CRI/T/111/99

IN THE HIGH COURT OF LESOTHO

Rex

vs

MASUPHA EPHRAIM SOLE

For the Director of Public Prosecutions:	Mr A.J. Dickson, S.C., Miss P.D Hemraj, S. C.
For the Accused:	Mr E. H. Phoofolo.

Before the Hon. Mr Acting Justice B. P. Cullinan on 10th and 11th May, 1st June and 21st August 2001.

ORDER

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Cases referred to:

(1) *Boucher v the Queen* (1955) 110 CCC 263 (SC Can);
(2) *R v Puddick* (1865) 176 ER 662;
(3) *R v Filanius* 1916 TPD 415;
(4) *O'Neil v State* (1926) 189 Wis 259 (Wis SC);
(5) *R v Chamandy* 61 Can CC 224; (1934) 2 DLR 48; OR 208 (CA Ont);
(6) *Berger v United States* (1935) 295 US 78;
(7) *R v Nakedie and Another* 1942 OPD 162;
(8) *R v Nigrini* 1948 (4) SA 995 (C);
(9) *R v Riekert* 1954 (4) SA 254 (SWA);
(10) *R v Hepworth* 1928 AD 265;
(11) *R v Steyn* 1954 (1) SA 324 (AD);
(12) *Lemay v The King* 102 Can CC 1; (1952) 1 SCR 232 (SC Can);
(13) *S v Van Rensburg* 1963 (2) SA 343 (NPD);
(14) *S v Hassim and Others* 1971 (4) SA 492;
(15) *Shabalala and Others v Attorney - General of the Transvaal and Another* 1995 (12) BCLR 1593; 1996 (1) SA 725 (CC);
(16) *Molapo v Director of Public Prosecutions* 1997 (8) BCLR 1154 (Les);
(17) *S v Nkushubana* 1972 (4) SA 633 (ECD);
(18) *Re Forrester and The Queen* (1976) 33 CCC (2d) 221 (SC Alb);
(19) *R v Berens et. al.* (1865) 4 F & F 842; 176 ER 815;
(20) *S v Masinda en 'n Ander* 1981 (3) SA 1157 (A);
(21) *S v Xaba* 1983 (3) SA 717 (A);
(22) *S v N* 1988 (3) SA 450 (A);
(23) *R v Bourget* (1988) 41 DLR (4th) 756 (CA Sask);
(24) *S v Jija and Others* 1991 (2) SA 52 (ECD);
(25) *S v Nassar* 1995 (2) SA 82;
(26) *R v Stinchcombe* (1992) LRC (Crim) 68; (1992) 68 CCC (3d) 1 (SC Can);
(27) *S v Fani and Others* 1994 (3) SA 619; 1994 (1) SACR 635 (E);
(28) *Phato v Attorney - General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney- General, Eastern Cape, and Others,* 1995 (1) SA 799; 1994 (2) SACR 734 (E);
(29) *Smyth v Ushewokunze and Another* 1998 (3) SA 1125; 1998 (2) BCLR 170;
(30) *Smith v Minister of Justice & Others* Case No299921/2000, 6/12/2000 Unreported (TPD);
(31) *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC);

(32) *S v Roberts* 1999 (4) SA 915 (SCA);
(33) *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A);
(34) *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 (HC);
(35) *R v S (RD)* (1977) 118 CCC (3d) 353 (SC);
(36) *Committee for Justice and Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716;
(37) *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No2) (1999) 1 All ER 577; (1999) 2 WLR 272 (HL);
(38) *R v Gough* (1993) AC 646;
(39) *South African Commercial Catering & Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC);
(40) *Fey v Austria*, European Court of Human Rights (ECHR) 93/1991/345/418 (24/2/93);
(41) *Hauschildt v Denmark,* ECHR Series A no.154, (24/5/89);
(42) *De Cubber v Belgium* ECHR Series A no.86, (26/10/84);
(43) *Thorgeir Thorgeirson v Iceland* ECHR Series A no.239, 47/1991/299/370, (25/6/92);
(44) *Nortier v The Netherlands* ECHR, 31/1992/376/450, (24/8/93);
(45) *R v Duffy: Ex parte Nash* (1960) 2 All ER 891; (1960) 2 QB 188;
(46) *R v Van Vuuren* 1983 (1) SA 12 (AD).

THE APPLICATION

This is an application by the accused, seeking an order to interdict the two Crown prosecutors in this case from taking any further part in this trial. The application has had a chequered history. It was initially included in an exception to the indictment. At that stage there were nineteen accused. Due to the non-availability of a trial Judge and also the priority of six other applications brought by the accused, his co-accused and a seventh by the Crown, the accused thought it best to bring the application before another Judge, in his civil jurisdiction. The learned Judge considered the matter to be *lis pendens* before the trial court, which decision was upheld on appeal to the Court of Appeal. The matter has now been placed before me, simply as an application during the course of a criminal trial. I would then prefer to regard the order sought, not as one calling for the civil remedy of an interdict, but simply as one calling upon the two prosecutors to withdraw from the trial. In any event, having heard the application, I dismissed it on the 1st June, reserving my reasons, in order not to delay the trial, which reasons I now give. Once again, I take the opportunity of expressing my appreciation of the assistance that I have received from the representatives of both sides in placing many wide-ranging authorities before me, and in their learned submissions thereon. I should add that for the purposes of this application, the Crown is represented by Mr Dickson S.C., and Miss Hemraj S.C., both of the Durban and Pietermaritzburg Bar.

FACTS AND CORRESPONDENCE

It is common cause that the accused, a civil servant, in October 1986 was seconded from the public service to the Lesotho Highlands Development Authority ("LHDA") where he was appointed to the post of Chief Executive Officer. He held

that post until dismissed therefrom in October 1995, that is, after a lengthy disciplinary hearing. At that hearing LHDA was represented by the two Counsel who are prosecutors in this criminal trial, namely Mr G. H. Penzhorn, S.C., and Mr H.H.T. Woker, both of the Durban Bar, both of whom had been briefed by a local firm of Attorneys, Webber Newdigate.

After the disciplinary proceedings, LHDA instituted civil proceedings in the High Court claiming damages against the accused (CIV/T/598/95). Again, LHDA was represented by Mr Penzhorn and Mr Woker. The trial took some four years. The record stands at some 20,000 pages. LHDA was given judgment on 20th October, 1999. The accused appealed to the Court of Appeal against that judgment. LHDA was once more represented on such appeal by Mr Penzhorn and Mr Woker. The appeal was dismissed by the Court of Appeal in its judgment delivered on 12th April, 2001.

The correspondence and papers placed before me indicate the chronology of some of the events leading to the present criminal trial. Arising apparently out of some of the evidence in the civil trial, enquires were conducted by the office of the Director of Public Prosecutions ("the Director" or "DPP") as early as August, 1997, as instanced by a letter written by the Director (then Mr G.S. Mdhluli) on 25th June 1999, to which I shall return. On 1st April, 1999 the Director wrote to the legal representative in Zurich of one of the accused subsequently indicted. The letter indicates that the Director had at that stage "made a request to the Swiss authorities" for an order directing certain banks in Switzerland to produce documents relating to alleged payments into a Swiss bank account allegedly held by the accused.

On the 13th May 1999 Mr Penzhorn wrote to the Chairman of the Society of Advocates of Natal in Durban, in which he stated that he and his junior Mr Woker had represented LHDA "over the past four years" in the above-mentioned civil trial, the evidence having concluded at that stage, with submissions set down in the following month; arising out of the evidence in the civil trial, the DPP had made an application to the relevant Swiss authorities for the production of documents under the Swiss Federal Act on International Mutual Assistance in Criminal Matters of 1981. The letter reads in part, in paragraph 3 thereof:

> "In this matter I acted, together with Woker and a junior from the Johannesburg Bar, Louw, not only on behalf of the complainant, the LHDA, but also on behalf of the DPP in terms of a delegation given to us by him for this purpose. The application was granted by the Judge hearing the matter. An appeal to the Zurich High Court failed and a further appeal to the Federal Court in Berne is pending. The Court is expected to give judgment in the next month or so."

At that stage it had been mooted that the prosecution of a criminal trial involving the accused and others should be led by Mr Penzhorn. There is some dispute as to the source of the suggestion, which I consider unnecessary to resolve. The correspondence throws some light on the situation. In any event, Mr Penzhorn's letter to the Society of Advocates indicated that his initial reaction,

> "was that it would not look right for Counsel who acted in the civil case to also act in a criminal case arising *inter alia* from the facts in the civil case."

The letter continues at paragraph 7 in part,

> "I would be able to do the matter basically on the knowledge I already have. For another Silk to do the matter will however involve an enormous amount of additional time and money in order to get him on top of the facts. Even then he would probably not be in as good a position as I would be to present the case. This is because of the intimate knowledge I have of the matter which goes beyond the documents and evidence led."

Mr Penzhorn then posed the question whether, whatever his reservations, it

would be "unprofessional or unethical" for him to accept a brief in those circumstances. He continued thus

> "9 In addition the following. The basis upon which the prosecution will be conducted will be witnesses who testified in the civil case as well as the documents that were placed before the Court in the civil case, together with whatever emanates from the application in Switzerland. To this must be added documents expected from France as a result of a similar application as well as statements and documents we have obtained from contractors in Germany and Sweden. In these instances I also acted on behalf of the DPP on the same basis as described above. My brief will be from the DPP and the Lesotho Government will be responsible for my fees, through the government attorney.
>
> 10. I accordingly ask for a ruling by the Council on whether it would be proper for me to accept the brief in this matter."

On 20th May 1999 the Honorary Secretary of the Society of Advocates wrote to Mr Penzhorn, stating that "the Council has no objection to you accepting the brief on the basis set out in your letter."

To return to the Director's letter of 25th June 1999, that letter was addressed to Cornelia A Cova, *lic. iur.*, Examining Magistrate in Zurich. The letter in part reads:

> "I advise that I have received the documents that you ordered should be made available to my office, pursuant to the request for mutual legal assistance which I made to you in August 1997. I wish to thank you profoundly for the admirable and helpful manner in which you dealt with the application.
>
> 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 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 investigating against Mr M E Sole."

On 7th July, 1999 Mr Penzhorn sent a facsimile communication, consisting of 10 pages, to the then Chief Executive Officer of LHDA, now deceased, Mr Marumo. The covering message referred to the "Sole charge sheet" and read in part, "Herewith the charge sheet with amended figures". The indictment ultimately preferred by the Director, against the accused and eighteen other accused, consisted of 22 pages, so that I imagine that the charges at that stage amounted to holding charges. In any event, the fax clearly indicates that the Chief Executive Officer of the plaintiff in the civil case was at least being briefed as to the progress of the criminal proceedings.

On 27th July 1999 the Director wrote to the Prime Minister, copying the letter to the Attorney-General. The letter indicated that a summons had been issued, directing the accused to appear before the Magistrates' Court in Maseru. The letter indicated, in the first paragraph thereof, that the accused had already appeared before the court: in any event, the accused appeared before the Chief Magistrate on the following day, when he was remanded on bail. The Director annexed a copy of the charge sheet to his letter addressed to the Prime Minister, indicating that the accused had been charged with twelve counts of bribery, two counts of fraud and a count of perjury. The Director explained that

> "[t]he charges are merely holding charges. I expect additional charges to the preferred against him after we have carefully scrutinized all the bank documents made available to us by the Swiss authorities."

Thereafter the Director, "as a person who has been involved in the investigations in the case against Mr Sole, albeit to a limited extent," expressed his concern about the prosecution, inasmuch as there was no direct evidence of any action or inaction by the accused, suggesting that the possibility of obtaining such evidence from some of the alleged "go-between" or intermediary accused, "should

be seriously explored." To this end, the Director was "prepared to meet and discuss with my colleagues who have been involved in investigations . . . and ... other role-players, if need be, with a view to deciding how best to proceed."

The following day, as I have said, the accused appeared before the Chief Magistrate. The frontspiece of the charge sheet has been placed before me, but not the actual charge sheet itself. The record indicates that the Crown was represented by the Director and the accused was represented by Mr Phoofolo. No plea was taken and the Director applied that the accused be remanded on certain bail conditions, agreed by the defence, including a bond on immoveable property in the amount of M200,000.00 and the surrender of his international, but not his 'local' passport. The accused was remanded to 31st August, 1999.

The following day, the 29th July, 1999, the Director wrote a memorandum to the Attorney-General informing him of the court proceedings the previous day and of the bail conditions imposed. The letter continues:

> "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."

The Attorney-General replied by memorandum the following day, referring to the Director's memorandum of 27th July (to the Prime Minister) and of 29th July. The Attorney-General's memorandum then reads:

> "As a follow up to appropriate action to be taken in dealing with this case, I confirm our telephonic discussion we had to-day 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 wrote to Mr JTM Moiloa, a partner in Webber Newdigate, on 3rd August, 1999. The letter reads:

"*REX V MASUPHA E. SOLE*

"I refer to the writer's telephonic discussion with your goodself concerning the above-mentioned matter and confirm my verbal instructions that you should represent the office of the Director of Public Prosecutions in the pending High Court trial against Mr Sole. The trial follows on the criminal proceedings which the prosecution has instituted against Mr Sole in the Magistrate's Court, Maseru.

For the purpose of carrying out your mandate, you are specifically instructed to brief Advocate Penzhorn, SC to undertake all the necessary preparatory work and appear for the Crown at Mr Sole's trial. I would appreciate it, if you would give this matter your immediate and urgent attention and try your level best to have the final indictment ready for my signature within the next six to eight weeks. As you are, of course, aware Mr Sole's next appearance in Court will be on the 31st August 1999. Please keep me advised of further developments from time to time."

Webber Newdigate, represented by Mr Moiloa, replied to that letter by letter of 13th August 1999. I consider it best to set out most of the letter which reads thus:

"We acknowledge your letter dated 3rd August 1999.

We offer the following suggestions and comments.

In principle we would be happy to undertake the prosecution of this case on your behalf. We point out that there is a lot of work still outstanding that needs to be completed before the trial can commence. We think that it is over optimistic to think that the remaining work can be completed in 6 - 8 weeks time. Our initial view is that these contractors should all be charged along with Mr Sole.

We propose the following:-

1. Investigating Officer:

We propose that a senior police officer be identified and allocated to us to assist in the *completion* of the investigation. This individual has to be an incorruptible person. He will keep in touch with the Senior Public prosecutor at the magistrate's court, the Law Office and ourselves. He will monitor the observance of the bail conditions.

2. Senior Public Prosecutor

We suggest that a senior public prosecutor be identified to oversee the month to month remands. He will be liaising with the investigation officer and the Law Office until such time that the case is removed to the High Court for trial.

3. Crown Counsel

We suggest that a Crown Counsel be identified and made available to us to oversee the remands and to liaise with us with regard to matters pertaining to progress of the investigation and commencement of the trial. He will also liaise with the investigating officer with regard to such matters as we may require their assistance.

4. Authority to Act for DPP

We require your authority to *complete* the investigations into this matter. In particular we need renewal of your authority with Swiss and French authorities. There are witnesses in Europe that we require to talk to and that we require to take statements from. This we had wanted to do during the last week of July but could not do due to circumstances beyond our control. Enclosed please find a draft letter that we suggest will enable us to do the necessary *final* investigations and prosecution of this case.

5. Senior Counsel and Junior Counsel

We recommend that we continue to use both Penzhorn S. C. and Advocate Woker as his junior. This case is complex and involves a lot of evidential material to be collected, analyzed and presented to court in a cogent manner. Both have been with the writer through the disciplinary inquiry, the civil trial and the investigation. Among the three of us a great deal of knowledge and wisdom has been amassed. Two Counsel are necessary to accomplish this effectively."(Italics added)

It is difficult to know why the writer should recommend the briefing of the *two* Counsel, Senior and Junior, named, when in the letter of 3rd August he had been given specific instructions to brief the Senior Counsel, unless it was the case that the writer was seeking specific authority for the briefing of Junior Counsel also. In any event, on 28th October, 1999 Advocate Johann Nel, of the Bloemfontein Bar, wrote to the Director, informing him that he had been briefed by a Bloemfontein firm of Attorneys to represent the accused. Mr Nel then requested the Director to furnish him

with all documents relevant to the prosecution of his client. The letter continues thus:

> "Information at our disposal shows that one advocate G. H. Penzhorn SC has been afforded a delegation to appear on behalf of your office and to lead the prosecution against Mr Sole. Confirmation of this information will be greatly appreciated because, if confirmed, we intend to object to such a delegation as we are of the opinion that Mr Sole will not be afforded a fair trial if advocate Penzhorn is to be in charge of and is allowed to deal with the case against Mr Sole.
>
> We are deeply concerned in this regard as information given to us, together with papers furnished to us relating to the civil matter LHDA v M.E. SOLE as well as a disciplinary hearing during which Mr Sole was dismissed as Chief Executive Officer of the LHDA, clearly show to our minds that advocate Penzhorn has *involved himself in a personal crusade against Mr Sole and that he lacks the objectivity* and *impartiality which is necessary to ensure that the State case against Mr Sole is presented fairly*. It is indeed my instructions that advocate Penzhorn has, during the disciplinary hearing, as well as during the protracted civil trial, *shown bias against Mr Sole* which clearly smacks of *his dislike of Mr Sole and his desire to see him behind bars."* (Italics added)

Mr Nel then went on to set out the oft-quoted dicta of Rand J in the Canadian Supreme Court in the case of *Boucher v The Queen* (1), as to the role of a prosecutor, to which I shall have occasion to refer again.

The present Director of Public Prosecutions, Mr L. L. Thetsane, replied to Mr Nel's letter on 3rd November, 1999. Mr Thetsane signed the letter as Acting Director of Public Prosecutions. There is an affidavit before me from the previous Director, Mr G.S. Mdhluli, deposing that he remained on duty in Lesotho, as the incumbent Director until 31st December 1999. This of course raises the issue of the *vires* of Mr Thetsane as Acting Director up to that date, bearing in mind, as will be seen, that it was Mr Thetsane who signed the notice of trial and the original indictment, on 1st December, 1999, (see section 118 (2) (a) of the Criminal Procedure and Evidence Act, 1981("the Code")). I do not see that I am called upon to decide the point. The original indictment has been withdrawn and a new indictment, charging only the

accused has been substituted. In any event, Mr Thetsane's letter of 3rd November, 1997 raises no issue of *vires*: the letter read in part:

> "3. I confirm that Advocate G. H. Penzhorn SC of the Durban Bar, together with Advocate H.H.T. Woker also of the Durban Bar as his junior, have been instructed to act in this matter.
>
> 4. The decision to prosecute Mr Sole was taken after a careful appraisal of all the available evidence. Mr Penzhorn had no involvement in the above decision. It was taken by officers on whom such duties lay statutorily. It has been decided to brief Mr Penzhorn to prosecute the case and it was solely due to his extensive knowledge of the background of this case. I am not aware of any facts which would preclude Advocate Penzhorn from acting in this matter."

On 8th November, 1999 Mr Penzhorn and Mr Woker sent a fax to Mr Marumo, the subject matter being "Memorandum - LHDA Contractor Investigations". The memorandum indicates that the LHDA management were at that stage involved in investigations concerning contractors/consultants involved in the Lesotho Highlands Water Project ("LHWP") who were "likely to be charged in the pending criminal matter," and in particular the preparation of "selected contract data," relating no doubt to the specific LHDA contracts awarded. The memorandum also indicates that both Counsel were advising LHDA in the matter.

As indicated earlier, an indictment and a notice of trial, both dated 1st December, were filed in the High Court on 3rd December, 1999. On 9th December 1999 Mr Marumo wrote to Webber Newdigate. I consider it necessary to set out the whole letter:

> "YOUR ENGAGEMENT AS LHDA'S LAWYERS IN THE BRIBERY ALLEGATIONS INVOLVING SOME LHWP CONTRACTORS AND LHDA'S FORMER CHIEF EXECUTIVE M E SOLE
>
> I refer to the various discussion we have had with yourselves on the subject on which

the Crown and the LHDA, had retained you, and Messrs Penzhorn and Woker, to act for and advise them on.

The subject was first brought up in the last paragraph of Mr Penzhorn's 11 October 1999 confidential memorandum to me.

It next became a topic for discussion before the meeting planned with Lesotho Highlands Consultants (LHC) on 3 November, at which Mr Penzhorn made the point that his role as the state prosecutor, as well as LHDA's Counsel, *would have to be made known* to LHC's representatives.

The subject was finally crystallised on the morning of 11 November 1999, after the Crown had served summonses on the parties who were to appear before the magistrates' court in response to such summons on 29 November 1999. Later that morning, Mr Penzhorn made it known to LHDA that he had received a letter of engagement from the DPP on 8 November 1999 and copies of the letter were given to LHDA's representatives.

It was at that point that it was agreed that there was a *need to define your relationship, and that of Messrs Woker and Penzhorn*, with the Crown, on the one hand, and LHDA on the other.

We have now considered the position carefully and ask you to agree to the following by signing this letter, which is prepared in two parts, one of which should be returned to us.

The parties agree that:

1. All assignments that you are now engaged in are in furtherance of the Crown's case and, therefore, any interviews, telephone-calls or any assignments whatsoever, including, but not limited to those with LHDA personnel, that you will carry out are *in furtherance of the Crown's case*, and will be for the Crown's account.

2.1 Should the LHDA need your *separate* services by way of assignment on any aspect of this case, instructions shall be issued to you by the Chief Executive or General Manager Corporate Services or a person designated for the purpose by the Chief Executive, as the case may be in writing or, if they are given verbally, shall shortly thereafter, be confirmed in writing.

2.2 Communication shall be conducted with the contact person nominated by Chief Executive from time to time.

2.3 Where an assignment necessitates the use of Counsel, fees, the names and *CV's of such Counsel* and level of seniority shall be cleared and agreed with the LHDA *before you can engage any such Counsel.*

2.4 Any travel, expenditure, personnel to be involved on the assignment, or any matter whatsoever that shall involve the LHDA in any costs shall not be incurred before LHDA's prior written approval.(Italics added)

2.5 Your fees and charges shall be paid at the rates as in the tariff of fees to be agreed upon from time to time between yourselves and the LHDA."

A copy of that letter, signed at the foot thereof by Mr Moiloa, on 2nd February, 2000, as acknowledgement of receipt thereof, was returned to Mr Marumo by Webber Newdigate on that date. Thereafter, on 21st February, 2000, the Acting Director Mr Thetsane addressed a Supplementary Application for Mutual Legal Assistance to the relevant Swiss authorities, namely, the Federal Office for Police Matters (Section for International Legal Assistance), in Berne, and the Examining Magistrate's Office in Zurich, marked for the attention of Mrs Cornelia Cova. The document referred to the application for mutual legal assistance of 25th August, 1997 and the supplementary application of 21st October and 5th November, 1997, and requested the provision of further "documents and/or evidential material." The documents is a lengthy one, consisting of 31 pages, containing requests for assistance in respect of numerous transactions: as to such transactions, the document indicates that the writer is satisfied that the accused was therein involved in bribery.

The accused has exhibited two newspaper articles, concerning this trial, to his founding affidavit, the first of which he deposes was published on Monday 19th June, 2000 and the second on Sunday 30th June, 2000. The latter date cannot be correct, as the 30th June fell on a Friday. Secondly, the text of the first article indicates that it was written some two weeks *after* this trial had opened, whereas the text of the

second article indicates that the trial was about to commence on the Tuesday following the Sunday on which the newspaper was issued. It would seem therefore that the latter article was probably published on Sunday 4th June, 2000. That article, to which I shall hereafter refer chronologically as "the first article" (and the other, "the second article"), appeared in the issue of "The Sunday Times" newspaper, which is printed and published in the Republic of South Africa. The article, with a large photograph of the Katse Dam as background, contains two headings. The first of these states that the particular journalist

> "LOOKS AT HOW A MAN HAS FALLEN AFTER COOKING EVERYTHING, FROM THE BOOKS TO GROCERIES BOUGHT ON HIS OFFICIAL EXPENSE ACCOUNT "

Another heading reads:

> "THE CRIME GREED AND STUPIDITY
> ACCUSED NO1 A LITTLE MAN IN A BIG POND
> ACCUSED NO2 BIG BUSINESS"

The opening paragraphs read thus:

> "Masupha Sole must be kicking himself. If he hadn't let greed get the better of him and fiddled his expense account claims for piffling sums of money, he would still be the chief executive of the massive Lesotho Highlands Water Project and the highest paid civil servant in the mountain kingdom.
>
> No one would ever have known about a Swiss bank account in his name, containing millions of rands allegedly paid to him as bribes.
>
> Instead, he has been ignominiously dismissed and is about to appear in the Lesotho High Court as Accused No1 in the world's first bribery and corruption trial involving international construction and consulting consortiums."

The article then deals briefly with the allegations in the present trial, recounting the initiation of the LHWP and the involvement of international constructing and consultant consortiums. It describes the disciplinary proceedings against the accused at which he

"insisted that it was his right to be represented by a full legal team at the inquiry.

That opened the way for the Minister to claim the same right, and two South African advocates, Guido Penzhorn SC and Hjalmar Woker, both of the Durban Bar, were briefed to act for the government in the inquiry. The two were given full government backing in their investigations, and it is only due to their detective work that massive foreign payments, allegedly to Sole, were discovered almost by accident."

The article then relates the findings of the disciplinary proceedings and the judgment of the High Court in the matter. It then continues

"As part of the investigation for this civil case, Penzhorn and Woker asked that Sole disclose his banking details. He gave them information relating to accounts held in Lesotho and swore under oath that he had no accounts abroad.

However, investigators found a Standard bank account in his name in Ladybrand, South Africa, and learnt that large amounts were being transferred into it from a Swiss account.

After a series of legal actions in Switzerland to have the records released, Penzhorn and Woker discovered a complex web of payments made by the contracting and consulting consortiums via middlemen to what turned out to be a Swiss bank account in Sole's name.

The prosecution will ask the court to draw the inescapable inference that these huge sums must have been for illegal purposes: they were paid secretly by the consortiums to Sole's foreign account through intermediaries at a time when he was considering tenders and variations to contracts in which the consortiums were involved or had expressed interest.

Sole had not disclosed these payments. Indeed, he had denied the existence of any outside accounts.

.....

The case is crucial for all involved. Sole, who faces 16 counts of bribery, two of fraud and one of perjury, will be trying to stave off a lengthy jail term. His co-accused want to protect their reputations and their livelihood in international construction work."

On 19th June, the second article, by another journalist, appeared in the "Business News" section of the "The Star" newspaper, printed and published in South

Africa. The first three paragraphs of the article read thus:

> "Johannesburg - South African companies and officials are under the corruption spotlight as investigators follow the money in the multimillion-rand Lesotho Highlands Water Project bribery scandal.
>
> Guido Penzhorn SC, the investigator and prosecutor in the complex trial which opened two weeks ago in the Lesotho High Court in Maseru, last week confirmed reports that new information had led his investigation across the border.
>
> "We are definitely looking at people and companies in South Africa", Penzhorn said. "The enquiry may also run into activities connected with the Maputo Corridor development"."

The accused has supported his application with a detailed founding affidavit. At page 23 thereof he summarises the grounds of his objection to Counsel for the Crown thus:

> "(a) [they] cannot be expected to be objective and impartial when they are contractually bound to serve the interests of the complainant, LHDA;
> (b) in view of their connection with the civil case involving the LHDA and myself they cannot be objective, impartial and detached as prosecutors should be;
> (c) they are investigators in the case and as such should not be prosecutors in the same case;
> (d) some charges I am facing relate to what is alleged to have happened in CIV/T/598/95 in which they represented the complainant, LHDA;
> (e) they have made statements which cannot be reconciled with the objective and impartial approach which they should adopt in prosecuting the case;
> (f) they have identified, associated themselves and collaborated with media people who have tried and found me guilty in the media; and
> (g) the first, second and third respondents cannot pass the basic test of appearances when it comes to their impartiality, objectivity and detachment as prosecutors in my case."

As to the standards to be expected of a prosecutor, I turn to the case law for guidance.

CASE LAW

As early as 1865 in the English case of *R v Puddick* (2) at p664, Crompton J

observed that prosecutors

> "are to regard, themselves as ministers of justice, and not to struggle for a conviction ..... nor be betrayed by feelings of professional rivalry."

In the 1916 case of *R v Filanius* (3) Mason J (Bristowe J concurring), stressing at p417 that "[t]he Crown had behind it the whole resources of the State" , pointed to the *duty* of the Crown to place those witnesses whom it did not propose to call, at the disposal of the defence.

In 1926 in the American case of *O'Neil v State* (4) the Supreme Court of the State of Wisconsin observed that

> "[a] prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid at arriving at the truth in every case ..... The district attorney is not a mere legal attorney. He is a sworn minister of justice."

In the Canadian case of *R v Chamandy* (5) decided in 1943, Riddell JA in the Ontario Court of Appeal observed at p227 (CCC), 50 (DLR), 212 (OR):

> "It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth."

The case of *Berger v United States* (6) decided by the Circuit Court of Appeals (2nd Circuit) of that country in 1935 provides a remarkable example of misconduct on the part of a prosecutor. Sutherland J at p84 described it thus:

> "He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly

indecorous and improper manner."

and at p85:

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."

Sutherland J observed at p85

"The trial Judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

Sutherland J concluded thus at p89:

"If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming", a different conclusion might be reached..... Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.. A new trial must be awarded."

The facts of *Berger* (6) are illustrative of "mild judicial action", or possibly inaction. When it comes to a general statement of the duty of a prosecutor it is ably stated by Sutherland J at p88 in the following powerful and stirring dicta:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The facts of the appeal case of *R v Nakedie and Anor* (7), decided in 1942 in the

Orange Free State by Fischer JP and van den Heever J, are more in point. The report does not indicate the outcome of the appeal, the report being concerned mainly with the following dicta of van den Heever J at p163:

> "The proceedings in this trial do not reflect credit on anyone engaged therein. In the grounds of appeal appellants draw attention to the fact that Sergeant Bisschoff had conducted the raid out of which this prosecution arose, that he was a principal witness for the Crown, as well as public prosecutor. That this reproach is not undeserved appears clearly on the face of the record. In theory the fact that he is also prosecutor does not disqualify him as witness, seeing that the court functions as arbiter between the prosecution and the defence. In practice, however, such a proceeding is strongly to be deprecated, especially in a case such as this, where the prosecutor functions as investigating officer, delator, principal witness and public prosecutor. It is difficult to see how in such circumstances an officer can prosecute an accused person with that detachment and moderation which is in accord with the high traditions of prosecution at the public instance in this country."

Those dicta were quoted with approval in 1948 in the Cape Provincial Division by de Villiers AJP (Searle J concurring) in the appeal case of *R v Nigrini* (8). De Villiers AJP observed at pp995/996:

> "This record displays a most extraordinary state of affairs for it would appear from the record itself that the public prosecutor was the chief witness in the case. He also was the complainant in the case and he was not only the investigating officer but also prosecuted so that he appeared in all those four capacities before the magistrate. There is no explanation on this record indicating how that came about. In my opinion this is a most unsatisfactory form of procedure."

Speaking generally of a prosecutor's duty and the corresponding duty of the Court in the matter, Claasen J had this to say in the 1954 case of *R v Riekert* (9) at p261:

> "Although the public prosecutor is *dominus litis* he is not in the same position as counsel or an attorney representing a client. The Court may usually assume that in a civil trial counsel or attorney will guard the interests of his client. Where the legal representative of a private party omits a necessary or desirable step in procedure in the interests of his client, there is generally no duty on the Court to put him right. The public prosecutor has a wider task than counsel or attorney for a client. He represents the State, the community at large and the interests of justice generally. I conceive that the Court has a wider duty, when some such step is omitted by the

> public prosecutor. He represents those wider interests in respect of which the Court has a special supervising capacity (*Hepworth's* case [10]).
>
> The public prosecutor does not only represent the interests of the Crown, but he also has a duty towards the accused to see that an innocent person be not convicted. Thus it is his duty to disclose, in certain circumstances, facts harmful to his own case (see *R v Steyn, [11]* at p337). The legal representative of a civil litigant is in a different position.
>
> Although the attainment of truth is in the public interest in both civil and criminal trials, I venture to say that in criminal trials the ascertainment of truth and the prevailing of the interests of justice are of greater public interest than in civil trials. (*Steyn's* case [11] at p336). That being so I am inclined to the opinion that a Superior Court will be more readily prepared to come to the assistance of the Crown in cases where the public prosecutor has, through a wrong deliberate decision, omitted to take a step in a trial which was necessary in the interests of justice."

The case of *Boucher v The Queen* (1) to which reference was made *supra*, was decided in the same year, 1954. The following dicta of Kerwin CJC at p265 indicate the basis of the relevant ground of appeal:

> "It is duty of Crown counsel to bring before the Court the material witnesses, as explained in *Lemay v The King*, [12]. In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language *his own personal opinion* that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty. In the present case counsel's address infringed both of these rules."(Italics added)

Locke J in his judgment at p272 quoted the dicta of Riddell JA in the Ontario Court of Appeal in the case of *R v Chamandy* (5) reproduced *supra*. He went on at p273 to observe:

> "It is improper, in my opinion, for counsel for the Crown to *express his opinion* as to the guilt or innocence of the accused. In the article to which I have referred [*Archbold* 33 Ed p194] it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express *his personal opinion* of or *his belief* in his client's case." (Italics

added)

The appellant Boucher had been convicted of murder. The Supreme Court allowed the appeal and ordered a new trial. When it comes to a general statement as to a prosecutor's duty, the case is notable for the particular all-embracing dicta of Rand J at p270, which, as indicated, Mr Nel, Counsel for the accused in the present case, quoted in his letter to the Director on 28th October, 1999. The dicta must surely rank with those of Sutherland J in *Berger* (6) *supra* as the *locus classicus* in the matter. Rand J had this to say:

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

As to the duty of disclosure, the prosecutor in the Natal case of *S v Van Rensburg* (13), decided by Caney J (Kennedy J concurring) in 1963, where the accused was convicted of theft on his plea of guilty, had failed to disclose correspondence which raised the issue of the accused's mental condition. Caney J observed at p343 that

> "it cannot be too strongly emphasised that it is part of the duty of a prosecutor to bring to the notice of the court information in his possession which may be favourable to the accused."

The extent of a prosecutor's duty was delineated in the dicta of James JP in the Natal case of *S v Hassim and Others* (14), decided in 1971. The learned Judge President observed at p494:

> "In my opinion, if a witness gives evidence which reveals a serious departure from or contradiction of matters contained in the statement given to the police which is in the prosecutor's possession, then the prosecutor is fully entitled to put the witness' previous inconsistent statement to him forthwith in order to discredit him in terms of sec.286 of the Code. If he decides not to do this at this stage, then it seems to me that he should, in the interests of fairness, make this statement available to cross-examining counsel in accordance with what was said in *R v Steyn,* [11]. I should emphasise that this duty only arises if the discrepancy is a serious one and not one of a minor or trivial nature."

Those dicta must be viewed in the light of the fact that the blanket docket privilege arising out of *R v Steyn* (11) has been held to be unconstitutional by the Constitutional Court of South Africa in the case of *Shabalala and Others v Attorney-General of the Transvaal and Another* (15), and also by Ramodibedi J in the case of *Molapo v Director of Public Prosecutions* (16) (being inconsistent with section 12(2) (c) of the Constitution of Lesotho). Accordingly, apart from the exceptional situations described by Ramodibedi J at p1165 B to C (paragraph 3) of his judgment, defence Counsel will ordinarily be in possession of all witnesses' statements. Nonetheless, the dicta of James JP are instructive, in that they indicate that a prosecutor must operate from a position of fairness towards the accused.

The relevant dicta in *Nigrini* (8) were referred to with approval by Addleson J (Jennett JP concurring) in 1972 in the Eastern Cape appeal case *S v Nkushubana* (17). Addleson J observed at p633:

> "[T]he only State witness who was also the investigating officer, was the prosecutor in this case. This is a highly undesirable state of affairs. It is obviously most invidious for a magistrate ever to be placed in a position where he has to pass judgment on the credibility of his prosecutor and such a procedure may quite unnecessarily give rise to the impression that justice has not been done. Except where his evidence is of the most formal nature a prosecutor should not give evidence in a case. Where it is essential that he be called as a witness, arrangements should be made with some other person to conduct the prosecution."

In another Canadian case, *Re Forrester and the Queen* (18), Quigley J in the Alberta Supreme Court had occasion to refer to the general duties of a prosecutor at p227 thus:

> "It has always been a supposition in the administration of criminal justice, that as a general rule "the prosecuting counsel is in a kind of judicial position". The idea of a contest between party and partly should not allowed to creep in where the prosecutor in a criminal case is concerned because he might then "forget that he himself was a kind of minister of justice": *R v Berens et al.* [19]."

The duty of disclosure by a prosecutor arose again in the 1981 case of *S v Masinda En 'n Ander* (20) before the Appellate Division (Muller JA, Botha AJA and Van Heerden AJA). The report of the judgment (per Van Heerden AJA) is in Afrikaans, but the English version of the headnote reads thus at p1158:

> "It is a recognised rule of practice that a prosecutor is obliged to draw the Court's attention to material conflicts between a witness' statement and his evidence and to make the statement available for cross-examination. A failure to do so cannot without more be regarded as a failure of justice, which is in itself an elastic concept. Such a failure, therefore, does not *per se* entail that the accused did not have a fair trial."

Bearing in mind the decisions in *Shabalala* (15) and *Molapo* (16), the above dicta can now only refer to those cases where the Court has permitted the Crown to withhold information on the general ground of public interest. In such cases the duty of disclosure of a statement inconsistent with subsequent evidence must surely still arise. It is in that sense that the dicta of Botha JA (Wessels JA, Galgut AJA, James AJA and Nicholas AJA concurring) in the subsequent Appellate Division case of *S v Xaba* (21), decided in 1983, at pp728 E to 730 D, which are quite extensive, are also still applicable. I select the following passages at p729 G-H and 730 A-B:

> "Whether or not a discrepancy between the evidence of a state witness and his previous statement to the police is sufficiently serious to call for the performance of the duty of disclosure by the prosecutor must therefore be assessed in the context of the effect that such disclosure and the cross-examination following upon it might

> have on the credibility and reliability of the witness. In my opinion a discrepancy is serious whenever there is a real possibility that the probing of it by means of cross-examination could have an adverse effect on the assessment by the trial Court of the witness' credibility and reliability. Such a real possibility is not created by a discrepancy of a minor or trivial nature."
>
> "If the discrepancy is clearly of a minor or trivial nature the prosecutor is not required to do anything. If the discrepancy is clearly a serious one, in the sense explained above, the prosecutor must as soon as possible after its emergence make the statement available to the defence. If the accused is unrepresented the prosecutor must forthwith disclose the discrepancy to the court."

The duty of disclosure was all the more marked in the Appellate Division case of *S v N* (22) where the prosecutor failed altogether to disclose an affidavit reflecting a negative result in a spermatozoa test in a case of rape. The failure to do so did not affect the conviction. Corbett JA (as he then was) (Viljoen and Nestadt JJ A concurring) observed that the negative result was "not conclusive" but that nonetheless "[i]t was for the Court, not the prosecutor, to evaluate the cogency of the evidence" and that

> "the prosecutor's failure to place the affidavit containing the result of the test before the Court, or at least to inform the defence attorney of it, was an error of judgment and in breach of his general duty to disclose information favourable to the accused (see Lansdown and Campbell *South African Criminal Law and Procedure*, vol V at 511-112 and the cases there cited)."

In the same year in the Canadian case of *R v Bourget* (23) Tallis JA in the Saskatchewan Court of Appeal, speaking of "the Crown's duty to make timely disclosure to the defence of all evidence supporting innocence or mitigating the offence," observed at p762:

> "Although we have elected to employ an adversary system of criminal justice, the Crown plays an essential role in the truth-finding function of our system. The need to develop all the relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments or verdicts were to be fashioned on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in it must depend

upon full disclosure of all the facts, within the framework of the rules of evidence."

Again, the issue of disclosure arose in the Eastern Cape in 1989 before Erasmus J in the case of *S v Jija and Others* (24) where the learned Judge held that the record of an identification parade was not privileged. In following the decisions *inter alia* of *Berens* (19), *Riekert* (9) and *Van Rensburg* (13) he observed at pp67/68:

> "[T]he Court had an uneasy feeling that State counsel had misconceived his function. It appeared to the Court from the nature of his address and attitude that he regarded his role as that of an advocate representing a client. A prosecutor, however, stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth."

The issue of disclosure came before the High Court of Namibia (Hannah J and Muller AJ) in 1994 in the case of *S v Nassar* (25). *Muller AJ* (as he then was) (Hannah J concurring) held that in view of the provisions of article 12 of the Constitution of Namibia (similar to those of section 12 of the Constitution of Lesotho) there was a duty of disclosure upon the prosecution, which duty however was not absolute. In this respect the learned Judge quoted *in extenso* the dicta of Sopinka J in the Canadian case of *R v Stinchcombe* (26) at p6 dealing with the discretion of Crown Counsel in the matter and the review thereof by the trial Judge. Those dicta are instructive.

So also are those of Muller AJ when he came to deal with the provision by the prosecution of a summary of substantial facts, as required by section 144 (3) of the Criminal Procedure Act, 1977. The learned Judge observed at p105, that under the Criminal Justice Act of 1967 of England and Wales, Parliament had "opted for the path of open justice" in providing that as an alternative to a preparatory examination the prosecution could elect to provide the accused with witnesses' statements. The

learned Judge continued at pp105/106:

> "In South Africa, however, Parliament of the day opted for closet justice. As an alternative to calling witnesses at a preparatory hearing, the prosecution could elect simply to provide the defence with a summary of the substantial facts of its case. The actual evidence of its witnesses needed no longer to be disclosed. It remained concealed only to be sprung on the accused at his trial. And it is our experience that when the evidence does unfold at the trial it all too often becomes apparent that important, material facts were not set out in the summary. Our experience in this regard is similar to that of Jones J as described by him in *S v Fani and Others* [27]. And further particulars do not remedy the matter, as Mr *Miller* claims. They may clarify the allegations made in the indictment but they are no real substitute for a preview of the evidence which the prosecution proposes to lead.
>
> Being provided with a summary of the substantial facts in terms of s144 of the Criminal Procedure Act is obviously better for an accused than being provided with no information at all concerning the case against him. If measured against the standard of receiving nothing the provisions of the section could, therefore, be described as enhancing the prospects of an accused receiving a fair trial. But that, in my view, is not the right approach. The Constitution provides that a person charged with a criminal offence is presumed to be innocent and is entitled to a fair trial and, in my opinion, in the light of the provisions of the Constitution he has a right to look at the State to provide him with all reasonably practicable facilities at the disposal of the State to ensure that his trial is fair. Article 12 provides for *adequate* time and facilities. I agree with Mr *Du Toit* that the expression 'facilities', as used in art 12 (1) (e) of the Constitution, should not be limited to physical facilities to enable an accused to prepare and present his defence. The word 'facility', particularly when used in the plural, can mean facilitating or making easier the performance of an action and when the word is liberally and purposively construed, as I think it should be, then, in my opinion, it must be taken to include providing an accused with all relevant information in the possession of the State, including copies of witness statements and relevant evidential documents. This also includes an opportunity to view any material video recordings and to listen to any material audio recordings."

In the *Fani* case (27) Jones J had observed at p622

> "Preparatory examinations are still part of the procedure laid down in the present Criminal Procedure Act 51 of 1977. But they are virtually never held. The result has been an erosion of the principle of full disclosure. The present practice is invariably to hold a summary trial in the Supreme Court without any preliminary hearing. There is no procedure laid down for the disclosure of information which characterises civil litigation and which was almost a universal practice when preparatory examinations were held as a matter of course. Instead of a preliminary hearing, the prosecution now attaches a summary of material facts to a criminal

> indictment in the Supreme Court. In practice, this has not always in my opinion measured up to the requirement of sufficient information to prepare properly for trial, and hence it does not necessarily facilitate a fair trial within the meaning of the new Constitution Act. It often says little more than the indictment itself. I have the impression that information contained in this document has become less and less informative as the years go by."

Those dicta were repeated by James J in the case of *Phato v Attorney-General, Eastern Cape, and Another* (28) at pp817/818. They were also quoted by Mahomed DP (as he then was) in *Shabalala* (15) at para 18, -737. The duty of disclosure is of course but one of the prosecutor's duties. The full scope of his duties were subjected to the examination of the Supreme Court of Zimbabwe (Gubbay CJ, McNally, Korsah, Ebrahim and Muchechetere JJ A) in the case of *Smyth v Ushewokunze and Another* (29). The facts of the case are, to say the least of them, unusual. The Supreme Court of Zimbabwe was faced with an application, under Constitutional provisions similar to those contained in section 22 of the Constitution of Lesotho (dealing with "enforcement of protective provisions"), alleging, in brief, that the applicant's right to a fair trial by an independent and impartial court established by law was likely to be contravened. The applicant, a British national and Queen's Counsel of the Bar of England and Wales, who had retired from legal practice in 1984 and had taken up missionary work in Zimbabwe, was charged with culpable homicide, arising out of the death by drowning of a 16 year - old student at a school holiday camp run by the applicant; he was also charged on five counts of *crimen injuria*.

The prosecution of the case was assigned to the first respondent ("the respondent"). Gubbay CJ, with whose judgment the other Judges concurred, observed at p1130 that the applicant alleged that the respondent had

> "involved himself in a personal crusade against the applicant and that he lacks the objectivity, detachment and impartiality necessary to ensure that the State's case is presented fairly. It is said further that the first respondent had exhibited bias against the applicant."

Gubbay CJ then considered at pp1130/1131 the authorities which establish the conduct expected from a prosecutor. In particular he quoted the dicta of Rand J in *Boucher v The Queen* (1) *supra*. The learned Chief Justice then turned to the respondent's conduct. Having done so, he went on at p1134 to say:

> "I have no difficulty in acknowledging the inherent danger or unfairness to the applicant attendant upon the first respondent prosecuting at the trial. Hence the question that arises is whether the applicant's right to a fair hearing by an independent and impartial court established by law, as enshrined in s18 (2) of the Constitution, is likely to be contravened. To put the enquiry more pertinently, whether the words 'impartial court' are to be construed so as to embrace a requirement that *the prosecution* exhibit fairness and impartiality in its treatment of the person charged with a criminal offence.
>
> In arriving at the proper meaning and content of the right guaranteed by s18 (2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the Court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."

Gubbay CJ referred to a number of authorities in the matter and continued at p1134:

> "Section 18 (2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner so as to include within its scope and ambit not only the impartiality of the decision making body but the absolute impartiality of the prosecutor himself, whose function, as an officer of the court, forms an indispensable part of the judicial process. His conduct must of necessity reflect on the impartiality or otherwise of the court. See, generally, Chaskalson *et al Constitutional Law of South Africa* at 27-18-27-19.
>
> To interpret the phrase 'impartial court' literally and restrictively would result in the

> applicant being afforded no redress at this stage. It would mean that in spite of prejudicial features in the conduct of the first respondent towards him, the applicant would have to tolerate the first respondent remaining the prosecutor at the trial. I cannot accede to the obvious injustice of such a situation.
>
> I am satisfied that the applicant has shown that his right under s18 (2) of the Constitution to a hearing by an independent and impartial court is in jeopardy if the first respondent proceeds as the prosecutor in this matter."

As to the respondent's conduct in the matter, they reach the quantitative proportions of a saga. Although the alleged offence of culpable homicide occurred in December 1992, and the alleged offences of *crimen injuria* in April, 1993, the applicant was not charged therewith until 15th September 1997, when he was arrested and taken immediately before a magistrate, where, despite the protestations of his legal representative (a Mr Drury) as to the need for arrest and remand, he was remanded on bail of Z $10,000, and the conditions of the surrender of his passport, residence within Harare, and weekly reporting. Gubbay CJ at p1131 observed:

> "Regrettably [the undisputed facts] reveal that the first respondent's behaviour has fallen far short of the customary standards of fairness and detachment demanded of a prosecutor. They instill a belief that if the case were to remain, in his hands there is, at the very least, a real risk that he will not conduct the trial with due regard to the basic rights and dignity of the applicant."

The learned Chief Justice then summarised the conduct of the respondent, which was not in dispute:-

(i) He alleged, without foundation that the applicant was responsible for the disappearance of the police docket relating to the death of the deceased.

(ii) During February 1997, when the applicant was on holiday in South Africa, the respondent informed Drury that failing the applicant's immediate return to Zimbabwe, he would seek the assistance of Interpol.

(iii) The respondent instructed the police to arrest the applicant on 15th September 1997 and take him to the Magistrate's court without advising Drury in the matter.

(iv) The respondent failed to correct allegations in the application for remand form, which he knew were untrue, and which aggravated the seriousness of

> the charges. For example, he failed to inform the Magistrate that the deceased was a competent swimmer (when the statement in the form was that he could not swim). Again, whereas the impression given in the form was that the applicant was present at the swimming pool on the evening in question, he failed to inform the Magistrate that the applicant had not in fact been there.
>
> (v) The respondent informed the Magistrate at the remand proceedings that, subsequent to February 1997, both Drury and the applicant had resisted attempts by the police to arrest the applicant at his residence or workplace, which allegation "was totally unwarranted."

Counsel for the State conceded that the subsequent arrest of the applicant was entirely unnecessary. Gubbay CJ found it difficult to credit that such arrest "was simply the result of overzealousness on the part of the first respondent." Furthermore, the respondent's brother had attended the school camps at the relevant time and was a potential witness at the trial: he had contacted the applicant and a Trustee of the body operating the school-camps, stating that the respondent was pressurising him to provide information about the camps and to involve himself, informing the Trustee that the respondent was "determined to get Smyth." Apart from such aspect, the very fact that the brother was a potential witness gave rise to a conflict of interest.

Those were the facts which led the Supreme Court to interdict the respondent from taking any further part in the preparation or presentation at the trial of the charges against the applicant. A similar interdict was also granted against a prosecutor by Roos J in the Transvaal Provincial Division in the case of *Smith v Minister of Justice and Others* (30) (unreported), decided in December, 2000, wherein the learned Judge referred to the *Smyth* case (29) and also to the cases of *Van Rensburg* (13), *Nigrini* (8) and Jija (24). Again, the behaviour of the prosecutor (the fourth respondent) was, to say the least of it, a subject for comment. During the

course of an investigation the applicant's home in Swaziland had been searched by the Swazi police. Members of the South African Police were, in the least, present at the time. The fourth respondent denied being present during the search, but admitted to being present in the applicant's home when a safe was opened and apparently witnessed the seizure of documents and exhibits, rendering her a potential witness at the trial. The judgment of Roos J reads thus at pp3/4:

> "It is further common cause that charges of conspiracy to murder the fourth respondent had been investigated against the applicant, although the respondents say that that investigation came to naught as far as the applicant is concerned.
>
> The applicant also relies upon newspaper articles referring to this investigation and photocopies of those articles are to be found at pages 33 and 34 of the paginated papers before me. The articles in the Middleburg Observer date 22 September 2000 attributed to the fourth respondent statements which clearly reflect her anger and antipathy towards the applicant. She unequivocally expresses fear and it seems from her remarks that the continued incarceration of the applicant, in the circumstances, would provide her with a measure of solace and comfort. Although the fourth respondent contends that there is no substance in the allegations and that no charge had been laid nor a docket opened against the applicant, she has chosen not to refute or to dissociate herself from the statements attributed to her in this article in the Middleburg Observer."

OTHER AUTHORITIES

Turning aside from case law for the moment, there is guidance to be found in various learned authorities placed before me by Mr Phoofolo. In a speech delivered before the New York State Bar Association on 30th January, 1976 (U.S.A *Criminal Law Bulletin* (1976) Vol 12, No3, p317) Governor Hugh Carey of New York at p319 quoted the dicta *supra* of Sutherland J in *Berger v United States* (6) and went on, at p321, to observe:

> "The combination of great power and great zeal breeds opportunity for great abuse. It is an anomaly indigenous to the American people that we are so alarmed about encroachments upon our liberties by officials with limited powers, and yet are

> generally complacent about the unbridled power and discretion exercised by the prosecutor."

Those observations may not be applicable to a prosecutor in Lesotho, inasmuch as an observer (S. Rosenblatt, "*Justice Denied*" (1971) at p93) says of the American counterpart,

> "The most powerful men in our criminal justice system are prosecutors. They were politicians first, and law-enforcement officials a distant second."

Accordingly, the Canadian model would be more appropriate. W.G. Gourlie observes ("*Role of the Prosecutor: Fair Minister of Justice With Firm Convictions,*" U.B.C. Law Review (1982) Vol 1612, 295 at pp296/297:

> "[T]he prosecutor's duty is to seek justice. Yet the ends of justice often demand of the prosecutor a firm adversarial stance. Since efficiency and expediency are germane to any viable system of justice, Crown counsel may indeed be called upon to perform in his capacity as timekeeper. Therefore the role of the prosecutor involves aspects of both a quasi-judicial and adversarial nature.
>
> At first blush these two aspects seem to be in conflict. Part and parcel of the prosecutor's function in the adversary system is to advocate to the best of his professional ability the case for the Crown. Yet, as a sort of minister of justice, he is asked to do so in an impartial manner. That is not unlike asking a professional chess player to put his heart and soul into making efficacious moves for one side, consistent with all the rules of the game, while at the same time urging that he not be concerned with its outcome. Furthermore, not only must he be indifferent to the final result and devote himself to the making of fair prosecutorial moves, but he must be *seen* to do so in order to maintain the appearance of justice."

K. Turner ("*The Role of Crown Counsel in Canadian Prosecutions*" (1962) 40 Can. B. Rev. 439 at p440) observes that

> "[a] present-day Canadian Attorney General or prosecutor is not a servant of the Crown, a servant of his party, a servant of the government, a servant of Parliament, or a servant of the rigour of human positive law. Rather, he is a servant of justice."

Emerging from the dicta in the cases and authorities over the years, the various bodies, national and international, regulating the conduct of legal practitioners, have

invariably formulated a code of conduct for prosecutors in particular. For example the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba in 1990, drew up " *Guidelines On The Role Of Prosecutors*". I select therefrom the following guidelines as being of particular relevance

> "3. Prosecutors as essential agents of administration of justice, shall at all times maintain the honour and dignity of their profession".
>
> "11. Prosecutors shall perform an *active* role in criminal proceedings, including institution of prosecution and, where *authorized by law* or *consistent with local practice*, *in the investigation of crime*, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest."
>
> "13 In the performance of their duties, prosecutors shall:
>
> (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural sexual or any other kind of discrimination;
>
> (b) Protect the public interest, act with *objectivity*, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the *advantage or disadvantage* of the suspect;
>
> (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
>
> 14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
>
> 15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where *authorized by law or consistent with local practice*, the *investigation* of such offences." (Italics added)

Again, the International Association of Prosecutors, established under the auspices of the United Nations in 1995, in April 1999 produced the "*Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*". While all of the standards are of importance, I again select the following as being of particular relevance:

"1. **Professional Conduct**

Prosecutors shall:

(a) at all times maintain the honour and dignity of their profession;

(b) always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

(c) at all times exercise the highest standards of integrity and care;

(e) strive to be, and to be seen to be, consistent, independent and impartial;

(f) always protect an accused person's right to a fair trial, and in particular ensure that evidence *favourable* to the accused is *disclosed* in accordance with the law or the *requirements of a fair trial*;"

"3. **Impartiality**

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

(a) carry out their functions impartially;

(b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

(d) have regard to all relevant circumstances, irrespective of whether they are to the *advantage or disadvantage* of the suspect;

(e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the *result disclosed*, whether that points towards the *guilt or the innocence* of the suspect; .....

4. **Role in Criminal Proceedings .....**

4.2 Prosecutors shall perform an *active* role in criminal proceedings as follows:

(a) where authorised by *law or practice* to *participate in the investigation of crime*, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

(b) when *supervising the investigation* of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;.....

(d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence *reasonably believed to be reliable and admissible*, and will not continue with a prosecution in the absence of such evidence; .....

4.3 Prosecutors shall furthermore;

(a) preserve professional confidentiality; .....

(d) *disclose* to the accused relevant *prejudicial* and *beneficial* information as soon as reasonably possible, in accordance with the law or the *requirements of a fair* trial;....." (Italics added)

In summary, perhaps the qualities necessary in a prosecutor are best and succinctly and penetratingly stated by the Attorney General of the United States, Robert H. Jackson, in an address to an Attorney's conference in 1940. Certainly his challenging words spring readily to mind. I reproduce them from an article, "*Criminal Justice: A Noble Profession*", by District Attorney E. Michael McCann , Chairman of the Criminal Justice Section, American Bar Association ("*Criminal Justice*", Journal of the Association, Winter 1995, Vol 9 No.4, p51 at pp51/52):

> "The qualities of a good prosecutor are as elusive and impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

BIAS: AUTHORITIES

The accused maintains that the two prosecutors are biassed and lack the impartiality and objectivity expected of a prosecutor. It is new to my experience to adjudge the bias or otherwise of a prosecutor, rather than that of a judicial officer. Nonetheless, Mr Dickson and Miss Hemraj have referred me to a number of leading authorities, that is, on judicial bias, to which I now turn. The applicable test has been the subject of relatively recent modification by the Constitutional Court and the Supreme Court of Appeal of South Africa, in the respective cases of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("the SARFU case") (31) and *S v Roberts* (32). The latter case was decided only three months after the former, when possibly the report of the SARFU (31) case was not available. In any event, there is no reference in the *Roberts* case (32) to the SARFU case (31). In *Roberts* (32) Howie JA (Vivier JA and Mpati AJA concurring)

at pp922/996 considered the authorities, in particular the Appellate Division case of *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* (33), wherein "it was finally laid down" at p693 at I to J,

> "that in our law the existence of a *reasonable suspicion* of bias satisfies the test, and that an apprehension of a *real likelihood* that the decision maker will be biased is not a prerequisite for disqualifying bias." (Italics added)

Ultimately Howie JA concluded at pp924/925 that the requirements of the test were that

> "(1) There must be a suspicion that the judicial officer might, not would, be biased.
> (2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
> (3) The suspicion must be based on reasonable grounds." and
> "(4) The suspicion is one which the reasonable person referred to would, not might, have."

The judgment in the *SARFU* case (31) was that of the Full Court (ten members). The Court conducted an exhaustive research of the authorities throughout the Commonwealth and the United States of America. In particular the Court at p748 para. 38 agreed with the observation of the High Court of Australia in the case of *Livesey v The New South Wales Bar Association* (34) at pp293/294 that it preferred the use of the word, "apprehension", rather than, "suspicion", (of bias) "because it sometimes conveys unintended nuances of meaning". The Constitutional Court observed:

> "Because of the inappropriate connotations which might flow from the use of the word "suspicion" in this context, we agree and share this preference for "apprehensions of bias" rather than "suspicion of bias."

The Court at p748 para. 40 adopted the dicta of Cory J in the Supreme Court of Canada case *R v S (RD)* (35) at para 117 namely that

> "Courts have rightly recognized that there is a presumption that Judges will carry out

> their oath of office ... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high."

The Constitutional Court also quoted an extract from the separately concurring judgment of L'Heureux - Dube and McLachlin JJ in *R v S (RD)* (35) at para32, in which the learned Supreme Court Judges quoted the following statement by Blackstone at p361 of his *Commentaries on the Laws of England* III:

> "The law will not suppose possibility of bias in a Judge, who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea."

The Constitutional Court also observed at p749 that "[a]bsolute neutrality on the part of a judicial officer can hardly if ever be achieved," quoting the words of Justice Benjamin N Cardozo in *The Nature of the Judicial Process* (1921) at pp12/13 and 167 (quoted also by L'Heureux - Dube and McLachlin JJ in *R v S (RD)* (35) at para 34) which I reproduce:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.
>
> .....
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge."

The Constitutional Court at p750 then quoted the following dicta of Cory J on the point in *R v S (RD)* (35) at para 119:

> "It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important

perspective to the difficult task of judging."

and again the dicta of L'Heureux - Dube and McLachlin JJ in *R v S (RD)* (35) at paras 38/39:

> "[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however; the reasonable person does demand that judges achieve impartiality in their judging.
>
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function."

The Constitutional Court observed at p751 para45 that the test adopted by the Supreme Court of Appeal was substantially the same as that adopted in Canada for the past two decades, contained in a dissenting judgment by De Grandprè J in *Committee for Justice and Liberty et al v National Energy Board* (36) at p735, that is, that

> "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information .... [The] test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through conclude'."

The judgment of the Constitutional Court continued at p751 para 45:

> "In *R v S (RD)* [35] Cory J, after referring to that passage pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet* [37] [at p588c (all ER) and 284 E (WLR)]:
>
> > "Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*, [38] [in which the test applied was that of "a real danger that the Judge was biased"], or modified it so as to make the relevant test the question whether the events in

> question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public,that the judge was not impartial.""

Those dicta were reproduced by Cameron AJ in delivering his judgment in the Constitutional Court (in which eight other members of the Court concurred) in the case of *South African Commercial Catering & Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (39) ("the SACCAWU case") at p713 para 11. The learned Judge continued:

> "[12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point *presumes* that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment [31], this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the *onus* of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted.
>
> [13] The second in-built aspect of the test is that 'absolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast of judicial impartiality - a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, 'a mind open to persuasion by the evidence and the submissions of counsel'; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that:
>
> > 'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals.... Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants ro the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'
>
> [14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself

must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu,* where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

> 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'

[16] The 'double' unreasonableness requirement also highlights the fact that *mere apprehensiveness* on the part of a litigant that a Judge will be biased - even *a strongly and honestly felt anxiety - is not enough.* The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised."(Italics added)

The relevant facts of the *SACCAWU* case (39) were that two members of an appellate court, the Labour Appeal Court, who had sat on a previous appeal alleged to involve a similarity of issues and of findings of credibility, declined to recuse themselves. The appeal to the Constitutional Court was dismissed. In their dissenting judgment Makgoro J and Sachs J would have allowed the appeal, observing at p726 of the judgment of Cameron AJ,

> "We agree in broad terms with the way in which he has outlined the test for recusal, but believe that the test as formulated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [31] requires that

> more weight be given than he does to the perception of the lay litigant and her or his right to a fair hearing. We accordingly note our dissent from his judgment."

All of that authority relates to judicial bias. Mr Phoofolo referred me to Amnesty International's *Fair Trials Manual* (Amnesty International Publications 1998) in the matter. I can find no assistance therein, however. While the *Manual* deals extensively with the concept of "a competent independent and impartial tribunal," it is clear that it deals with those qualities as they affect the tribunal itself and not the officers thereof. As to the authority on judicial bias placed before me by Mr Dickson and Miss Hemraj, to apply it to the role of a prosecutor requires some qualification. Firstly, does the *presumption* of judicial impartiality apply to a prosecutor? Legal practitioners, as officers of the Court, are sworn to duty, as much as the Judge. He expects the same standards of them, as they of him. If there is no formal presumption in the matter, then in the very least a Judge must surely assume that the Court's officers will be as impartial as he.

Secondly, in the context of a criminal trial the word "bias", if it does not involve a judgment, surely connotes some form of determination, or in the least a mental reservation. Clearly a prosecutor is inevitably involved in some form of a determination necessary to found the very institution of criminal proceedings. He is enjoined by the *Standards* of the International Association of Prosecutors to proceed against an accused "only when a case is well-founded upon evidence reasonably believed to be reliable and admissible." Inevitably, therefore, the prosecutor decides whether or not there is, what is generally termed, a *prima facie* case. That does not preclude a prosecutor from forming the opinion, in any case, that the evidence is e.g.

well-nigh overwhelming. Whatever the strength of the evidence, and whatever the corresponding firmness of the prosecutor's opinion, the point is that, unlike the judicial officer, he is called upon to form an opinion in the matter: the judicial officer on the other hand must keep an open mind, until judgment.

The word "bias" is defined in *The Concise Oxford Dictionary*, 7 Ed as meaning *inter alia*

> "1. (Bowls). Lopsided form of a bowl, its oblique course. 2. Inclination, predisposition (towards); influence;"

Whereas a judicial officer should not entertain a mental "inclination" or "predisposition" towards the guilt of an accused, I cannot see that it would be wrong or untoward for a prosecutor to do so. At the same time, a prosecutor must accept that he may well be wrong in the matter and that ultimately the Court must be the arbiter: in other words the prosecutor must, despite the firmness of his personal conviction, also keep an open mind as to the accused's guilt or innocence. His difficulty in the matter, as W. G. Gourlie observed *supra,* is apparent, to the extent indeed that, it seems to me that the parameters of any licence or discretion he may have, are only limited by the aspect of *prejudice.*

Prejudice arises, for example, where the prosecutor has launched a prosecution upon patently insufficient evidence. Again, it arises where, although a *prima facie* case clearly exists, the prosecutor is nonetheless not content simply to do his duty and lead his case, but seeks to influence and to foist his opinion in the matter upon the

Court or the jury, as the case may be. In brief, while a prosecutor may inevitably entertain a 'natural' bias (in the sense of the first dictionary meaning *supra*) towards the guilt of an accused, he crosses that invisible line when prejudice arises. When one speaks of bias in respect of a prosecutor, therefore, in reality one is alleging prejudice, and it is in that sense and, I consider, only in that sense that the authorities on judicial bias are relevant.

GROUNDS FOR THE APPLICATION

Representation of LHDA

I have earlier reproduced the accused's summary of the grounds for his application. The first of those is the involvement of both prosecutors with LHDA. To say that both Counsel represented the "complainant" in these proceedings constitutes a simplistic approach. While LHDA is a legal *persona,* I cannot see that it is the "complainant" in this case. The 'complaint' or charge was laid by the Crown and the fact that the Crown had indicated that a number of LHDA officers will be called to give evidence for the Crown, does not transform the LHDA into a 'complainant'.

There can be no doubt, of course, on the papers before me that as late as 7th July, 1999, the Chief Executive Officer of LHDA was being briefed as to the progress of the criminal proceedings. Mr Penzhorn's faxed communication of the latter date, does not indicate who had drafted the charge sheet at that stage, although it is fair to assume that he had amended the figures therein. The Director's letter of 27th July addressed to the Prime Minister, indicated, as I have said that the accused had already appeared in court at that stage, on holding charges of twelve counts of bribery, two

of fraud and one of perjury. The particular charge sheet is not before me, but in view of the Director's letter in the matter and his appearance in court the following day, 28th July, 1999. I assume that, if he had not drafted the charge sheet, then in the least he had approved of it and signed it.

In any event, there can be no doubt that no later than 3rd August, when the Director wrote to Mr Moiloa, a decision had been made to brief Mr Penzhorn: the letter of Mr Marumo to Webber Newdigate on 9th December, 1999 indicates (in the fourth paragraph thereof) that Mr Penzhorn had received a formal letter of appointment from the Director on 8th November, though Mr Nel's letter of 28th October indicates that Mr Penzhorn had "been afforded a delegation" at that stage, no doubt on the authority of the Director's letter of 3rd August addressed to the instructing Attorneys.

What is significant in Mr Marumo's letter, however, is that it indicates that no later than 3rd November Mr Penzhorn had drawn attention to his position as Counsel for the Crown as well as LHDA and presumably "the need to define" such relationship. What is more significant is that Mr Marumo's letter makes it clear that the services of Webber Newdigate would only be utilized by LHDA by way of specific assignment. There is no mention of retaining the services of Mr Penzhorn or Mr Woker: on the contrary the letter makes it plain that Webber Newdigate could not brief *any* Counsel without the prior agreement of LHDA. In brief, no later than 9th December 1999, Mr Penzhorn and Mr Woker had ceased to act for LHDA. I cannot then see how it can be said that they represent the 'complainant' or "are contractually bound to serve the interests of the complainant, LHDA", in these

proceedings.

I cannot for that matter see that their prior representation of LHDA in the civil trial would *per se* debar them from subsequently representing the Crown in a criminal prosecution, even where two of the counts (no17 and 18, for fraud) arose out of two of the claims for damages in the civil trial. Indeed, as to those two counts, I could see no objection to Counsel, who represented a plaintiff in a civil action for say, damages for assault, subsequently representing the plaintiff complainant in a private prosecution for such assault: I can then see no objection in principle if the Crown were to brief such Counsel in a public prosecution for such offence. It would be a different matter, of course, where a judicial officer, as final arbiter, is concerned: the *SACCAWU* case (39) illustrates the difficulties which may arise. In the case of a prosecutor, however, his familiarity with the case, as I see it, serves but to enhance his ability to deal efficiently with the criminal prosecution. It serves also perhaps to fortify his opinion as to an accused's guilt, but I cannot see that that would give rise to a reasonable apprehension of prejudice, in a reasonable accused, or that he would not thereby receive a fair trial: it is obvious to an accused that, in any event, a prosecutor would not have initiated a prosecution unless he entertained some form of opinion as to the accused's guilt. Whilst a prosecutor should not conduct himself so as, in the eyes of an accused, to project a malign character, I cannot see that, under the adversarial system, he is required to impress himself upon an accused as a benign influence.

Potential Witnesses

Because the two prosecutors had represented LHDA at the civil trial, the

accused maintains that they are potential witnesses in these proceedings. This submission, I believe, arose out of the fact that initially a nineteenth count, for perjury, had been framed against the accused, based on the allegation that in giving evidence at the civil trial, the accused had falsely maintained that he had no foreign bank account. The count of perjury has been withdrawn. Secondly, the accused's evidence in the civil trial as to such aspect need not necessarily be proved *viva voce.*

Investigators

The accused also maintains that the prosecutors are potential witnesses as they have become investigators in the case. The first and minor basis for such allegation is that they have settled witness' statements. If that were the case, then many an Advocate would be regarded as an investigator. As I see it, the settling of witness' statements and affidavits is part of the routine function of an Advocate.

The accused describes the prosecutors as investigators because of their involvement with the Swiss authorities. It will be seen from the letter of the Director of 25th June 1999 that as early as August 1997 he had made a request for "mutual legal assistance" and indeed that he had granted a "delegation" to Mr Penzhorn, and Mr Moiloa of Webber Newdigate in the matter. In this respect, the Supplementary Application for Mutual Legal Assistance of the 21st February 2000, which had been drafted by Mr Penzhorn, signed by the Director and addressed to the Federal Office for Police Matters, Section for International Legal Assistance, in Berne and the Examining Magistrate's Office in Zurich, referred to previous applications on 25th August, 1997, 21st October 1997 and 5th November 1997. The Supplementary Applications were made under the provisions of the Federal Act on Mutual

Assistance in Criminal Matters of Switzerland.

The application of 21st February, 2000, a copy of which was apparently supplied to the accused by the relevant Swiss authorities, is, as indicated, a lengthy and detailed document of 31 pages. The document indicates that the writer is in no doubt that the accused was involved in "fraudulent and/or corrupt activities" and, in particular, bribery, to which the accused raises objection. But the document was issued under the hand of the Director and must be taken as representing the opinion of the Crown in the matter. Even if it also represents Mr Penzhorn's opinion in the matter, it was addressed to foreign authorities seeking their assistance, and clearly it was necessary to establish a basis for seeking such assistance, namely the Crown's opinion or suspicions in the matter. I consider that a police docket might well contain statements and opinions far more emphatic than those contained in the Supplementary Application addressed to the Swiss Authorities, and can see no objection thereto.

As for the nature of the 'investigation' carried out by Mr Penzhorn, the Supplementary Application to the Swiss authorities reads thus at para 2.2.:

> "2.2 These documents [previously received from the Swiss authorities] have been analysed on behalf of the acting Director of Public Prosecutions ("the DPP") by the forensic division of accountants Price Waterhouse Coopers. It is largely on the basis of the report by Price Water Coopers that criminal proceedings have now been instituted against Mr Sole as well as a number of contractors and consultants. In order however for Price Waterhouse Coopers to complete their report additional information is required. See in this regard the covering letter to Price Waterhouse Coopers' report dated 23 November 1999 which is annexed hereto (as annexure "A")."

It is apparent therefrom that the forensic investigation was conducted by a firm

of Accountants, Price Waterhouse Coopers. As for the role of Mr Penzhorn and Mr Woker in the matter, Mr Dickson points out that their function was to draft and pursue the applications to the Swiss authorities under the relevant Swiss legislation, to attend before the Examining Magistrate in Zurich, to represent the Director in an appeal by the bank account holders to the High Court and a further appeal to the Federal Court of Switzerland.

The Director in an opposing affidavit has deposed that the investigations overseas were "left to the investigating authorities in Switzerland, France and Sweden"; a visit to Sweden involved consultations with potential witnesses and legal representatives of one of the other accused initially charged. The Director visited Switzerland with Mr Penzhorn and Mr Woker and Deputy Commissioner Matsoso for the purpose of attending the taking of depositions before the Examining Magistrate in Zurich, to which the legal representative of the accused in Switzerland had been invited but did not attend. As I see it, the various functions carried out abroad required the professional services of practitioners with extensive experience.

The Director in his affidavit deposes that Mr Penzhorn and Mr Woker, due to their detailed knowledge of the case, were in a position to direct and did direct investigations on particular issues and also settled witnesses' statements. He submits that in matters as complex as the present trial, prosecutors play a more active role in investigations. Such role would appear to be recognized in the UN "*Guidelines On The Role Of Prosecutors*", reproduced *supra*, guideline 11 of which reads:

> "11. Prosecutors shall perform an *active* role in criminal proceedings, including institution of prosecution and, where authorized by law or *consistent with*

> *local practice*, in the *investigation of crime*, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest". (Italics added)

Again, the *Standards* of the International Association of Prosecutors reproduced *supra*, in para 4.2 thereof read:

> "Prosecutors shall perform an *active* role in criminal proceedings as follows:
> (a) where authorised by law or *practice* to *participate in the investigation of crime*, or to *exercise authority over the police or other investigators*, they will do so objectively, impartially and professionally;
> (b) when *supervising the investigation* of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;" (Italics added)

In some countries indeed the task of investigation is very often assigned to a Judge. In the case of *Fey v Austria* (40), decided by the European Court of Human Rights in 1993, the applicant was charged with defrauding his landlady. An "investigating Judge", Judge Kohlegger, conducted an investigation which included a study of the case file (which included the accused's criminal record and a record of interrogation of the accused by another investigating Judge), an interrogation of the complainant, a further interrogation of the accused (by another investigating Judge) and telephone calls to a bank and insurance companies in order to ascertain material information concerning the accused. Judge Kohlegger subsequently tried the accused and found him guilty of one charge of fraud (acquitting him of another), the judgment being "founded *inter alia* on [the complainant's] testimony as well as the information obtained from the bank and the insurance companies."

The applicant maintained that he had not received a fair hearing by an impartial tribunal within the meaning of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed on 4th November

1950, taking effect on 3rd September, 1953) which was born of the Council of Europe. The Convention was the forerunner of many a Bill of Rights contained in what I term the "Malborough House" model Constitutions, which emerged throughout the Commonwealth around the 1960s. In particular Article 6 of the Convention is the forerunner of many an Article throughout the Commonwealth dealing with the right to a fair trial - see section 12 of the Constitution of Lesotho and sections 9 and 12 of the 1965 and 1966 Constitutions respectively. Article 6 (1) of the Convention provides that

> "[i]n the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal."

In the *Fey Case* (40) the European Court of Human Rights observed at p12 para 28:

> "The existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (ibid., § 49).
>
> 29. As to the subjective test, the applicant did not dispute the personal impartiality of Judge Kohlegger.
>
> 30. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, and above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is determinant is whether this fear can be held to be *objectively justified* (ibid., § 51).
>
> In this regard, the Court has previously held that the mere fact that a judge had also *made pre-trial decisions* in the case *cannot be taken as in itself justifying fears as to his impartiality* (see the *Hauschildt v Denmark* judgment [41] at p22, § 50).

> Although this statement referred to systems like the Danish, where investigation and prosecution are exclusively the domain of the police and the prosecution, it must also be of some relevance to systems of an inquisitorial character, such as the Austrian. What matters is the *extent and nature* of the pre-trial measures taken by the judge (see, *mutatis mutandis*, the *De Cubber v Belgium* judgment [42] at pp15-16, § § 29-30, and the ... *Thorgeir Thorgeirson* judgment [43], at p24, § 53)." (Italics added)

The Court observed at para 32 that the investigating Judge was engaged pre-trial in "collecting simple information", which measures were "of a preparatory character". The Court went on to observe thus:

> "34 It was not until the hearing on 24 March 1988 that Judge Kohlegger was faced with the applicant for the first time; she then heard both him and the landlady and all the evidence in the case was presented.... In the Court's view, it was only at that stage that she was in a position to form any opinion as to the applicant's guilt. It does not appear that the various measures which she had taken prior to the trial were such as could have led her to reach a preconceived view on the merits. In this regard, it should be noted that she did acquit Mr Fey on one of the two counts ....
>
> 35. Thus, the extent and nature of the pre-trial measures taken by the District Court judge are clearly distinguishable from those that were dealt with in the above-mentioned *De Cubber* judgment [42]. In that case the Court concluded that the impartiality of the tribunal in question had been capable of appearing to the applicant to be open to doubt, bearing in mind, *inter alia*, the fact that one of its members had carried out extensive investigations in the case, including numerous interrogations of the accused (see pp15-16, § § 29-30, of the judgment).
>
> 36. In the light of the foregoing, the Court does not find that such fears as the applicant may have had as to the District Court judge's impartiality can be held to have been objectively justified. Accordingly, there has been no violation of Article 6 §1 in the present case."

Later in the same year (1993) the European Court Of Human Rights decided the case of *Nortier v The Netherlands* (44). That was a juvenile case where the juvenile, aged 15 years, shortly after his release from a youth custody centre after serving a custodial sentence for rape, was again arrested on suspicion of attempted rape, and confessed to the police. He again confessed to a Juvenile Judge, Judge

Meulenbroek, sitting as an investigating Judge. The latter ordered the juvenile's detention on remand (extended on three occasions) and a preliminary investigation involving a psychiatric report. The latter investigation, involving the questioning of the prosecution witnesses, was conducted by "a substitute juvenile Judge." The trial was set down before Judge Meulenbroek, who rejected an application to recuse himself on the basis that "he had taken pre-trial decisions concerning the applicant's detention on remand." Upon trial, the juvenile again admitted the offence, which was held to be proven. The Judge ordered the committal of the juvenile to an institution for the psychiatric treatment of juvenile offenders, and subsequently, upon a biennial review, extended such detention to a total, since the date of arrest, of three years and ten months.

The European Court observed at pp 9/11 that under the Code of Criminal Procedure for The Netherlands a more informal procedure was provided for juveniles than for adults, that for juveniles having "primarily a pedagogical purpose, the interests of the minor being borne in mind at all times", and in particular that "it is conducive to the protection of the juvenile if the juvenile Judge is consulted beforehand on the subject of the desirability of criminal prosecution, especially if he already knows the minor concerned". The Code provided indeed that the Juvenile Judge is "responsible for the preliminary investigation". The Court also observed that there had been criticism of the system 'for a long time". The Court continued at p15, para 33:

> "33. The Court recalls that what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be *objectively justified.*
>
> The mere fact that Juvenile Judge Meulenbroek also made pre-trial decisions,

> including decisions relating to detention on remand, cannot be taken as in itself justifying fears as to his impartiality; what matters is the *scope and nature* of these decisions.
>
> 34. Apart from his decisions relating to the applicant's detention on remand, Juvenile Judge Meulenbroek made no other pre-trial decisions than the one allowing the application made by the prosecution for a psychiatric examination of the applicant, which was not contested by the latter. He made no other use of his powers as investigating Judge." (Italics added)

Ultimately the Court at p16 held unanimously that there had not been a violation of Article 6 (1) of the Convention. Article 268 of the Code of Criminal Procedure of the Netherlands (unlike that of Austria, it seems) debarred an Investigating Judge from taking part in the subsequent trial, but that provision did not apply in juvenile procedure, so that the Court's unanimous decision in the matter is perhaps not surprising. In the *Fey Case* (40) the inquisitorial system applied, which may well explain a decision (by a majority of seven to two Judges) which might come as some surprise to the proponent of the adversarial system. In the case of *Thorgeir Thorgeirson v Iceland* (43) decided by the European Court of Human Rights in 1992, to which the Court referred in the *Fey* Case (40), the Icelandic Code of Criminal Procedure provided for a dual adversarial or inquisitorial system, apparently upon the determination of the Public Prosecutor, depending upon the applicable punishment and also the difficulty, or significance or importance of the case. Where the adversarial procedure did not apply, the prosecution did not appear, unless the Public Prosecutor decided otherwise. The judgment of the Court indicates, at para 37 that

> "[w]hen the prosecution does not appear the judge must, in accordance with the general rule contained in Article 75, *investigate ex officio and independently*, all the facts of and issues in the case, even if the prosecution *has already investigated them* and *prepared reports thereon*. The Judge must also consider all factors relevant to the guilt or innocence of the accused and all mitigating or aggravating circumstances. *Once the investigation is completed* and the defendant, or his counsel, has submitted his evidence and written observations, the judge determines the case on the basis of

all the evidence." (Italics added)

The Court observed that the Reykjavik Criminal Court had held twelve sittings, only six of which were attended by the prosecution. The applicant, who was ultimately found guilty of [criminal] defamation of the police, maintained that he had not received a fair trial, as the Judge had taken on the role of a representative of the prosecution. The Court observed, however, that "the Public Prosecutor was, with one exception, present at all the sittings at which evidence was submitted and witnesses heard", the exception being a sitting "essentially devoted to the showing of a video-taped television programme". The Court concluded at p25, paras 53/54:

> "53. It can be seen from the foregoing that, at those sittings at which the Public Prosecutor was absent, the Reykjavik Criminal Court was not called upon to conduct any investigation into the merits of the case, let alone to assume any functions which might have been fulfilled by the prosecutor had he been present. In these circumstances, the Court does not consider that such fears as the applicant may have had, on account of the prosecutor's absence, as regards the Reykjavik Court's lack of impartiality can be held to be justified.
>
> 54. Accordingly, there has been no violation of Article 6 (1)."

The Court's decision in the matter was unanimous. Considering that at the very first sitting of the court *a quo,* the Judge, in the absence of the prosecution, asked the applicant a number of material questions, and subsequently declined to recuse himself, the decision of the European Court is best explained by the particular legislation, which in part incorporated the inquisitorial system.

All of which tends to show that, at least in some European countries, where the inquisitorial system is embraced, the adoption of an investigative role by a Judge seems to be commonplace. While under our adversarial system that might reflect

upon the Court's impartiality, I find it difficult to appreciate that the execution of investigative tasks by a *prosecutor*, who has charge over the investigation, would reflect upon that impartiality and in the result upon the fairness of the trial.

To say that a prosecutor should not be an investigator is of course entirely appropriate where the investigation renders the prosecutor a potential witness. In the usual criminal case coming before the courts, the Investigating Officer, as he is known, invariably attends court as a witness, for example to produce a warn and caution statement made before him by the accused, or to produce, say, a firearm or other objects surrendered by or found in the possession of the accused, or to give evidence of a search or of a pointing out by the accused. These are but examples; the point is that the investigator has became so physically embroiled in the investigation as to render him a potential witness and ergo unfit to prosecute. Examples can be found in the cases of *Nakedie* (7), where the prosecutor had conducted the raid upon the accused, who were found in possession of illegal beer, or in *Nigrini* (8) where the accused was charged with attempted extortion in respect of the prosecutor himself, or in *Smith* (30) where the prosecutor was present during a search, and witnessed the seizure of exhibits from the accused.

In all such cases, the essential objection was not that the prosecutors were investigators as such, but that they were, because of their physical involvement, potential *witnesses*, to the extent indeed of tendering exhibits. Again, those cases were relatively elementary and uncomplicated cases, where the investigation was a far cry from that in a complex commercial case, such as the present, calling for a sophisticated investigation, and where, as I have observed, the professional services

of experienced practitioners are required: indeed that would seem to be the present day commonplace practice. I cannot see that examining bank accounts, if that is the case, which the Crown seeks to produce through the medium of bank officials, settling witnesses' statements, and appearing before an Examining Magistrate, much less representing the Crown at two appeal proceedings, could render the two prosecutors in this case potential witnesses. In brief, I cannot see that the activities of the prosecutors could objectively affect their impartiality or the fairness of the accused's trial.

Newspaper Articles

There is then the aspect of the two newspaper articles. As to the first of those articles, while the word "allegedly" is used in the second paragraph thereof, considering the two headings to the article and the context of the first and second paragraphs, I consider that the reader is left with the impression that the accused is guilty in the least of some wrong-doing, on a massive scale. Mr Penzhorn's opposing affidavit reads at para 21 thereof:

> "I am not the author of the article in the Sunday Times annexed as "MES5." Neither does the comment therein emanate from me. The reporter of the article, Ms Rickard, asked me to make available to her certain documents relating to the pending trial. These included, as far as I can recollect, the Indictment, requests for further particulars by various accused, the findings of the disciplinary enquiry and the judgment in the civil trial. These I point out are all documents which are filed with this Honourable Court. As to any comment on the pending trial I referred Ms Rickard to the Attorney-General."

I wish to say as little as possible about the newspaper article, printed and published in another country, but to say the least of it, while it contains a detailed, accurate and succinct report of the case, the general effect of the headings and opening paragraphs thereof, in the context of this trial, is unfortunate. While I

appreciate that the public have the right of access to information, an accused also has the right to a fair trial. I can well appreciate that the public would wish to be and are entitled to be informed of the progress of this trial. Nonetheless, the *sub judice* rule is still a pillar of the common law, in which respect it may not be appreciated that some South African newspapers are circulated within Lesotho.

For my part I observe, to quote Lord Parker CJ in *R v Duffy* (45) at p895 B, that a Judge, "though in no sense superhuman . . . . has by his training no difficulty in putting out of his mind matters which are not evidence in the case." As for the second newspaper article, that appearing on 19th June, 2000, Mr Penzhorn's affidavit continues thus:

> "22. Neither am I the author of the article in The Star referred to in paragraph 23 of the Founding Affidavit. Any description of my role as investigator must be a perception of the author and was not conveyed to him by me."

While the third paragraph of the article quoted what Mr Penzhorn said to the journalist, it will be seen therefrom that Mr Penzhorn referred to an "enquiry" and did not describe himself as an "investigator" Further, the Director in his affidavit has deposed thus:

> "20.1 My office has been in contact with South African authorities about possible South African links to what has been discovered through the bank records in Switzerland. Mr Penzhorn and Mr Woker have assisted me in this.
>
> 20.2 The suggestion that Mr Penzhorn and Mr Woker in doing so acted as investigators is unfounded. Also, the allegation that Mr Penzhorn has another agenda is both speculative and unwarranted.
>
> 20.3 I also wish to point out that this contact with the South Africans is largely unrelated to the present case against the Accused."

Suffice it to say that Mr Penzhorn's affidavit in both matters cannot be gainsaid, and in any event for the reasons already stated, I cannot see that the

description of either Prosecutor as "investigator", or the reference to "their detective work", could in any way affect their ostensible impartiality or the fairness of these proceedings. To return to the first article however, while it can in no way affect the impartiality of the Court, how does it reflect upon the impartiality of Mr Penzhorn? I cannot see that the journalist's conclusions in the matter can be attributed to him. In other words, I am satisfied that he did not voice his opinion as to the accused's guilt or innocence to the journalist. Nonetheless, the resultant article serves to illustrate the basis underlying the undesirability, indeed inadvisability of granting interviews to the media concerning matters *sub judice*.

The section of Vol 14 (Replacement) of *The Law of South Africa* ("LAWSA"), dealing with *Advocates* reads thus at p281, para 279:

> "The extensive rules relating to publication, broadcasting, lectures, television appearances, interviews and photographs were repealed in 1991. This does not mean, however, that counsel now has carte blanche in those matters. The general rule against touting applies. Furthermore counsel must act honourably in all situations and not bring the profession, bar or administration of justice into disrepute.
>
> Members of the bar should not write articles in non-legal publications with regard to pending cases or cases where the time of appeal has not expired [Bar rule 4.18.3].
>
> It is contrary to professional etiquette for counsel to engage in newspaper correspondence or to issue press statements on the subject of cases in which they are or have been themselves concerned as counsel [Bar rules 4.18.3, 4.21.1].
>
> It is undesirable for a member to express an opinion in the press by letter, article, interview or otherwise on any matter which is still pending in the courts. [Bar rule 4.18.3]."

The last three paragraphs above, contained in the Replacement volume, were repeated verbatim from the original work (Vol 14, p243, para 251) introduced in 1981. The second newspaper article above indicates that Mr Penzhorn made a "press

statement" to the journalist, the reference to "new information", in its context, indicating that the statement concerned the present case. As for the first article, while I am satisfied that Mr Penzhorn did not express any opinion in the matter, it might well be said that the supply to the journalist of the various documents, particularly the indictment, containing, at that stage, the Crown's summary of substantial facts, in itself constituted a form of press statement. In any event, it seems to me that if Bar rule 4.18.3 has not been contravened in letter it has been contravened in spirit. The result, again, is unfortunate.

The necessity to abide not simply by professional etiquette, but by the *sub judice* rule, points again to the wisdom of the observation that, where comment is requested by the media, the best comment is simply "no comment". That I suppose constitutes judgmental hindsight. It might have helped matters had Mr Penzhorn, at a very early stage, indicated that he disassociated himself from the first article in particular. As matters stand, I can only regard his role in the matter as warranting the Court's disapproval. Weighed in the balance, however, I cannot see that that in turn would warrant the remedy sought by the accused.

Bias: Disclosure

The accused maintains that both prosecutors are biassed, that is, prejudiced against him. I can find no evidence thereof. Certainly it is not apparent in the conduct of both Counsel before the Court: indeed on more than one occasion Mr Phoofolo has expressed his appreciation of the cooperation displayed by them. I am informed that all documents on the Crown docket have been supplied to the accused. The Crown has made no application to withhold any document. A reply, constituting

163 paragraphs, has been made to the accused's request for further particulars, constituting 91 paragraphs. The only document not supplied by the Crown was an extract from the civil record: the Court ruled that there was no need to supply such extract, as the accused was already in possession of the whole record, having supplied the Court of Appeal with a number of copies thereof.

Earlier on in this ruling I placed much emphasis on the prosecution's duty of disclosure. I cannot but see that that duty has been squarely met. The present proceedings are by way of summary trial without a preparatory examination, under the provisions of section 144 of the Code. Indeed, in the Republic of South Africa, as Jones J held in the *Fani* case (27) preparatory examinations "are virtually never held". Section 144 (3) of the Criminal Procedure Act, 1977, to which I referred earlier, then provides that in the case of a summary trial

> "the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him....."

There is no such provision in section 144 of the Code. Nonetheless, the Crown supplied the accused in this case with a statement of substantial facts. There was no statutory necessity to do so, nor perhaps any practical necessity where the contents of the police docket had been fully supplied. The statement supplied formed part of the indictment: it was held in the case of *S v Van Vuuren* (46) at p21, however, that it is not an integral part of the indictment. Nevertheless, it is clear that in supplying the accused with such statement, both Counsel acted in good faith, in order to better "inform the accused of the allegations against him."

Conduct of Counsel

It is claimed by the accused that the initial LHDA disciplinary hearing was protracted and acrimonious. No evidence has been adduced to suggest that the latter was the case. As to the allegations, based on instructions, contained in the accused's Counsel's letter of 28th October, 1999, I respectfully observe that they largely adhere to a passage contained in the judgment of Gubbay CJ in *Smyth v Ushewokunze* (29) at p1130 at H - I (and see the headnote at p1126 at F - G) reproduced supra. As to Mr Penzhorn's alleged "desire to see [the accused] behind bars", there is simply no evidence of such before me: indeed the Court was informed that at one stage the accused had not been complying with all the conditions of his bail, when Mr Penzhorn simply advised the Crown that this matter be brought to the accused's attention. The prosecutors have not sought at any time to foist their opinion upon the Court. There is nothing to indicate any lack of human kindness on their part: there is no evidence before me indeed of any "hard blows" been struck by them, much less any "foul ones."

The application of the phraseology in *Smyth v Ushewokunze* (29) is indicative of the overriding reliance placed by the accused upon that authority. But it is clearly distinguishable. The behaviour of the prosecutor in that case was little short of outrageous, to the extent indeed that I doubt whether he could thereafter be trusted with any prosecution, much less the one before the Court. Further, the Supreme Court of Zimbabwe was concerned with a prosecution before another court, a lower court, and not, say, with the conduct of Counsel before the Supreme Court. The behaviour of the prosecutor in *Berger v United States* (6) was equally improper, but there it seems that the situation, which was allowed to develop by, in effect, judicial

inaction, might well have been saved, at an early stage, by "stern rebuke and repressive measures." In *Ushewokunze* (29) the Supreme could not exercise day-to-day control over a prosecutor in a lower court, and in any event the Supreme Court no doubt considered that the point of no return had long been reached. In particular I consider that the *Ushewokunze* (29) judgment should not be regarded as an open sesame by accused who may fear the efficiency of, or even dislike a prosecutor. In the milieu of a criminal trial there may well be occasions calling for the rebuke of a prosecutor, which nonetheless do not warrant the extreme sanction of calling upon the Crown to replace him. Apart from Constitutional interpretation, I do not see that the judgment in *Ushewokunze* (29) introduced anything new in principle: it is simply a case where the extreme sanction of interdict was imposed to meet an extreme situation.

CONCLUSION

In brief, it is a truism to say that every Judge (and judicial official) is master in his own court. While equally with the Judge, Counsel, as officers of the Court, must execute their duties fairly and impartially, it is the Judge who is arbiter of, and must control, the behaviour of its officers. As Gubbay CJ observed in *Ushewokunze* (31) "[the prosecutor's] conduct must of necessity reflect on the impartiality or otherwise of the court". Ultimately it is the Judge who is arbiter of the innocence or guilt of the accused. Accordingly, in his control of the behaviour of the officers, and otherwise in his conduct of the trial, it is the Judge who is the ultimate repository of the fairness of the trial.

The accused may not then seek to change prosecutors because they are

completely versed in and familiar with the facts of this case. The efficiency of a prosecutor, despite any apprehensiveness or anxiety felt by the accused, is in no way a hallmark of prejudice, impartiality or unfairness. The onus is on the accused in the matter. In all the circumstances, I cannot see that any apprehension on his part, in his position, that the prosecutors are prejudiced against him and that thereby he will not receive a fair trial, is objectively a reasonable one, and the application is accordingly dismissed.

Delivered This 21st Day of August, 2001.

B. P. CULLINAN
ACTING JUDGE