CRF/T/111/99
IN THE HIGH COURT OF LESOTHO

In the matter between
Rex
vs
MASUPHA EPHRAIM SOLE

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

Before the Hon. Mr Acting Justice B. P. Cullinan on 28th and 29th November, 4th and 18th December, 2001.

ORDER

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Cases referred to:
(1) R v Bly 1946 EDL 341;
(2) R v Mgqobelo 1945 EDL 208;
(3) S v Zondii 1968 (1) SA 709 (N);
(4) Ndweni and Others v S [1999] 4 All SA 377 (A);
(5) S v de Jager 1965 (2) SA 612 (AD);
(6) Oosthuizen v Stanley 1938 AD 322;
(7) Colman v Dunbar 1933 AD 141;
(8) Hladhla v President Insurance Co Ltd 1965 (1) SA 614;
(9) Barclays Western Bank v Gunas and Another 1981 (3) SA 91;
(10) May v May 1931 NPD 223;
(11) Dm Plessis v Ackermann 1932 EDL 139;
(12) Mkwanazi v Van der Merwe 1970 (1) SA 609 (A).

The accused has brought an application to re-open the defence case. On 4th December, 2001, I dismissed the application for reasons which now follow. The accused is charged with sixteen counts of bribery and two counts of fraud. He was initially charged and summoned before the Magistrate's Court on 28th July 1999. Ultimately he was indicted before this Court on 3rd December 1999, being jointly indicted on the bribery counts, with eighteen other accused, that is, twelve Contractors/Consultants based overseas, and six alleged intermediaries in the matter of bribery (that is, three companies and three individuals). The original indictment charged the following accused:

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MASUPHA EPHRAIM SOLE	Accused No. 1
JACOBUS MICHEL DU PLOOY	Accused No. 2
HIGHLANDS WATER VENTURE ("HWV")	Accused No. 3
UNIVERSAL DEVELOPMENT CORPORATION (PANAMA) ("UDC")	Accused No. 4
ELECTRO POWER CORPORATION (PANAMA) ("EPC")	Accused No. 5

MAX COHEN	Accused No. 6
SOGREAH	Accused No. 7
SPIE BATIGNOLLES ("Spie")	Accused No. 8
LESOTHO HIGHLANDS PROJECT CONTRACTORS ("LHPC")	Accused No. 9
ASSOCIATED CONSULTANTS AND PROJECT MANAGERS ("ACPM")	Accused No. 10
MARGARET BAM	Accused No. 11
ASEA BROWN BOVERI SCHALTANLAGEN GmbH, GERMANY ("ABB Germany")	Accused No. 12
ASEA BROWN BOVERI GENERATION AG, SWEDEN ("ABB Sweden")	Accused No. 13
LAHMEYER INTERNATIONAL GmbH ("Lahmeyer")	Accused No. 14
ACRES INTERNATIONAL LIMITED ("Acres")	Accused No. 15
DUMEZ INTERNATIONAL ("Dumez")	Accused No. 16
SIR ALEXANDER GIBB & PARTNERS LTD ("Gibb")	Accused No. 17
CEGELEC	Accused No. 18
COYNE ET BELLIER ("Coyne")	Accused No. 19

The proceedings first commenced on 5th June, 2000. On that date the following seven accused, based overseas, failed to attend Court, whether by corporate representative or legal representative ("A" =Accused):

A4 UDC
A5 EPC
A6 Max Cohen
A12 ABB Germany
A13 ABB Sweden
A16 Dumez
A18 Cegelec

The Court was informed that Dumez had not been served as such, but had nonetheless been invited to attend Court. I understand that the difficulty in securing the attendance of those seven accused continues.

On 12th June, 2000 the Court ruled that HWV had, as a partnership, been irregularly cited and that the Court had no jurisdiction over it in these proceedings. On the 13th June, 2000 the Court by consent ordered separation of trials in respect of Spie and LHPC. On the same date the Crown withdrew against ACPM: subsequently the Crown also withdrew against Margaret Bam. On the 20th June, 2000 by consent the Court ordered separation of trials in respect of Sogreah, Gibb and Coyne. On 26th February, 2001, the Court ruled that the joinder of all accused on the one indictment constituted a misjoinder. Thereafter the Crown framed a separate indictment against the present accused. Due to initially the non-availability and then the part-availability of a trial Judge and further a prolixity of preliminary applications initially by a number of accused, and latterly the present accused in particular, the accused did not plead to the indictment until 11th June 2001, when the present trial commenced. Meanwhile dates had been set for the trials of other accused. I may add that after

argument had concluded in the present application, on 3rd December, 2001, the Crown withdrew against Sogreah and Coyne.

Ultimately the Crown closed its case in this trial on 8th November, 2001. Mr Phoofolo indicated to the Court that he did not intend to make any submissions, and the Court ruled that there was a case to answer on all eighteen counts. Mr Phoofolo forthwith closed the case for the defence. Dates were set for the delivery of the Crown's and the defence's heads of argument, that is the 16th and 26th November, submissions being set down for 29th and 30th November. The Crown's heads were duly delivered on 16th November. On 21st November, however, the accused filed the present application.

In his founding affidavit the accused has annexed some 37 letters and communications representing correspondence between the Chief Executive of the Lesotho Highland Development Authority ("LHDA") and the various Consultant/Contractor accused, during the latter half of 1999. The correspondence, in general, consists of requests for explanations as to the alleged payments to the accused and replies of an exculpatory nature from such accused. The accused then, in brief, seeks an order to subpoena a witness to produce such documents in evidence, and also an order to subpoena certain Consultants/Contractors to give evidence before the Court or on commission. In his affidavit the accused avers

"3. Subsequent to the closing of both the prosecution and the defence cases I came to know that there were documents and facts which the Crown was bound to have disclosed to the defence, which it deliberately did not disclose while they were in its possession, and within its knowledge. I and my attorney then engaged in an investigation of these matters in order to obtain copies of the said documents and facts so as to assess their evidential value to the defence case. Furthermore I learned from the presentations made on behalf of the Acres International on the 12th

November before this very Honourable Court that Acres had long before indicated to the prosecution that it would be Acre's defence that (ACPM) represented by Mr. Z.M. Bam was their local consultant, under a representative agreement concluded between the two parties. Further that no approval was given by Acres to give bribery money to myself as it in fact didn't. Since it is the Crown's case that Acres bribed me through Z.M. Bam, and that Acres has made certain explanations in writing for that matter, it is my respectful submission that such explanations, done in the process of the investigation of this matter by the prosecutors should have been part of the material in the docket which should have been disclosed to myself or my legal representative. This the prosecution chose not to do. Indeed I was not aware of the existence of this evidential material before I closed my case. This Honourable Court is also aware that the Crown in its wisdom, did not call Acres or any of the companies which it alleges bribed me to give evidence on its behalf. Clearly it did not call for such evidence because it was fully aware of the attitude of these companies, a factor that I have not been aware of until after I had closed my case.

4. The comments that I have made with regards to Acres apply equally to most if not all the companies that are alleged to have given me bribe money, as shown in the annexure hereto. It is Acres's disclosed attitude which triggered the whole investigation which I have said my

attorney and I undertook. Just as another example: the defence has learnt with dismay and utter surprise that the prosecution led by Adv. G. Penzhorn acting as investigators for this trial had occasion to interview representatives of ABB Sweden and ABB Germany and in the process obtained explanations that were exculpatory both to themselves and to me by process of deduction, before certain Swiss Judicial authorities. I was not present during these investigations, I did not know and could not have known the explanations given by these two companies unless the Crown made this disclosure to me, which it did not. I have very little doubt that the prosecution, acting as investigators in this matter, must have held interviews with representatives of all the companies which appear in the indictment against me, and are in full possession of these companies' responses either recorded or unrecorded. It was the prosecution's duty to disclose what information they obtained to me or my legal representative. During my investigations I managed to obtain copies of certain correspondences between LHDA and some of these companies and I take liberty to annex them hereto for purposes of this Honourable Court's information in order to assist it to find a basis for exercising its discretion in favour of my prayers in this application.

5. I respectfully aver that the evidence of the LHDA Chief Executive and production of the documents that I have lately learned are in his possession, are material for the purposes not only of my defence, but in order to enable the court to arrive at a just decision in this trial. Furthermore the calling of these companies by order of this Honourable Court will provide it with direct evidence , as opposed to factors upon which the Crown seeks some inferential decision therefrom. It is also evidence much

in my favour which this Honourable cannot in all fairness ignore. Thirdly I respectfully submit that my request will not prejudice the Crown in anyway because it will not have to recall any witness in rebuttal, in as much as no witness testified on its behalf as to his direct knowledge of receipt of bribe monies by myself from these companies as alleged in the indictment. In as much as I was not furnished with those documents, nor did I know of their existence at the proper time, I say that even by the exercise of due diligence I could not have led this evidence at the proper time. Fifthly I say that it would be more of the onerous task upon me to apply to lead this fresh evidence at the Court of Appeal. Lastly my request is not motivated by any feeling or realisation that the Crown has in its argument exposed any weaknesses in my case. Once I faced these charges alone I could not obtain any cooperation from those companies, which themselves are facing charges of giving me bribery monies. Every one sort of kept his possible defences close to his chest.

I am aware that obtaining the attendance of these companies might present jurisdictional problems. I say however that in the light of my above stated submissions evidence on commission is necessary for the ends of justice."

The accused then seeks an order, in two parts, firstly that the Chief Executive of the LHDA be subpoenaed in order to produce the documents annexed to the accused's affidavit. The Crown has produced as an exhibit (Exhibit "AW") a bundle of documents, which it claims was served upon the accused, including all but four of the documents annexed to the accused's affidavit. Apart altogether from the evidential value of such documents, they are already before the Court, so that I see no necessity to call the Chief Executive of LHDA, or any witness, to produce them.

As for the latter part of the application, the accused seeks an order that the following Consultants/Contractors "be subpoenaed to give evidence on behalf of the defence in this trial, alternatively that evidence be taken on commission [from] these companies", namely, (with reference to the original indictment),

1) Highlands Water Venture Accused No 3
2) Sogreah Accused No. 7

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3) Spie Batignolles Accused No. 8
4) Lesotho Highlands Project Contractors Accused No.9
5) Asea Brown Boveri Generation AG, Sweden Accused No. 13
6) Lahmeyer International GmbH Accused No. 14
7) Acres International Limited Accused No. 15
8) Dumez International Accused No. 16
9) Sir Alexander Gibb & Partners Ltd Accused No. 17
10) Cegelec Accused No. 18
11) Coyne et Bellier Accused No. 19
12) 'Muela Hydropower Project Contractors ("MHPC")
13) Lesotho Highlands Consultants ("LHC")

As to whether or not any of the above accused can be called as a witness Hoexter J (as he then was) (Pittman JP concurring) observed in the case of R v Bly (1) at p342,
"The magistrate erred in thinking that Mtutyaza could refuse to give evidence merely because he was a prisoner awaiting trial on the same charge as the accused. He could only refuse if he were actually a co-accused, i.e., if he were being tried jointly with the accused. (See Rex v Mgqobelo [2], In fact he was not being tried jointly with the accused, and the magistrate ought to have allowed the accused to call him as a witness. Once in the witness-box, Mtutyaza's attorney could have relied on the terms of section 301 of the Criminal Code [incorporating the privilege against self-incrimination] in order to protect his client, but he had no right to prevent him going into the witness box."

Hoexter J quashed the conviction on the basis of "a gross irregularity". The decision in R v Bly (1) was followed in S v Zondi (3) by Harcourt J (James J concurring). Tn that case a Magistrate advised a witness (one Madondo), an erstwhile

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co-accused awaiting trial on the same offence, that he was not obliged to give evidence for the defence unless he consented thereto: when Madondo declined to give evidence the Magistrate ruled that he could not be called as a witness. On review Harcourt J observed at p710:

> "In my judgment the decision in R v Bly [1] is clearly good law..... A person occupying the position of Madondo is a competent and compellable witness for the defence and the mere fact that he is awaiting trial on an identical charge does not require that he should only be called on his own application or expressed consent. It will be the case, of course, that he should be warned that, in the absence of an indemnity offered to him by the prosecutor, he is not obliged to answer any questions

which tend to incriminate him in the commission of the offence being investigated. It is unlikely that he will be offered indemnity in view of the proceedings pending against him. It may well be, however, that the questions which the accused will wish to ask Madondo will not necessarily incriminate Madondo."

In the present case, certainly all three individual erstwhile co-accused above, subject to jurisdictional aspects, are competent and compellable witnesses for the defence. As to the corporate Consultants/Contractors, that is another issue which I shall defer for the moment. In any event, the application to call witnesses was made after the defence has closed its case. The question then arises as to what are the criteria applicable to the exercise of the Court's discretion in the matter. Mr Phoofolo refers to the case of Ndweni and Others v S (4). That case relied upon the dicta of Holmes JA (Beyers & Rumpff JJ A concurring) in the case of S v de Jager (5) where the Appellate Division was dealing with an application to call further evidence on appeal. Holmes JA observed at p613:

"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but

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their tenor throughout has been to emphasise the Court 's reluctance to re-open a trial. They may be summarised as follows:

1) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
2) There should be a prima facie likelihood of the truth of the evidence.
3) The evidence should be materially relevant to the outcome of the trial."

In the case of Ndweni (3) in the Supreme Court of Appeal, Smallberger JA Grosskopf JA and Mpati AJA concurring) adopted those three requirements. Those decisions, of course, were concerned with the introduction of fresh evidence upon appeal. As to evidence sought to be adduced by a party after it has closed its case, the authorities thereon seem to be all civil cases, but I do not see that the principles involved would be any different because of that. The common law on the situation is that the Court has a general discretion to allow a party who has closed his case to lead evidence at any time up to judgment; see Hoffman & Zeffert, The South African Law of Evidence 4 Ed at pp476/477 and see the authorities listed at n.4 on p477, including Oosthuizen v Stanley (6) at p323. In the latter case Tindall JA (de Wet JA and Feetham AJA concurring) observed at p333:

"Several considerations have a bearing on the exercise of such discretion, for instance, the reason for the plaintiff's failure to call the witness before, the danger of prejudice to the opposite party owing to his being no longer able to bring back his own witnesses, and, of course, the materiality of the evidence. In application for leave to lead fresh evidence in this Court the test as to materiality laid down in Colman v Dunbar [7] is that the evidence tendered must be presumably to be believed and such

that it would be practically conclusive. In a trial Court, however, in my judgement the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty."(Italics added)

Van Blerk JA (Ogilvie Thompson, Rumpff, Holmes & Williamson JJ A concurring) applied the dicta of Tindall JA in the case of Hladhla v President

Insurance Co Ltd (8). In that case, the trial court decreed absolution from the instance, after the plaintiff and the defendant (the latter without calling evidence) had closed their cases, refusing an application by the plaintiff to recall a police Constable van Staden, who had mistakenly given the wrong registration number (TAB 3581 instead of the correct number TAB 3541) of a vehicle involved in an accident, in which the appellant had been injured. Van Blerk JA set aside the order of absolution, remitting the case to the trial Court to allow the Constable to give further evidence, observing thus at pp 621/622:

" Wigmore para. 1878 in dealing with the introduction of evidence after argument has begun says:

"The presentation of evidence has naturally no place after argument on either side has begun. Moreover a special danger of abuse for such a situation lies in the opportunity which it would afford for the deliberate colouring or manufacture of testimony to suit some specific need which may be apparent only after the opposing counsel's argument has revealed where the emphasis of his claim is placed and what conclusions he founds upon the evidence as already presented."

The learned author in this connection refers to the following dictum in a case quoted, namely:

"To make a general practice of introducing new evidence when, from the argument of the adversary, it is found where the shoe pinches, might lead to perjury."

But the learned author continues:

"Nevertheless, situations may easily arise in which an honest purpose may justly be served, without unfair disadvantage, by admitting evidence at this stage; and it has always been conceded that the trial Court's discretion should not be hampered by an inflexible rule."

I see no reason why even at this stage of the proceedings a trial Court should not on application have the power to allow in its discretion a witness to be recalled especially where, as in this case, it is clear that plaintiffs counsel inadvertently omitted to establish the identity of the vehicle which was involved in the accident. The defendant put the identity of the vehicle in issue, merely because it had no knowledge of the allegation that the insured vehicle was involved in the accident. It was never suggested that defendant was in a position to adduce evidence to disprove the allegation. The nature of the evidence which the plaintiff now seeks to place before the Court by recalling the witness is purely supplementary and almost of a formal nature. It is, on the view I take, to correct an error which may be described as a slip of the pen. It would appear, however, that what weighed most with the trial Court in

refusing a re-opening of the case was the absence of due diligence on the part of the plaintiff, the uncertainty that the witness if recalled

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would be in a position to give the required evidence to remedy the lacuna in plaintiffs case, and the fact that a further postponement of the trial would be necessary.....

I cannot agree with the learned Judge that this inadvertence of counsel should be equated to absence of due diligence. It was a pardonable lapsus in regard to the one digit in the number. Nor do I think the learned Judge was justified in saying that there was nothing before him to show that van Staden, if recalled, would be able to give the evidence that was lacking. Counsel intimated to the Court that he personally spoke to van Staden who confirmed that according to his notes made at the time the number of the vehicle was TAB 3541. On this intimation by counsel there was a reasonable certainty that the required evidence would be forthcoming as there was no reason to doubt counsel's word that van Staden confirmed his ability to testify as to the true registration number."

In the case of Barclays Western Bank v Gunas and Another (9). Leon J allowed a defendant to call further evidence after judgment had been reserved, even though (at p94) he was "satisfied that the applicant has failed to show that he exercised due diligence in the preparation of the case." The learned Judge reviewed the authorities in the matter, in particular those of Oosthuizen (6), Hladhla (8), May v May (10), Du Plessis v Ackermann (11) & Mkwanazi v Van der Merwe and Another (12). He observed at p95,

> "Despite the effect of some of the cases set forth above I am satisfied that the modern view is that an applicant's failure to show that he exercised due diligence is not decisive of the application."

The learned Judge then referred to Hoffmann, Law of Evidence 2 Ed at pp337/338 (see now Hoffmann and Zeffert op. cit. at p477 where the learned authors speak of "a more liberal modern trend"). In particular Leon J at p96 construed the dictum of Tindall JA in Oosthuizen (5) reproduced supra, that is, that "the test of materiality should be held to be satisfied where the evidence tendered, if believed, is

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material and likely to be weighty", to indicate

> "that there is no obligation on an applicant in a case such as this to show that the evidence is likely to be believed."

In considering the Mkwanazi case (12) Leon J observed that the majority of the Appellate Division held that a Magistrate should, on the facts, have admitted fresh evidence after both sides had closed their cases "even though there was no satisfactory explanation before the Court as to why the evidence had not been led in the first case". In this respect, in granting the application before him, Leon J observed at p96 that

> "[a]lthough the applicant has not shown that he exercised due diligence he has given some explanation as to why the evidence is sought to be led at this late stage."

As for the present application, as indicated, the Crown contends that the accused was served with copies of the documents annexed to his affidavit, that is, with the exception of the following four documents (I shall refer to the annexures to the accused's affidavit as a "bundle"):

Page of Accused's Bundle	Parties	Date
9	LHDA/Spie Draft letter	22/7/99
40/41	ABB Sweden/LHDA	16/9/99
70/71	LHDA/HWV Draft letter; Page 1 missing	74/75
	WebberNewdigate/ (Attorneys of LHDA)/ Dumez Draft letter	22/7/99

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At this stage I pause to observe that it has proved necessary, in order to determine this application, to scrutinize many documents which the Crown and the accused have placed before me. I shall also have occasion to refer to other documents placed before me in other applications and to documentary exhibits. I wish to say that, the evidential provisions of section 246 of the Criminal Procedure and Evidence Act 1981 ("the Code") apart, such documents constitute evidence, not of their contents, but of their making, of their existence.

The Crown called Deputy Commissioner Borotho Matsoso as a witness, in answer to the accused's affidavit. The witness testified that he had supplied a bundle of documents to the accused, a spare copy of which bundle he produced in evidence (Exhibit "AW"). He also produced a copy inter alia of entries from his diary (Exhibit "AV") under the heading "List of Accused Representatives Who Have Been Given Witness Statements and Other Documents". Opposite the accused's name is a signature, acknowledged by Mr Phoofolo to be his, dated 2nd March, 2000. Mr Phoofolo informed the Court that the accused's position is that he did not receive copies of the documents in question, that is, those exhibited to his affidavit. The witness also produced, however, as part of Exhibit "AV", a copy of an "Index From Top to Bottom", which, he testified, had been compiled and supplied to each accused, so as to assist him in locating documents in the bundle (Exhibit "AW"), which comprises some hundreds of pages.

The witness testified that he was "part and parcel of compiling" the bundle, that is, that he was assisted by other Police officers, which may well indicate that he was also assisted in the drawing up of the Index. He could not remember any individual

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document, but in view of the lapse of time and the hundreds of documents involved, he could hardly be expected to so remember. He could not interpret an item (no.11), "List of ent,", which turned out to be a reference to a list of the nineteen accused and might well, Mr Penzhorn volunteered, mean "List of entities", in reference to the various Consultants/Contractors.

As for the accuracy of the Index it is, at least as to the first half (in bulk) thereof, quite accurate. It does not, as Mr Phoofolo points out, detail two witnesses' statements included in

the bundle. When it comes to the correspondence between LHDA and the various Consultant/Contractor accused it is listed thus (my item numbering):

> "23 Extract of Communication between HWV
> 24 Letter from Sogreah
> 25 Communication Letters
> 27 Communication Letters extracted from LHDA files."

Mr Phoofolo pointed to the fact that, apart from items 23 & 24 above, the Index specifically listed six letters (Items 6,8,9,10,12 &13) from Contractors/Consultants or their legal representatives. Apart from one item, Item 12 "Letter from Lahmeyer International GmbH", which was either not included in the bundle or was included under Items 25 or 27, the other five letters are all addressed to the Director of Public Prosecutions, which indicates why they were individually itemised.

There are, however, two other letters above, Items 23 & 24 which are letters from HWV & Sogreah respectively addressed to LHDA. Mr Phoofolo then queries why such letters were itemised and the other LHDA correspondence was not. Quite clearly an efficient indexing would have made reference to each and every letter,

rather than to "Communication Letters" or "Communication Letters extracted from LHDA", as to which differentiation, no explanation was forthcoming. At the bottom of the bundle there is a considerable volume of variegated documents, dealing mostly with details of various LHWP Contracts and Deeds of Partnership of some Consultants, including also details of expenses incurred by the accused overseas in June 1991, and again copies of bank records of a French bank account apparently maintained by Dumez (Nigeria) Limited. Quite clearly all of such documents should have been individually itemised. It would seem that they have one thing in common, that is, that they have been uplifted from LHDA files and hence, though the description of "Communication Letters" is entirely inappropriate in places, it would seem that they were collectively described as "Communication Letters extracted from LHDA files."

The collective bulk of the documents so described, and these described as "Communication Letters" is slightly more than half the bulk of the entire bundle (Exhibit "AW"). The impression one gets, therefore, is that the indexer started out with the best intentions, but having reached a point less than half way through the bundle, took somewhat drastic short cuts thereafter. The resultant index may not then be a fully complete, or accurate or indeed sophisticated one. The question arises, is it a genuine one? It seems to me that its general lack of sophistication underlines its reliability. At least two material letters, Items 23 and 24, from HWV and Sogreah respectively were itemised. Furthermore, as indicated, four letters annexed to the accused's affidavit were not included in the Crown's bundle (Exhibit "AW"), as three of them were draft letters. The fourth letter, from ABB Sweden, dated 16th September, 1999, is in reply to a letter of 27th August, 1999 from the Chief Executive

of LHDA, which caused ABB to express "great concern that we read that LHDA is now trying to take back its indemnity." ABB Germany and ABB Sweden were ultimately joined in

the original indictment signed on 1st December, 1999. Neither attended Court when proceedings began on 5th June, 2000. I cannot say why the letters of 27th August, 1999 nor 16th September, 1999 were not included in the Crown's bundle on 2nd March, 2000, whether by inadvertence or design (arising from an indemnity). The point is that their very non-inclusion, and indeed the non-inclusion of the three draft letters, in the bundle placed before the Court, points to the genuineness of that bundle.

On 21st February, 2000 Mr Penzhorn wrote to E. H. Phoofolo & Co in part thus:

> "We confirm that the statements and other documents that the Crown intends using at the trial [of all accused] are now available for collection by arrangement with the investigating officer, Senior Superintendent Matsoso, who can be contacted on 09266 -854025." (Italics added)

On 12th May, 2000 Mr Woker wrote to E. H. Phoofolo & Co, enclosing a letter of the same date addressed to Bowman Gilfillan Inc, the Attorneys for the eight and ninth accused Spie Batignolles and LHPC. That letter reads in part:

> "1. On 2 May 2000 after the adjournment discussions took place at Court concerning the documents made available to the Accused by the Crown.
> 2. We have gone through the four files prepared by Clair Reidy of Bowman Gilfillan and confirm that the documents therein are the documents previously made available to the various Accused as per our letter to you dated on or about 29 February 2000."
> The letter continues in paragraphs 5 and 8 thus:
> "5. Besides the above, we have recently received a representation agreement from Acres which can also be collected from the investigating officer. We are also in possession of documents which relate to ABB (Accused 12 and

> 13). It debatable whether theses are relevant. However these too can be made available."
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> "8 We also once again wish to remind you of our previous request both by letter and verbally at Court on 2 May 2000 to advise us of any matters which you may wish to raise which may require us to investigate and respond to. If we are not given sufficient time then any delay in the matter proceeding will not be the fault of the Crown."(Italics added)

Mr Penzhorn wrote to E. H. Phoofolo & Co again in May, 2001 (Mr Penzhorn considers it was 22nd May - see verbatim record at pl025, line 26 ("R1025.26")) inclosing further documents recently received, namely the final report of Price Waterhouse Coopers, additional bank documents and documents received from the World Bank. All of that covering correspondence was read out by Mr Penzhorn in pen Court on 18th June, 2001 (Rl 022/6) when Mr Penzhorn submitted, without objection, that "the Crown had from the very word go ... played completely open cards with the Defence." The correspondence in the matter was then put in as Exhibit 'H" (R1050) on 19th June 2001.

The correspondence indicates that the present bundle before the Court (Exhibit 'AW") was ready for collection as early as 29th February 2000. Further, as the Crown was clearly obliged

to furnish each accused with statements (correspondence) made boy that particular accused, I cannot imagine but that each legal representative of each accused would ensure that copies of his client's correspondence had been included in the bundle (supplied to all accused by the Crown), on the "open docket" principle, in order to prevent any surprise introduction thereof by the Crown at the trial. For example, Item 14 on the "Index From Top to Bottom" reads "List of witnesses who refund [refused] to cooperate." The list in fact consists of brief notes, written it seems

by Deputy Commissioner Matsoso on 7th December, 1999, and signed by various accused, or their representatives, to the effect that they declined to make a statement: the accused concerned were Accused No 1,2,3,7, 8,9,10,11,14,15,17 and 19, that is, twelve in all, the other seven accused, who subsequently failed to attend the trial, that is Accused No 4, 5, 6, 12, 13, 16 and 18, apparently not being available. The point is, that such list was relevant to the trial of the twelve accused involved. A fortiori any statement previously or subsequently made by any accused in correspondence with the LHDA (apart from any issue of admissibility) was all the more relevant, in which case its presence in or absence from the bundle supplied by the Crown was a matter of importance and query by the legal representative of each of the accused concerned.

Mr Phoofolo submitted that there was no lack of due diligence on his client's part, indeed that he had "looked at every document meticulously". That he is meticulous is evidenced by the fact that his request for further particulars dated 12th June, 2000, comprises 38 pages and 91 paragraphs of searching detail. With reference to one paragraph in particular, 9(1) (c), the Crown had occasion to reply thus, on 27th July, 2000, in a document of 49 pages and 163 paragraphs, at para 27:

> "Such documents as are in the Crown's possession are with the investigating officer. Sight of these as well as the making of copies thereof can be arranged with him as indicated to those representing Accused 1 by letter dated 29 February, 2000."

Thereafter there are numerous references, in the Crown's further particulars, to the contents of the above paragraph 27. In paragraph 159 the Crown states that "statements of witnesses in addition to those already supplied will be made available to those representing Accused 1 in due course." The paragraph continues:

> " 159.3 The Crown also has in its possession documents relating to Accused 12 [ABB -20-Germany] and 13 [ABB Sweden]. [T]hese are available".

On the 5th, 6th, 12th and 13th June, 2000, the Court heard an application (decided on 20th June) by Sogreah and Coyne and their corporate representative in these proceedings, objecting to the indictment on the grounds that they had been irregularly cited in the indictment. Annexed to the founding affidavit in respect of Sogreah's application is a letter (marked "WB3"; see pp 487/491 of affidavit and annexures) dated 28th November, 1999 from the firm of Rabin, Van Der Berg and Pelkowitz, the Attorneys for Sogreah. The letter, covering more than four pages, explicitly details Sogreah's defence. Inasmuch as the letter sets out an innocent association with UDC and Max Cohen, that possibly also suggests a defence in respect of Gibb and Cegelec, who were associated with the same two alleged intermediary accused in the original indictment. In any event, the last paragraph of the letter

indicates, and paragraph 13 of the founding affidavit confirms (and see also letter "WB5" at pp 515/516) that the contents of the letter were read into the record and copies were handed to the Chief Magistrate and the Director of Public Prosecutions at a sitting of the Chief Magistrate's Court in Maseru on 29th November, 1999.

The letter refers to LHDA's letter to Sogreah of 27th August 1999. Sogreah thereafter wrote a letter of acknowledgment on 28th September and then an exculpatory letter on 17th November 1999. Thereafter there followed their Attorneys' letter (in similar exculpatory terms) of 28th November. That letter was not addressed to LHDA but to the Attorney-General. Paragraph 19 of the letter indicated, however, that a copy would be sent to "the Authority" (LHDA). There is no indication that the letter was ever delivered to the Attorney-General or the LHDA. The founding affidavit does not state that the letter was ever delivered to the Attorney-General or

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LHDA but states that a copy was handed to the Director of Public Prosecutions and the Chief Magistrate. A copy was also received it seems by Mr Penzhorn (see " WB 5" at p516 and "WB6" at pp519/520). It may not have found its way to the LHDA files but nonetheless it should have been included in the Crown's bundle. Nevertheless, it is the Crowns position that Sogreah's exculpatory letter of 17th November was included. Apart from such aspect, the point is that a lengthy, detailed, exculpatory letter from Sogreah's Attorneys was fully ventilated in the Chief Magistrate's Court on 29th November, 1999 and in the proceedings connected with the original indictment in this Court in June, 2000, which letter contained the potential for a similar defence from two co-accused, members of the same tri-corporate partnership, namely Gibb and Coyne, who as indicated, were also linked to UDC and Max Cohen under counts 14 and 19 respectively of the original indictment.

On 10th July 2000 the accused filed an application to interdict both Counsel for the prosecution from further appearance in this trial. That application had initially been included in an exception to the indictment. Be that as it may, in the later application the accused annexed to his founding affidavit a copy of a Supplementary Application for Mutual Legal Assistance addressed by the Director of Public Prosecutions to the relevant Swiss authorities on 21st February, 2000, which copy had apparently been supplied to the accused by the Swiss authorities. Paragraph 13.3 thereof refers to the late Mr Z. M. Bam, one of the directors of ACPM, the 10th Accused ; it reads thus:

> "13.3 it is also known that Mr Bam involved himself with ABB of Germany and ABB of Sweden with regard to the obtaining of contracts. These two firms are now accused in the current pending trial. This involvement includes a so-called "representation agreement". The DPP is satisfied from the evidence available that this "agreement", as well as similar ones involving other accused, are not genuine

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> and were used to cover up bribery."(Italics added)

There could then be no doubt as to what the term "representation agreement" in the Crown's letter of 12th May, 2000, meant. Further, the reference to "other accused" would automatically suggest a similar defence by Lahmeyer, Acres and Dumez respectively, who

were linked with the late Mr Bam under counts 7,9 and 11 respectively of the original indictment.

As to the defence of ABB Germany and ABB Sweden, in an application opposing the appearance of the former Director of Public Prosecutions, Mr G.S. Mdhluli as legal representative of the accused in this trial, the Acting Attorney-General Mr KRK Tampi swore a founding affidavit on the 16th of August, 2001 in which he averred:

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

> 12. Prior to the events sketched in the aforegoing paragraph Mr Mdhluli had communications not only with Mrs Cova but also with the attorney representing ABB Germany and ABB Sweden.
> 14. Mr Mdhluli was also present when statements were taken from witnesses representing ABB Sweden. This was done in Stockholm. Once again this was done in the context of a possible indemnity for ABB Sweden. This also involved discussions with ABB Sweden's in house lawyer.
> 15. Mr Mdhluli was involved in discussions with Mr Max Cohen, the erstwhile [sixth] accused, and his lawyer. These discussions concerned a possible

> indemnity to Mr Cohen and using him as a Crown witness. This has not been finalised and Mr Cohen is still Mr Cohen is still a potential Crown witness". (Italics added)

As I observed in the ruling delivered on 24th September, 2001 at ppl7/18, there was no denial of such averments in Mr Mdhluli's answering affidavit of 23rd August, 2001. No later than that date, therefore, the accused was fully aware that ABB Germany and ABB Sweden were contemplating seeking an indemnity.

That aspect must be considered against the background of a certified translation of a Closing Order dated 10th September, 1998 by Mrs C. Cova, lie. iur., an Examining Magistrate in the Canton of Zurich, releasing certain bank accounts. The following appears at p8 of the certified translation (contained in Vol. 1 of the Swiss Bank Records, Exhibit "AA"):

"2. Investigations at ABB have shown the following: The payment on 17.05.1994 of the amount of USD 7 978.55 (or DEM 13 500.-) by ABB Schaltanlagen GmbH Mannheim to the UBP account of Zalisiwonga Bam is based on a verbal agreement between ABB Mannheim and Zalisiwonga Bam according to which ABB would pay 1.5% of the contract value to Zalisiwonga Bam, payable in three instalments, if ABB were given the contract to Muela project in Lesotho (132kv switchgear installation). This payment was the first instalment; further payments were not made.

As far as the two payments from UBS Zurich (20.06.1994: USD 122 542.-- and 26.07.1994 USD 59 218.-) to the UBP account of Zalisiwonga Bam are concerned, they came from the UBS account of Spartak Trading Ltd., a 100% subsidiary of the ABB group. These two payments result from a written contract between the Swedish ABB Generation AB and Zalisiwonga Bam. According to the contract ABB were paying Zalisiwonga Bam 1 % of the contract value in two instalments of 50% (initial payment and final payment) if ABB were awarded the contract for the Muela Project."
Again, a similar extract appears at p20 of the Closing Order by Mrs Cova of 23rd September, 1998 (Vol. 1 Exh. "AA"). Those Closing Orders, and others, formed part of the Swiss Bank records, as a necessary support for the Swiss bank officials'

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affidavits (see section 246 (4) of the Criminal Procedure and Evidence Act, 1981, as amended). The letter of 12th May, 2000 addressed by Mr Woker to Bowman Gilfillan Inc, and copied to the accused, indicates that the bank records had already been delivered at that stage, and that translations of those parts in German were available for collection. In any event, the records including the Closing Orders were put in as Exhibit "AA" on 17th October, 2001 so that the accused was supplied with the above extract no later than that date.

The aspect of an indemnity also arose in the case of Mr Cohen. Indeed, the accused was aware of that position no later than 10th May, 2001, when the Attorney-General filed a second affidavit in the application to interdict Counsel for the prosecution. To that affidavit was annexed a copy of a letter addressed by the then Director of Public Prosecutions, Mr Mdhluli on 1st April, 1999 to the legal representative, in Zurich, of Mr Cohen, discussing the aspect of an indemnity to Mr Cohen. The Director stated inter alia (at pp3/4 of the letter) that he "would also wish to have an affidavit from Mr Cohen in which he should give details of why he said two corporations [UDC and EPC] made payments to Mr Sole and reasons underlying the payments made Mr Sole." In this respect there is a documents on the Crown's bundle (Exhibit "AW") (which I have given the item number of 22D) entitled "Affidavit". It is undated and unsigned. It was apparently intended as a joint affidavit by UDC and EPC, "both represented by Mr Max Cohen Paris", which two corporations, "through their Consultant and Public Relations Manager Max Cohen were asked to represent three French Companies" with regard to the Lesotho Highlands Water Project. Suffice it to say that the document sets out payments made by UDC and EPC to the accused, and the reasons for such payments. Considering

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the contents of the Director's letter of 1st April, 1999, the draft affidavit, in the least indicates the defence of UDC, EPC, Mr Cohen and "three French companies."

In this respect, the following graphically illustrates the alleged association of the various alleged intermediaries with the Consultant/Contractor accused, as indicated in the sixteen counts of bribery contained in the original indictment ("A" = Accused):

Intermediary Consultant/Contractor Count

A2 A3 HWV 1
A4. A5. A6 A7 Sogreah 2

A8 Spie 3
A9 LHPC 4
A17Gibb 14
A18Ceglec 15
A19 Coyne 16
A10. All and ZMBam A12 ABB Germany 5
A13 ABB Sweden 6
A14Lahmeyer 7,8
A15 Acres 9, 10
A16Dumez 11, 13
Direct Payment
A16Dumez 12.

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As I see it, apart from Counts 1 and 12, the papers before the Court, and in the possession of the accused, apart from the Crown's bundle (Exh "AW"), have for many months now indicated, directly and indirectly, the likely position of the Consultant/Contractor accused in the matter, namely the operation of a representative agreement between them and the alleged intermediaries. As to Count 1, in which the Mr Du Plooy and HWV (as initially cited) are linked, reference to such a representative agreement, termed a "Consultancy Agreement", and to an "Addendum No 1" thereto, is to be found in another Closing Order made by Mrs Cova on 17th July, 2000: see Closing Order No1 of that date in Vol 9 of Exhibit "AA" at paragraph III on p5 and also paragraph V 2. on p6. Indeed, a copy of such Consultancy Agreement between HWV and "JM du Plooy Consultancy", dated 11th October, 1990 and the "Addendum Nol" thereto dated 19th April, 1993, is annexed (Vol. 9, Exh. "AA") to the affidavit of Dorothea Gleich, Head of the Department Customer Information File of the Nordfinanz Bank Zurich, dated 25th April, 2001: see Documents No. 6 005 to 6 009. Further, three copy invoices from "JM du Plooy Consultancy" made out to HWV and a fourth to Impregilo S pA, two in accordance with the Consultancy Agreement and Addendum No 1 thereto, and two in respect of "consultancies", are to be found in Documents 6 010 and 6 011. Thus the accused was in possession of such documents no later than 17th October, 2001, that is, when he received Exhibit "AA". Clearly then the accused has long since been served with documents indicating the likely defence of his co-accused.

As early as June, 2000, no less than eight co-accused, due to separation of trials and otherwise, became notionally available as witnesses for the defence, to be joined by the remaining co-accused in February, 2001, when the Court held that the original

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indictment constituted a misjoinder. From the moment of their notional availability, I cannot but imagine that the accused, duly advised, considered whether or not he should call particular individuals as witnesses, and whether, in view of impending trials, and the privilege against self-incrimination, the individuals might wish to give evidence. Despite the indications contained in the record, the accused paints a picture of non-cooperation between co-accused and would have it that "every one sort of kept his possible defences close to his chest." The eleventh accused Mrs Bam filed an affidavit in the application to interdict the Counsel for the prosecution, and another affidavit in the application to quash the indictment on the grounds of misjoinder, on 18th July and 27th July respectively, that is, opposing both

applications. She averred that she was advised that on 2nd May, 2000 defence Counsel, including Mr Fischer then representing the accused, met at the Lesotho Sun Hotel " to consider their position", when Counsel decided not to pursue the first of those applications and secondly, formulated their general preference for a joint trial. The accused in an affidavit sworn on 31st July, 2000, could not admit or deny such meeting, but contests whether Counsel took any such decisions on his behalf. Mrs Bam did not attribute any specific decision to the accused's Counsel, but averred only as to the general consensus. For our purposes the meeting surely indicates a degree of cooperation between co-accused.

In particular, it is difficult not to imagine a degree of cooperation between Mrs Bam and the accused, at least up to July, 2000. In his affidavit of 31st July, 2000 the
accused averred:

"11. I wish to place on record that [Mrs Bam] is a close family friend and that having regard to the nature of our family relationship I would have expected her to have discussed her problems with me before launching her present

application objecting to my application. However, in as much as she desires to be prosecuted together with me by the present prosecution team I do not wish to be that close to her and she can go her own separate way [if] she so wishes."

The accused's association with his co-accused Mrs Bam, is also marked by a letter addressed to the now late Chief Executive of LHDA Mr Marumo, by Mrs Bam and a co-Director of Lesotho Consulting Engineers (Pty) Limited ("LESCON"), on 30th March, 1999, following upon the death of Mr Z. M Bam on 20th March, 1999. A copy of the letter was included in the Crown's bundle (exhibit "AW") (I have numbered it Item No 22C). The letter reads in part:

> "We wish to thank you for your support during our bereavement, and also for sending your Representative, Mr. S. Nthako who was one of the speakers at the funeral service of Mr Z. M. Bam. The Bam family has appreciated this kind gesture.
>
> Following the shocking and untimely death of our Chairman and Managing Director, Mr Z.M. Bam, we are pleased to inform you that the Board of Directors has appointed Mr Masupha E. Sole to replace Mr Z. M. Bam as our new Managing Director with effect from 1st April, 1999.
>
> As you may know, Mr Sole has a wealth of knowledge and experience in Management and Engineering, most of which has been in the implementation of the Lesotho Highlands Water Project. We are therefore delighted that he has accepted our offer of Appointment as Managing Director of LESCON."

In those circumstances, it is difficult to imagine that if not as early as July 1999, when he was charged before the Magistrate's Court, then since 3rd December, 1999 when formally indicted, the accused did not discuss with his relative their likely defence and that of ACPM, and thereby the defence of the Contractor/Consultant accused associated with ACPM and the Bams on the original indictment.

The accused refers in his founding affidavit to "jurisdictional problems". Three of the accused whose attendance he seeks have never attended these proceedings,

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namely ABB Sweden, Dumez and Ceglec. As indicated, Dumez was not served and was but invited to attend, but nonetheless declined to do so.

The accused seeks the attendance of HWV but as the Court held in the ruling delivered on 12th June, 2000, HWV being a partnership was improperly cited as an accused. In this respect the accused makes no reference to any single corporate partner. Furthermore, there are no "criminal proceedings against" any such partner, (nor indeed against MHDPC or LHC, whatever their corporate status might be, whose attendance is sought by the accused); see section 338 (1) of the Code. I do not see therefore that the provisions of section 338 can be called in aid.

For that matter they cannot be called in aid against any co-accused, as the purpose of section 338 (2) in particular is to prosecute "any criminal proceedings against a company", and not merely to summon a company to give evidence. Section 338 provides a vehicle by which the corporate body can be compelled to attend court, by the citation (by the Crown, the choice not being that of the corporate body) of a director or servant as representative, thereafter attendance at court being compelled by due process, that is, a summons or indeed a warrant in default of obedience to the summons. Even if it were possible, to utilize the provisions of section 338 and to issue a subpoena against a cited representative, such representative would not necessarily be in a position to render any relevant evidence. All of which serves to emphasize the fact that a subpoena ad testificandum or subpoena duces tecum is a matter in personan. Against what particular witnesses could the Court therefore issue a subpoena? The accused has not indicated a single witness. For example, he has not sought the attendance of any one of three individual "intermediary" accused, two

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of whom, though resident outside the jurisdiction, attended trial.

I have to say that if the Court were disposed to allowing the accused to re-open his case, he might then identify individual witnesses, within the jurisdiction against whom the Court might issue a subpoena, or those outside the jurisdiction who were willing to attend and give evidence, or indeed to give evidence on commission. I am not so disposed, however. It is not simply a matter of a lack of due diligence which the Court might be well disposed to condone .

I am satisfied that the bundle of documents issued to the accused (Exhibit "AW") contained copies of all but four of the documents, copies of which were annexed to his affidavit. I am also satisfied that, in any event, on the papers before me, the accused has for some time now been appraised of the probable general defence of his co-accused. Further, there is another matter which puts me on enquiry.

All but three of the sixteen documents on the Crown's bundle (Exhibit "AW") (one of which bears manuscript endorsements emanating from LHDA) bear an LHDA date-stamp: ten of such documents bear the date-stamp of the Chief Executive of LHDA. I referred to four

documents supra which were annexed to the accused's affidavit and which had not been included in the Crown's bundle: the letter of 16th September, 1999 from ABB Sweden bears no LHDA date-stamp but does bear manuscript endorsements apparently emanating from LHDA; the other three documents being draft LHDA documents, obviously bear no such date-stamp, but being draft documents apparently emanated from and were supplied to the accused by some employee of LHDA; alternatively all four documents could have been copied

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to another source from whence the accused was supplied.

In any event, those four documents were not included in the Crown's bundle. Further, there are another five documents annexed to the accused's affidavit which, while included in the Crown's bundle, differ from the latter documents in that those supplied by the accused do not bear the date-stamp of the Chief Executive of LHDA, as do the five documents supplied by the Crown: neither do the five documents supplied by the accused contain any manuscript endorsements, as do four of those (other than the second) supplied by the Crown, three of which endorsements apparently emanate from LHDA . The five documents in question are as follows. (I shall refer to the accused's affidavit and annexures as a "bundle"):

Pages of Accused's Bundle	Parties	Item in Crown's Date	Content Bundle of Letter	Date-Stamp in Crown's Bundle
13	Spie/LHDA	25/8/99 25.1	Exculpatory	27/8/99
21	Acres/LHDA	11/8/99 27.2	Exculpatory	26/8/99
32	Lahmeyer/LHDA	12/8/99 26.2	Acknowledge.	12/8/99
33	Lahmeyer/LHDA	26/8/99 26.3	Exculpatory	30/8/99
72	HWV/LHDA	26/8/99 23	Denial	30/8/99

MrPhoofolo referred in particular to the first and third of those letters, pointing out that those supplied by the accused, could not have been copied from the Crown's bundle. The same applies to the other three letters. The possibility of the date-stamps (and also manuscript endorsements) having been removed was mooted at one stage of the argument; that possibility is stronger in the case of the third document above, when one compares that supplied by the Crown and that supplied by the accused,

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which possibility should not be laid at the door of the accused, as I consider, in any event that such possibility must be discounted, when one considers that the accused supplied a number of other documents bearing the Chief Executive's date-stamp, and indeed manuscript endorsements apparently emanating from LHDA.

Nine of the documents supplied by the accused were not therefore copied from the Crown's bundle. I do not see, however, that that indicates that he was not supplied with copies of the relevant letters in the Crown's bundle. For all the reasons earlier stated I am satisfied that he was supplied with the relevant documents, apart that is from the four documents which the Crown concedes were not included.

As to the five documents itemised above which were not date-stamped, it seems to me that rather than supporting the accused's application, they undermine it. I am constrained to say that the accused seems all along to have had little need of the Crown's bundle. In the application to interdict Counsel for the prosecution, he filed an affidavit on 27th July 2000 to which he annexed a copy of a letter, marked "Strictly Private & Confidential", addressed by Webber Newdigate, at one stage the Crown's instructing Attorneys, to the Director of Public Prosecutions; the accused averred that the copy had been handed to the accused's Attorney by one David Mopeli. To another affidavit filed on 4th May, 2001, the accused annexed some five documents, all of which seem to have emanated from LHDA, that is, correspondence with the Chief Executive. Certainly the overall primary impression created, is that the accused continued to have access to LHDA documentation: that is the primary impression as, of course, there is always the possibility that such documentation was copied to

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another source also available to the accused.

The question which now arises is where did the accused obtain copies of the five letters addressed to the Chief Executive of the LHDA, which do not, as in the case of those supplied by the Crown, bear the Chief Executive's date-stamp and in some cases manuscript endorsements? I can think of three possibilities. It is possible that an employee of LHDA photocopied such documents before being date-stamped. This seems unlikely, as the pattern was not repeated with other documents. If such was the case, however, the photocopying, before the Chief Executive had even considered the documents, it seems, would surely have been done for the purpose of informing another or others of the contents thereof forthwith, in which case the accused would have learnt of their contents forthwith.

Alternatively, the makers of the documents, Spie, Acres, Lahmeyer and HWV copied documents to other sources, who in turn copied to the accused. Alternatively again, the makers of the documents copied them direct to the accused. In either of those two cases the accused would no doubt have been supplied with the copy documents forthwith.

All of which, of course, may amount to speculation. But any such speculation arises from the accused's silence in the matter. Mr Phoofolo submits that it is not incumbent upon the accused to reveal the source of the documents. It seems to me that, in all the circumstances, if he seeks the exercise of the Court's discretion in his favour, then he surely must take the Court into his confidence.

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As I have said, it is not simply a matter of a lack of due diligence, which I have little doubt that I would otherwise overlook. It seems to me that inherent in all the dicta I have considered and set out supra, is the requirement for the applicant to approach the Court in good faith. I am not satisfied that the accused's application is brought in good faith, and it is accordingly dismissed.

Delivered This 18th Day of December, 2001.

B. P. CULLINAN
ACTING JUDGE