Crown be aggrieved and why should not the Court come to its aid?

It will be seen that the test applied by the courts and other authorities over the years exhibit a degree of variance. In *Bricheno v Thorp* (2) the test was that of *"something more* than *hypothetical* mischief." In *Rakusen* (10) the test was that "real mischief and real prejudice will *in all human probability result*," it being unnecessary to *prove* mischief, "because that is a thing which you *cannot prove*." Those dicta were adopted by the Appellate Division in the case of *Robinson* (16). The Uniform Rules of Professional Ethics for Advocates preclude a second brief, "if it *might reasonably be thought"* by the person first advised that he would be prejudiced. The Code of the Bar of England and Wales precludes a second brief "if there is or *appears* to be a conflict or *risk of conflict*." And Cordery speaks of the *probability* of prejudice.

Those authorities are largely civil: I assume, by their phraseology, that the ethical codes were directed at civil, rather than criminal cases. The criminal standard

was set in England in the case of *Smith* (18), where the Court adopted the classic statement of Lord Hewart CJ in the *Sussex Justices* case (19), namely whether justice was "manifestly seen to be done". In the *Dann* case (20) one trial Judge based his decision on the fact that counsel's appearance for the prosecution was simply "not acceptable". The Court of Appeal spoke of the *risk* of disclosure of confidential information as being material, and learned authority has it that the dictum of Lord Hewart CJ is a valid precedent, upon appeal.

As for the American cases, the Court in *Crockett* (28) held that "[a] showing of actual prejudice is not required; all that is necessary is a showing of *conflict*." In *Latigue* (33) the Court held that even the *appearance* of unfairness or impropriety could not be permitted. In *Jaquindo* (35) Morgan J held that formal proof of prejudice was unnecessary where *legitimate* doubt or suspicion arises as to the ethical propriety of a particular retainer. And in *Kitchin* (37) the Court proceeded on the basis of public perception, that is, public interest and public suspicion, ultimately deciding the case on the basis of "society's interest in fair but unimpeded prosecution of the criminal law." As for the Canadian courts, I consider that it accurately sums up their approach to say that they proceeded, as a matter of public policy, on the basis of the public interest and confidence in the judicial process, that is, on the basis of objective reasonably well-informed public perception, when even the *appearance* of impropriety was to be avoided.

The Court in *Kitchin* (37) observed that "concern is even greater in a case involving the *public's interest* in the prosecution of alleged criminal acts as opposed to civil litigation". I am inclined to agree. In this respect, examination of the dicta

in the criminal cases in England, America and Canada reveals an affinity. One might summarise the English approach as requiring that justice be seen to be done, and the American and Canadian approach as one of public perception. For my part I perceive a further affinity with the test applicable, for example, to judicial bias (see eg the Court's ruling of 21st August, 2001 at pp38/44), namely a reasonable apprehension on the part of a reasonable person. I do not see that the affinity or analogy is in any way strained, as in both instances the basis of the test is objective reasonable public perception, which basis to all intents and purposes equates to the test of whether justice is "manifestly seen to be done." I conclude, therefore, that if a reasonable person were to reasonably apprehend that the present defence retainer will give rise to prejudice to the Crown, then the Crown will have made out its case.

Application of Test

Considering the extent of Mr Mdhluli's involvement in the prosecution of this case, I cannot but see that objectively speaking, a reasonable person would entertain a reasonable apprehension that, were Mr Mdhluli to continue representing the accused, it would result in prejudice to the Crown's case. Certainly I cannot see that if he did so, justice would manifestly be seen to be done. Further indeed, to apply the standard in the civil cases of *Rakusen* (10), and *Robinson* (16), human nature being what it is, I have no doubt that Mr Mdhluli would find himself in an invidious position if he continued to act for the accused when his knowledge of privileged information may, in the least, *unconsciously* affect him in doing his duty towards the accused. Indeed I am satisfied that if he were to continue to act for the accused, prejudice to the Crown's case would in all human probability result.

As a matter of public policy, the public have an interest in the proper administration of justice and for the former Director of Public Prosecutions, in the circumstances of this case, to be now associated with the defence, would serve only to engender public distrust in the judicial process. In brief the accused's right to counsel of his choice must yield to public policy, so that public confidence in the fair and proper prosecution of the criminal law is maintained.

Material Irregularity

As matters stand, I consider that there has been a breach of ethics and as Mahomed DP observed in *Shabalala* (51) at p754 F, "a breach of an ethical rule has been held to be capable of constituting an irregularity in the trial." The learned Deputy President was there referring to the case of *S v Mangcola and Others* (105) where, on the facts of that case, Williamson J (as he then was) rejected a claim that the accused could not have a fair trial. The learned Judge, however, referred to some authority, in particular the case of *S v Mushimba en Andere* (106) where the Appellate Division set aside the convictions of all accused, because of (in the words of Williamson J) "the grossest breach of that professional privilege which exists between attorney and client". In that case a member of staff of the firm of attorneys who had represented the appellants at the trial, had given copies of statements by the appellants and defence witnesses and other confidential and privileged documents to the security branch of the police, who passed them on to the investigating officer, who in turn gave instructions thereon to State Counsel (who was unaware of the irregularity). The Appellate Division described the breach of privilege as "an extremely gross irregularity."

Williamson J also referred to the case of *S v Moseli en 'n Ander* (2) (107) to which the Crown refers, where Counsel for the defence called the Court Interpreter to give evidence as to what the accused had told him in consultation, which evidence was of a gravely prejudicial nature. In the face of such breach of privilege, Erasmus J declared the proceedings void and withdrew from the case, part-heard, leaving the matter in the hands of the Attorney-General to take further steps at his discretion.

In the case of *R v Price* (108) the Appellate Division set aside the convictions and sentences where an assessor had died after the Court had adjourned to consider its verdict, but before a verdict on any count had been determined; the Judge and remaining assessor did not constitute a quorum, the particular 1917 legislation on which reliance was placed being not applicable to a non-jury trial. In the case of *S v Gqeba and Others* (109) the Appellate Division (Grosskopf JA, M T Steyn JA and Grosskopf AJA) held by a majority (MT Steyn JA dissenting) that the discharge of an assessor under section 147 of the Criminal Procedure Act, 1977 on the basis that he had become "*unable* to act as assessor" (when the assessor, in great distress, had requested release due to the serious illness of his daughter), constituted an irregularity: the convictions of a number of accused (seven, for murder) and sentences were set aside.

The client in an attorney and client relationship may always waive privilege. Even if the Crown were to do so, as Lacourciere JA observed in *Robillard* (59) at pp27/28 "[t]he court is always required to consider the public interest and the need for public confidence in the administration of criminal justice." The Crown has not waived privilege, so that a material irregularity has arisen. I also consider that it has

arisen because of the other impediments to representation by Mr Mdhluli stated *supra*. I cannot see that the Crown may waive irregularity. Indeed, Mr Penzhorn submits that it is the duty of the Crown to direct the attention of the trial Judge to such irregularity: I agree (see the *Naidoo* case (78) at p713 D - E per Hofmeyr AJA). For that matter neither can the accused waive irregularity (per Greenberg JA in the *R v Price* (108) at p223D and Grosskopf JA in the *Gqeba* case (109) at p717J).

Conclusion

It is the Court's duty to remove the material irregularity which has arisen in this trial. I have to say that it never should have arisen. As Morgan J observed in *Jaquindo* at p256 "[a]ttorneys are officers of the court and are required to be sensitive to matters affecting public confidence in our judicial procedures." That surely applies *a fortiori* to the present case. There is, in the words of Johannes Voet, "no lack of other highly learned gentlemen" to represent the accused. Mr Mdhluli in the final paragraph of his affidavit of 4th May, reproduced *supra*, averred:

> "Speaking for myself I would not have considered briefing Mr Penzhorn and Mr Woker because I considered that they together with me were involved in investigations. I myself would not have considered it prudent to appear for the Crown in a matter in which I had been personally involved as an investigator."

I fail altogether, therefore, to appreciate how Mr Mdhluli could then consider it prudent to appear for the defence.

In his latter submissions Mr Mdhluli did state that he "would have no problem withdrawing" from this case. The early South African and English authorities spoke of restraint, or interdict or injunction; the American authorities imposed a disqualification in the matter; the Canadian authorities removed the practitioner as

counsel of record. While clearly the Court has power to impose any of those sanctions, I consider that the ends of justice would be served by adopting the approach of the trial Judge at Snaresbrook in the *Dann* case (20), namely that the present situation is simply "not acceptable", and that of Eloff JP in *Memani* (22). I consider it would be sufficient, therefore, to call upon Mr Mdhluli to withdraw.

Where would that leave Mr Phoofolo? He is in professional association with Mr Mdhluli and that, as a number of the authorities reviewed indicate, is a ground for disqualification or removal from the record. The Crown does not seek his removal: Mr Penzhorn submitted that the Crown would be content with an appropriate undertaking by Mr Phoofolo in the matter.

On a point of procedure, Mr Phoofolo submitted that the Crown's application contained no prayer for rescission of the Court's ruling of 14th August. That, as I see it, is a technicality, which can be cured by amendment, even at this stage.: I see no need therefor, as such prayer is in any event implied in the Crown's application. Accordingly, I make the following order:

Order:

(1) The Court's ruling of 14th August is hereby rescinded.

(2) The Court calls upon Mr G. S. Mdhluli to withdraw from representing the accused in this trial.

(3) The Court calls upon Mr E. H. Phoofolo to furnish the Court with an undertaking that he

(a) will not remain in, or enter into professional association with Mr G. S. Mdhluli during the continuation of this trial, and

(b) will not during such continuation discuss with, or communicate to, or receive from Mr G. S. Mdhluli, directly or indirectly, any matter arising out of or relevant to this trial.

Delivered This 24th Day of September, 2001.

B. P. CULLINAN
ACTING JUDGE