

**IN THE HIGH COURT OF LESOTHO**

**In the matter between**

**REX**

**v**

**ACRES INTERNATIONAL LIMITED**

**JUDGMENT**

**Delivered by the Hon. Mr Justice M L Lehohla on 13<sup>th</sup> September 2002.**

.....

The accused Acres International Limited hereinafter referred to as Acres is indicted before the High Court on two counts of bribery.

In Count I the Crown charges that: Acres is guilty of the crime of bribery in that over the period June 1991 to January 1998 Acres paid/transferred CAD to 493 168-28 into a Swiss Bank Account held by Zalisiwonga Mini Bam (now deceased) who thereafter paid/transferred the said sum, or part thereof, to Mr Sole which payment/transfer was made to Mr Sole in circumstances as described in the Preamble

and more particularly in paragraph 22 above.

In Count 2 the Crown charged that Acres is guilty of the crime of bribery in that over the period 31 January 1991 to 3 April 1991 Acres paid/transferred CAD 188 255-48 into a Swiss Bank Account held by Margaret Bam, who thereafter paid/transferred or was supposed to pay/transfer the said sum, or part thereof, to Mr Sole which payment/transfer was made to Mr Sole in circumstances as described in the Preamble and more particularly in paragraph 21 above.

The Preamble to the charges consists of 24 paragraphs. For purposes of clarity it is deemed fruitful to extract and cite the paragraphs referred to in the two counts above.

Paragraph 22 mentioned in Count 1 makes reference to paragraphs 10, 11, 20 and 21.

Paragraph 10 reads that:

“ Mr Sole was a civil servant in the employ of the Lesotho Government, and as such a state or public official:

Paragraph 11 reads that:

“ While retaining his status as a civil servant Mr Sole was seconded to the LHDA as Chief Executive Officer”

Paragraph 20 reads that:

“Margaret Bam as well as the aforementioned Zalisiwonga Mini Bam were responsible for or involved in, as intermediaries, the payment /transfer of funds from Acres to Mr Sole through Bank Account(s) held by them in Switzerland”.

Paragraph 21 reads that:

“The counts of bribery referred to hereinafter relate to:

21.1 payments made by Acres -

21.1.1 to the mentioned intermediaries who in turn paid such monies or part thereof over to Mr Sole into his Swiss Bank Account(s); and or

21.1.2 of monies or part thereof which were destined/intended for the benefit of Mr Sole in Lesotho, and or

21.2 Contracts which were -

21.2.1 to be executed in Lesotho by Acres, and/or

21.2.2 were negotiated by or on behalf of Acres

with the LHDA in Lesotho, and/ or

21.2.3 were concluded by or on behalf of Acres

with the LHDA in Lesotho; and/or

21.2.4 contracts in respect of which Acres was to benefit either in Lesotho or from the work it was to perform in Lesotho; and/or

21.3 Variation orders and/or contractors claims arising out of contracts referred to in paragraph 21.2 above, and/or

21.4 payments which were made or were to be made by the LHDA to Acres pursuant to contracts between the LHDA and Acres, such payments being made or initiated or authorised in Lesotho.”

Finally paragraph 22 reads that “The payments referred to in paragraphs 20 and 21 above were made in respect of action or inaction by Mr Sole in his capacity as described in paragraphs 10 and 11 above and/ or were intended to influence Mr Sole in such capacity and/or were intended to be utilised by the intermediaries as referred to in paragraph 20 above for this purpose”.

By agreement with respective counsel the court entered a plea of not guilty for

Acres with regard to both charges set out above.

Thereafter Mr Penzhorn SC for the Crown gave a lengthy and detailed outline of the charge and explanation of evidence intended to be adduced for the Crown in terms of Section 175 (1) of Criminal Procedure and Evidence Act No7 of 1981.

In the oral evidence that was led the Crown for purposes of establishing its case relied on the evidence of:

PW 1 TSEBANG PUTSOANE  
PW 5 SOPHIA MOHAPI  
PW 6 JOHAN CLAASSENS  
PW 7 JEAN ROUX  
PW 8 CHARLES PUTSOANE  
PW 9 FELIX MATSOHA  
PW10 UGO SYBRAND HIDDEMA  
PW 11 PHILLIPUS D OPPERMAN  
PW 12 MRS SENTSUOE MOHAU  
PW 13 PATRICK CINNAMON  
PW 14 MS SUSANNA RUDMAN  
PW 15 LETLAFUOA MOLAPO

As for PW3 P J Lock and PW4 Ms A V Ramjee their evidence was accidentally called because of an account operated in their respective Bank branches by an entity whose name merely approximated that of the Acres that now stands accused before this court. Otherwise that entity is entirely different from the Acres that is before this court. This misfortune was occasioned by the insistence in the law that bank books can only be produced on subpoena, in which case an error that could have been discovered earlier than on the court day would invariably be discovered on the day of appearance of the witness bearing the bank records thought mistakenly to be relevant by the party seeking to rely on their contents.

On their part the defence adduced the evidence of :

DW 1 VICTOR HARE

DW 2 CLIFFORD BROWN

DW 3 JEAN PAUL GOURDEAU

DW 4 JOHANNES MEYER

DW 5 CHARLES GIBBS

DW 6 ERIC BURNETT

I have made a liberal use, as far as possible, of the summary ably prepared by Mr Alkema SC in his handy set of written submissions and heads of arguments

regarding facts which are common cause between litigants or are at least not seriously disputed. Otherwise I have also resorted to my own devices as well as incorporating the Crown's version, as far as possible, of what they submitted as matters which are common course. These are as follows:

1. During 1981 Acres was appointed as a sub-consultant to a Canadian company, Delcanda, the main consultant in the construction project of the Moshoeshoe Airport, Maseru. Another subcontractor on the project was LESCON (PTY) LIMITED, a company registered as such in Maseru. The managing director of LESCON at the time was one Z M Bam, a South African citizen with permanent residence in Lesotho.

The airport project was completed towards the end of 1986. During the period 1980 and 1986 Tony Russel, Acres' corporate representative on the airport project, got to know Z M Bam well, having worked closely with him on the project.

2. During this period, the Lesotho Highlands Water Project (LHWP) was established. The object and purpose of the project was to provide water to RSA and hydro-electrical power to the

Kingdom of Lesotho.

The project was described in evidence and fittingly so as one of the biggest dam and hydro-electrical projects in the world. To this end the RSA and the Government of Lesotho (GOL) signed a Treaty commonly referred to as “the Treaty” in these proceedings. The purpose of the Treaty is defined as follows in Article 3(1):

“The purpose of this treaty shall be to provide for the establishment, implementation and maintenance of the project”

3. In terms of Article 6(4) of the Treaty, GOL was charged with the duty of establishing

“..... The Lesotho Highlands Development Authority (LHDA) as autonomous statutory body under the Laws of the Kingdom of Lesotho in accordance with the provisions of this Treaty.”

The LHDA was duly established by GOL in terms of Order No. 23 of 1986. In terms of Article 7(1) of the Treaty, the LHDA.

“.... .... Shall have the responsibility for the implementation, operation and maintenance of that part of the Project situated in the Kingdom of Lesotho, in accordance with the provisions of this Treaty, and shall be vested with all powers necessary for the

discharge of such responsibilities”.

4. As such, the LHDA had the power, **inter alia**, to appoint consultants and contractors to the Project, but always subject to the provisions of the Treaty. In evidence, the LHDA was often equated to “the Client”. Be it noted that the LHDA, throughout the project, concluded a vast number of contracts with consultants/contractors estimated in number to verge on 500. These contracts ranged from the appointment of financial consultants such as chartered accountancy firms and economists, to the appointment of environment experts to undertake environmental impact studies, the appointment of engineering consultants/contractors, to establish the infrastructure of the project. Many of the engineering (consultancy) contracts were of supervisory nature only.

5. During the time in question the LHDA consisted of seven divisions:

- 1) the Training Division
- 2) the Public Relations Division
- 3) the Administration Division
- 4) the Technical Division
- 5) the Environmental Division
- 6) the Financial Division
- and 7) the Capital Finance Division

Each Division had, at its head, a manager known as the Division Manager. See the Organogram Exhibit "G" The managers reported, in turn to the Chief Executive of the LHDA whose functions and duties are described in Article 7 of the Treaty, read with Order No.23 of 1986. The Chief Executive at all relevant times was one E M Sole. The Chief Executive, in turn, reported to the board of Directors of the LHDA established in terms of the Treaty and appointed in terms of the aforesaid Order.

6. During the initial stages of the project - pre-LHDA - an American company known as TAMS, was awarded the contract as Study Supervisor during the feasibility study phase of the LHWP. During 1986, TAMS was sole-sourced to submit proposals under Contract 19 (C 19), which made provision for technical assistance to the LHDA. Effectively, this meant the provision of qualified professional staff to the structures of the LHDA, and more particularly the staffing of various posts in the technical division of the LHDA.
  
7. The *sole-sourcing* of a consultant must be distinguished from the process known as competitive bidding. Under the process of *competitive bidding*, the client invites a number of consultants to

submit technical and financial proposals for the services: the process is known in the industry as the *short-listing* of firms. Under the process of sole-sourcing, only one consultant is invited to submit proposals. If the proposal or tender is found to be acceptable by the client, the procedure thereafter remains the same, whether under a competitive bidding system or under a sole-sourcing system. Such procedure includes the technical and/or financial evaluation of the proposal; and if found acceptable, an invitation to negotiate the contract; the negotiation process; the preparation of a document known as a Memorandum of Understanding (MOU) based in principle on the agreement reached during the negotiations; and thereafter the preparation and signature of the final contract, based on the MOU.

8. The process of sole-sourcing is accepted in the engineering industry and is internationally recognised; also by funding agencies such as government institutions, the World Bank, the European Union, and other commercial banks. The “Guidelines” issued by the World Bank recognise the advantages of the sole-sourcing process and describes the circumstances under which it will be advisable to sole-source a consultant/contractor in

preference to open bidding system.

9. It is also customary in engineering practice that if the proposals of a consultant who had been sole-sourced are found to be unacceptable, he is excluded from invitation to once more submit proposal when the process is changed to the competitive bidding system; i e. ( He is not short-listed),
  
10. It so happened that the proposals of TAMS under Contract -19 were found to be unacceptable by the LHDA and the procedure was therefore changed to a competitive bedding system. Consequently TAMS was not invited to submit proposals. The consultants invited by the LHDA to submit proposal were Acres, Bechtel, Halcrow, and Snowy Mountain, Australia. The proposals of Acres were ranked the highest by the LHDA, and having completed the rest of the process referred to in paragraph 7 above Contract 19 was awarded to Acres during April 1987.
  
11. By letter dated 28<sup>th</sup> April 1989, and in the course of the operation of Contract 19, the Chief Executive, Sole advised Acres that the LHDA had decided to sole-source Acres in respect of contract 65.

Acres was accordingly advised in accordance with the prevailing practice that,

“ ..... should the technical proposal be judged inadequate, or the financial proposal be judged excessive, then LHDA intends to request proposal from a short-list of consultants.(This short-list will not include your firm” The decision to sole-source was called in question by the prosecution through PW15 and PW10.)

12. Contract 65, like Contract 19, provided technical assistance to the LHDA. As such, Acres was required to provide professional engineering staff to fill various line position in Planning- and - Design and Construction Division (formerly the Technical Division of the LHDA). In the evidence before court, Contract 65 was described as *an extension* of contract 19, save that it carried more responsibilities. Whereas Contract 19 was concerned primarily with the tender design, preparation of tender documents and tendering for the main construction works, contract 65 included the provision of services relating to the establishment and implementation of the construction contract of Katse Dam and the transfer Tunnel and Delivery Tunnels lying South.

13. Acres' proposals in respect of Contract 65 were found to be acceptable by the LHDA, and it was invited to the negotiation process. Having gone through the process of negotiations, a MOU was prepared which formed the basis of a contract and which contract was eventually signed by the parties on 21 February 1991 in Maseru. Acres continued to render services under Contract 65 until November 1999.
14. At the end of 1988 Z M Bam left Lesotho to take up employment with Botswana Housing Corporation in Botswana. He was to remain there until February 1991.
15. After Sole told Acres that it would be invited on a sole-sourced basis, to put in a proposal for the continuation of services in April 1989, Acres contacted Z M Bam and proceeded to negotiate with him over a period of 18 months a representative agreement in respect of the new contract i.e. contract 65, which was first mooted after a trip to Canada by Sole in March.
16. After Sole had issued a letter of intent on 24 July 1990 Acres then started to mobilize, with Sole authorising that mobilization and

undertaking to pay Acres, on 14<sup>th</sup> August 1990.

17. This took place despite that contract 65 had not yet been signed. Matters of such importance as the fact that Acres' fee had not yet even been agreed, had not been ironed out when this occurred. This was followed by Acres claiming an advance payment under the unsigned contract in September 1990. Nor was the question of taxation finalised when this authority was given to mobilize.
18. In September 1990 Sole travelled to Canada.
19. On 23<sup>rd</sup> November 1990 Acres signed a representative agreement with an entity called ACPM whose address was given as that of a bank in Geneva.
20. On 28<sup>th</sup> November Witherell, an employee of Acres on contract with the LHDA, authorised the payment to Acres of its advance under the unsigned contract on behalf of the LHDA.
21. On 29<sup>th</sup> November 1990 the Maloti portion of the advance i.e M250 000-00 was paid to Acres and on 4<sup>th</sup> January 1991 the

Canadian Dollar portion, CAD 1 160 000-00 i.e 1.16 million Canadian dollars was paid.

22. On 28<sup>th</sup> January 1990 Acres paid Z M Bam (Not ACPM)  
CAD 180 000-00
23. On 21<sup>st</sup> February 1991 Sole signed contract 65 on behalf of the LHDA as indicated in paragraph 13 above.
24. Monthly payments from Acres to Z M Bam proceeded to share this money on a 60/40% basis with 60% going to Sole.
25. This arrangement endured until after Sole lost his court challenge against his dismissal in January 1997, whereafter Acres reduced its payments to Z M Bam to approximately 40% of what it had been paying up to then. These payments now Z M Bam did not share with Sole. Acres then ceased paying altogether when Z M Bam died in 1999 (with Acres owing up he was owed a portion of his fees even as this case started)
26. The monies paid by Z M Bam to Sole were paid into an account

in Switzerland from which account Sole then fed an account in Ladybrand from which account he in turn transferred funds to his account in Maseru. All this is summarised in exhibit "K4". All this was not challenged.

27. At the same time as he was receiving these funds from Acres and in turn paying a portion over to Sole, Z M Bam was also receiving funds from other contractors/consultants, namely ABB Germany, ABB Sweden, Lahmeyer, Lahmeyer MacDonald Consortium and Dumez, and also in respect of these payments he shared the proceeds with Sole. This was also done through Swiss bank accounts with Sole also being paid in Switzerland.
28. The evidence also shows Z M Bam's accounts in Switzerland being used almost exclusively for the receipt of monies from these contractors/consultants and the transfer of portions thereof to Sole.
29. Shortly before Acres finally left the project, an indictment was served on it and also on a number of other consultants/contractors. In the Indictment Acres was charged with two counts of bribery it

being alleged in the first account that during the period June 1991 to January 1998 Acres paid an amount of CAD 493 061-60 into the Swiss bank account of Z M Bam who thereafter transferred the said sum, or part thereof, to Sole. In the second count, it is alleged that Acres paid an amount of CAD 180 825-48 into the Swiss bank account of M M Bam, the wife of Z M Bam, who thereafter transferred the said sum to Z M Bam. Because there is no direct evidence that Z M Bam transferred this money to Sole, the Crown relies on inferences that may be relied on to show from proved facts that the moneys arising under this transaction landed in Sole's Purse.

30. In respect of both counts, it is alleged that the aforesaid payments were made by Acres with the intention to pay bribe moneys to Sole, and that the accounts of Z M Bam and M M Bam were only used as conduits to make payments to Sole. It is alleged by the prosecution that Acres used M M Bam and Z M Bam as intermediaries to make payments to Sole. It is therefore alleged that, in respect of both counts, Acres committed the crime of bribery.

31. Acres says that it had appointed ACPM of which Z M Bam was the proprietor to act as Acres' representative in Lesotho. Acres goes further to say the alleged payments to ACPM were in strict accordance with the representative agreement. Acres asserts that it has no knowledge that Z M Bam made payments to Sole and denies that it intended payments it made to ACPM to be made over by Z M Bam to Sole. It thus pleaded not guilty to the charges of bribery in the two counts.
32. The need to appoint agents by foreign company operating on foreign shores is recognised by various Government agencies, the Canadian Government and international funding agencies such as the European Union and the World Bank.
33. The document purporting to set out the terms of an agreement between the parties was signed by Hare and Rynard on behalf of Acres and by Z M Bam on behalf of ACPM.
34. The only real issue before court is whether or not Acres, when paying Z M Bam, intended for him to share the money with Sole or, if not actually so intending, whether it was reckless as to whether this occurred or not.
35. In its defence Acres put up a "representative agreement." The main issue

canvassed in the evidence was whether this agreement was genuine or not.

36. The payments made by ACRES to ACPM appear to have been made on the dates and in the amounts referred to in Exhibit "L" which is the document that also appears in Exhibit "C" Volume 15 section 7 pages 42 through 44 - The entries on Exhibit "L" correspond substantially with the financial reports prepared by PW7 (Jean Roux). DW6 (Burnett) and PW7 are in agreement that the differences are minor and are attributable to banking costs and charges; and such factors as short delays caused by banking clearance procedure from the date of deposit to the date the transaction is reflected on the bank statement. On the face of it DW6 and PW7 are agreed on the correctness of such payments.

### **ADMISSIONS**

The admissions contained in Exhibit "B" including the plea explanation Exhibit "A", the actual payments reflected in Exhibit "L", contents of Volume 15 part 7 shown in pages 42 through 44 and the factual background against which these payments were made are not in issue.

In fact Acres admits even certain additional payments not recorded in the Swiss Bank accounts. Here reference is to Z M Bam's Nedbank Accounts as shown and recorded at Page 697 lines 11 to 19 read with Volume 6 page 1467 as well as the 40% payments to Z M Bam in Switzerland after January 1997. Exhibit "L" shows this too.

It is common cause that Acres actually used LHDA money it received to pay Z M Bam. See record of proceedings pages 2 lines 12 to 16 and 5 lines 11 to 13.

The documentary evidence collected in Exhibit “C” is placed before court by consent of the parties to this trial and on the basis that what is contained therein speaks for itself.

The Swiss Bank records contained in Volumes 10 to 14 are before court in terms of section 246 of the Criminal Procedure and Evidence Act No.7 of 1981. Needless to say in terms of this section the entries in the bank records:

“shall be **prima facie** proof..... of matters, transactions and accounts recorded in the accounting records”

Because there was no dispute about the payments, it can safely be noted that they in fact are admitted. To that extent then the **Prima facie** proof has converted into conclusive proof.

Furthermore, the other bank records relating to Acres, Z M Bam, Masupha Sole, both in South Africa and Lesotho are not in dispute. Exhibits H, J, N, O, R, through V, X and Y are clear proof of this.

The benefit to be reaped from admission of these records is that their contents are as a matter of course admitted in so far as they show the following.

1. That the LHDA also paid Acres in Lesotho - as shown in Exhibit “U”

page 41 - the advance of M250 000-00. It also paid Z M Bam in Lesotho (through LESCON, via Lahmeyer).

2. Sole had bank accounts in Lesotho as shown in Exhibits "R", "S", "T", and "O" as well as in South Africa as Exhibits "X" and "Y" show.
3. Acres in fact paid Z M Bam in South Africa as Exhibit "C" at page 1467 of Volume 6 shows.
4. Z M Bam also had accounts in South Africa as shown in Exhibits "H" and "J", as well as in Lesotho surviving under the name LESCON as Exhibit "V" shows.
5. Acres also had bank accounts in Lesotho as shown by Exhibits "N" and "U".

Mr Penzhorn submits that all payments could have easily been effected locally as opposed to in Switzerland. It seems to me that no common sense counter to this submission would carry the day. In fact a further logical development of this submission seems unassailable in its bold but truly penetrating if devastating implication that had these payments been legitimate it is inconceivable that they would have been effected in Switzerland.

One major factor that has remained unassailable resulting from the above is that the

payments in Switzerland to Lesotho and South African residents contravened these two countries' Exchange Control Regulations.

### **REGARDING CORPORATE LIABILITY**

Our section 338 of the Criminal Procedure and Evidence is based on the old provision in the 1917 South African Act. As regards the present South African section 332 the following passage appears in the *South African Criminal Law and Procedure* Volume 1 by Burchell and Hunt (1983) at Page 395 reading

“ Being an artificial *persona*, a corporation cannot itself commit an *actus reus* or entertain *mens rea*. It follows that a corporation can be penalized for crimes committed only by its agents or servants. In a sense, therefore, when criminal liability is imposed upon a corporate body, it is vicarious. However, the criminal responsibility of natural persons, in truth it rests upon the imputation to the corporation of the crimes of persons acting on its behalf, rather than upon vicarious responsibility. Their acts and states of mind are the company's acts and states of mind and it is held liable, not for the acts of its servant, but for what are deemed to be its own acts.”

At Page 397 the following passage merits citation:

“It will be seen that section 332(1) removes the obstacle to fixing criminal liability upon a legal *Persona* that since it has no mind it could not be found guilty of a crime requiring *mens rea*. In terms of the subsection where a corporation is charged with such a crime the *mens rea* of the director or servant who committed the crime will be imputed to the corporation.” ..... Section 332 (1) expressly renders corporate body liable

where, committing the crime, the director or servant acted beyond his powers or duties but while ‘furthering or endeavouring to further the interests of’ the corporation. Liability under the section, therefore, extends beyond the normal limits of vicarious responsibility where “the principal or master is liable only if the agents or servants acted within the scope of his authority or employment”

It follows first that a corporate body can be convicted of virtually any crime requiring *mens rea*. In **R vs Bennett and Co.(Pty) Ltd 1941 TPD 194** the company was for instance convicted of culpable homicide. The fact that what the servant does was expressly forbidden by the company makes no difference provided that in doing so he sought to further the interests of the company.

For this reason I am inclined to the submission made by Mr Penzhorn that provided that Acres’ money was used, the intention of that firm’s employees when paying the money to Z M Bam is the intention ascribed to Acres. If they intended the money or part of it to be paid to Sole or if they were reckless as to whether or not this happened, Acres would have so intended either in the form of **dolus directus** or **dolus eventualis** whatever the case may be. It cannot be over-emphasised that there is no presumption against Acres. The only thing being that the intentions is ascribed to it.

It should be regarded as now trite that the present form of citation of the company as the accused in its own name is perfectly correct following the sound ruling by Cullinan AJ on 6<sup>th</sup> March 2001 in **Rex vs Sole CRI/T/111/99** (unreported).

It should also be noted that the same judge, for very sound reasons for which I would take the cue from his ruling does not agree with Burchell and Hunt where these learned authors say in bribery there necessarily has to be a *quid pro quo*. I share the learned Judge's view that it is enough that money was received for purposes of favour. Whether the Bribie reneged afterwards is irrelevant. One thing to keep in mind is that it is of vital importance to note that in bribery unlike in other forms of crime where the victim of an offence is the complainant or is the deceased, the participants in the unlawful transaction are both culprits. They are both beneficiaries thus making the detection of this form of crime difficult to make, and the prosecution a very arduous task. That is why I agree with the soundness of the view that does not insist on production of proof that the Bribie gave such and such a benefit in return for what he received from the brier. Thus it is enough for the Crown to only prove payment and receipt with the requisite intent without the need to prove actual benefit.

The crown has accordingly set out to state that the only possible reason why Acres would have wanted to pay Sole was in order to have him look favourably towards Acres in the context of its contractual relationship with the LHDA. The Crown maintains that the fact that Sole accepted this money is evidence proving the existence of an agreement to this effect; further that this in turn constitutes bribery. If in the assessment of material laid for evaluation before this court the points raised are borne out in evidence then I am in no doubt that the Crown's contentions would pass muster. The Crown cleared the decks for action by stating that whatever Sole did or did not do thereafter for Acres is irrelevant. Even if he did his duty he, as well as Acres, still committed bribery.

### WHAT FORMS BACKGROUND TO THE PAYMENTS

It is important to have background knowledge of what the instant case seems to be all about.

First as the record shows at page 35 lines 18 to 23 Sole was the Chief Executive of the LHDA at the relevant time forming /constituting the framework of this case. He was at all relevant times also a public official as mentioned at pages 89 lines 3 to 90 line 1. He and two others namely Acres and Z M Bam are the role players who came together in the context of the water project.

Acres is a company registered in Canada and was an external company in Lesotho involved previously when they were engaged in the airport contract in about 1982. It is here that Acres worked alongside Z M Bam as part of Delcanda.

Acres then bid for TAC-1 i.e contract 19 and were successful. The contract was awarded after a competitive bidding process.

Under TAC-1 Acres was closely involved with the running of the LHDA. As shown earlier they were involved in the setting up of the LHDA whose engineering component was primarily staffed by Acres engineers. Acres' involvement with the LHDA scaled the dizzy heights of that organisation. For instance Jonker was the assistant to the Chief Executive of the LHDA as shown in volume 1 page 55. Thereafter his position was held by another Acres' man Witherell from 1<sup>st</sup> October, 1989. See Volume 1 pp 387 and 392.

Witherell's appointment was under a separate contract i.e. Contract 64. He dealt with his own contract on behalf of the LHDA. Pages 305, 384 and 387 bear this out in Volume 1.

Under this contract Witherell had wide powers within the LHDA. See Volume 1 pages 389 to 400. Documentation before this court shows him dealing with contractors on behalf of the LHDA as indicated in Volume 1 pages 404 to 407. In Sole's absence Witherell was entitled to authorise payments to contractors. PW5's evidence at Page 471 lines 1 to 12 furnishes proof of this. He even authorised payments to Acres who were his employers. See Volume 9 pages 189, 193, 296 and 271. This followed instances where he had signed Acres' invoices on behalf of Acres itself.

The close involvement of Witherell in the LHDA management appears variously from the evidence and in some instances it is illustrated by the minutes of various management meetings all attended by him. As assistant to the Chief Executive both Jonker and Witherell must have had a close working relationships with sole. In fact Brown admitted this saying that Sole and Witherell even socialised.

The documents before Court also show Acres personnel working with contractors on behalf of the LHDA as exemplified by Brown in Volume 1 pages 171 to 179. The Acres personnel dealt with their own contract on behalf of the LHDA as was the case when they dealt with contract 19 shown in Volume 2 page 423.

As repeatedly mentioned in this judgement it was in 1989 towards the beginning thereof when it was decided that Acres should continue under TAC-2 known as contract 65. See Volume 1 page 146.

The first draft of Request for Proposals (RFP) was issued in March 1989 as shown in Volume 1 pages 121 to 133. Correspondence followed. The RFP was given to Acres in January 1990. In April 1990 Acres' proposal was evaluated. See Volume 1 pages 310 to 374.

Witherell then dealt with contract 65 as at 23<sup>rd</sup> May 1990. Volume 1 page 303. At that time he had specifically been appointed as Acres' agent in Lesotho i.e on 18<sup>th</sup> May 1990. See Volume 1 page 380. He was at the time also a signatory on behalf of the LHDA. In fact, by May 1990 Witherell had been in Lesotho for a considerable period of time. As early as 14<sup>th</sup> October 1987 he, along with Jonker and Hare were signatories to Acres' bank account with Barclays Lesotho in terms of, account number 811 000 485 as reflected in Exhibit "U".

The signing of the MOU on 19 May 1990 meant that contract 65 was basically in place, so Acres mobilised. It placed its people in the LHDA under the proposed contract, as from August 1<sup>st</sup>, 1990. Sole's letter is on record to substantiate this fact. This came after Sole had issued a letter of intent dated 28<sup>th</sup> July 1990. As will be shown in more detail later Acres personnel occupied line positions within the LHDA. See Appendix B to Contract 65.

All this was done without the approval of the LHDA board, JPTC or World Bank. In this galley it remains questionable whether there is any validity in the alleged strict approval processes and the proposition that Sole couldn't really do anything to assist the LHDA.

See pages 408 line 10 to 409 line 5. C/f the requirement that approval must be in writing. Page 231 lines 15 to 16 and pages 238 lines 23 to 239/line 12 in relation to the line of authority regarding menage /DCE/JPTC/funding/agency/Board/Minister and pages 239 line 12 to 242 lined 1 to 2 as to everything being open, transparent and negotiated.

On top of all this sight should not be lost of the way Willet was kicked out by Sole; followed by what amounted to Sole virtually trailing his coat tails in that when Hare whispered his protest against this to Makhakhe who intimated it to Sole, Hare suffered the same fate as Willet for daring to question Sole's admittedly unwarranted, high-handed and totally unreasonable action.

According to Acres' High Court summons against the LHDA the agreement in respect of contract 65 was reached orally on 28<sup>th</sup> March 1990 and put into effect on 1<sup>st</sup> August 1990. Volume 2 page 296. The question is how could it come about that a company of Acres' World stature conclude a contract of this magnitude by only word of mouth.

Taken against the background that what has not been done is that Sole has not signed and therefore Acres' are out on a limb as of 23<sup>rd</sup> November 1990, then the words of Cullinun AJ become very relevant as they appear at page 203 of **Sole** judgment.

As from August 1990 Acres claimed payments from the LHDA. See Volume 9 pages 134 and 139 to 140.

Many of the payment certificates were in fact signed by Witherell, not only on behalf of

Acres but also on behalf of the LHDA. All this then belies Acres' need for Z M Bam's assistance in facilitating payments. PW5 (Sophia Mohapi) testified that Z M Bam never assisted in this regard; and I believe her. As a matter of fact she had no idea that Z M Bam was Acres' agent. See page 477 lines 14 to 15 of the record of proceedings.

Although contract 65 was sole-sourced, Sole warned Acres on 1<sup>st</sup> February 1990 that the LHDA would look to other bidders and exclude Acres if negotiations were not successful. Volume 1 page 303 read with 189. It stands to reason that in this galley Acres would have had every reason to want to keep Sole well disposed towards them. Oiling his palm could not be put past his ruling passion that bribery has stood him in good stead in a number of occasions including where a case of brandy offered to a Minister would secure him what he wanted from the particular Minister. More distinct reference to that later.

On 16<sup>th</sup> August 1990 the World Bank indicated that it had no objection to the LHDA entering into the new contract with Acres. See Volume 1 page 401. By this time that the World Bank gave signification of its non-objection, Acres was already working on the new contract.

TAC-2 was signed some six months later i.e. on 21<sup>st</sup> February 1991. This was done without the necessary World Bank approval which was only given on 13<sup>th</sup> March 1991. See Volume 8 Page 192. Needless to say the JPTC had not approved nor in fact known as Meyer came to testify later on this point corroborating Letlafuoa Molapo's evidence.

I accordingly accept the Crown's submission that none of the major milestones leading up

to the conclusion of contract 65 were reached with the requisite prior approval in writing. See page 231 lines 15 to 16 of the record.

### **FEATURES OF THIS CASE**

An outstanding feature of this case is that it is based on circumstantial evidence. There is no direct evidence to show that Acres concluded a bribe agreement with Sole. Should there be any such conclusion it would necessarily have to be inferred from the evidence as a whole.

Another feature of circumstantial evidence is that it is more cogent and compelling in many instances in its probative value than direct evidence. For example, evidence of identification by a finger print would be considered more reliable than the direct evidence of a witness who identified the accused as the person he saw. See **S vs Shabalala 1966(2) SA 297 A at 299C**.

Mr Penzhorn took issue with Counsel for the defence against the latter's attempt to take individual witnesses' evidence separately and subject it to a test whether that evidence standing alone can lead to the only inference that incriminates the accused. Mr Penzhorn therefore urged that the correct approach is to hear all the evidence and find from it if the totality of that evidence points in the direction of guilt. I agree with this approach.

Mr Alkema relies heavily on the famous case of **R vs Blom, 1939 AD 188 at 202 to 303** where it is succinctly stated that:

“In reasoning by inference there are two cardinal rules of logic which

cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

Learned Counsel urged that a distinction should be made between inferences validly drawn on the one hand and conjecture speculation and various forms of assumptions on the other hand.

Applying the dictum in **Blom** and paying particular heed to the caution immediately above Learned Counsel submitted that the inference that Acres made payments to Sole pursuant to an offer to bribe is not consistent with the evidence of the representative agreement. Next he submitted that the evidence of the representative agreement and the payments made by Acres to ACPM/Bam thereunder, exclude the inference that the payments were made in terms of an offer to bribe.

Assuming the accuracy of the propositions made above Mr Alkema submitted that the inferences which the Crown seeks to draw, are based on conjecture and speculation, and not on

the proved facts before this court. I hasten to state that the reasoning he has adopted would only follow provided the representative agreement is found to be valid by this court.

Suffice it to say any inference that the Court should draw from the circumstantial evidence must be the only reasonable one in the circumstance and it must be consistent with all proved facts as I understand the underlying rationale in **Blom** above is . Otherwise reference to **S vs Setsetse 1981 (3) SA 353 at 369H** to 370 C would suffice in underscoring the principle involved.

The court in going about the exercise advocated by the authorities when dealing with a case involving circumstantial evidence is alert to the authority of **Govan vs Skidmore 1952 (1) SA 732 (N) at C- D** where an illustration of the application of the principle involved indicates that the approach in criminal cases is distinct from that in civil ones in the sense that in civil ones the inference need only be the most provable among any number of possible inferences.

Suffice it to say the question of circumstantial evidence which is a feature in this case along with that of accused's silence and false testimony will be revisited after the assessment and evaluation of evidence in this case which is based on protracted facts which necessarily therefore lead to the judgment being a long one in an endeavour to treat as many of the facts canvassed as possible and accord them their due significance.

Apart from the oral testimony that PW1 T. Putsoane gave, he relied on and submitted his written statement handed in and received in evidence marked Exhibit D.

The court learnt from PW1's evidence that he is an engineer by profession and is presently employed by a firm of consulting Engineers known as Africon which has an office in Maseru where PW1 is based.

PW1's involvement with the Lesotho Highlands Water Project "LHDA" for short, dates back to 1985/86 when he was then employed by the Ministry of Works as a Senior Road Design Engineer.

In 1987 he was involved in assisting the Lesotho Highlands Development Authority (LHDA) in reviewing the design of the Northern and Southern Access Roads consisting of connection routes from Pitseng to Katse and Katse to Thaba-Tseka. He also assisted the LHDA in setting up the Southern Access Road Task Team (SARTT) which was the departmental construction unit charged with upgrading the Southern Access Road.

This witness testified that after resigning from the Civil service he joined the LHDA as senior engineer responsible for road infrastructure projects in 1987. He indicated that during the following year the LHDA mushroomed and grew to dimensions never known before. This was the time when some civil servants such as Masupha Sole were seconded to the LHDA by their departments in the civil service.

It is the view of this witness that there was a perception that secondment created problems in the event that the department concerned could withdraw its employees from the LHDA at will and without regard to the disruption that this practice could impose on the LHDA training

programmes.

In 1990 PW1 became principal engineer and his duties were no different from his duties in the previous position of a civil engineer which was the capacity he first joined the LHDA in.

But in 1991 he was promoted to the position of Infrastructure Manager. In this capacity he reported to the Deputy Chief Executive in the Engineering and Construction section headed at the time by Mr Rohrbach.

It was during this time that Phase IA was coming to an end and Phase 1B was coming into operation. PW1 was in charge of both these operations i.e.the phasing out of Phase 1A and the introduction of Phase 1B. These are nothing but major infrastructure contracts relating to the respective Phases mentioned above.

PW1 continued working as Principal Engineer until 1994 when he was appointed Acting Chief Executive thus replacing the Chief Executive Officer Masupha Sole who was then suspended from office.

PW1 remained in that position until 1996 when the new Chief Executive Mr Marumo was appointed to that position. Thereupon PW1 became Deputy Chief Executive (Environment).

PW1 left the LHDA in 1997 and joined Africon which is the organisation where he has remained to date.

For purposes of completion it is important to mention that LHWP consists of 4 main Phases. The two most important of which are Phases 1A and 1B.

Phase 1A embraces the construction of the Katse Dam, the hydro-power, the transfer tunnels and the delivery tunnels. Phase 1B involves the Matsoku diversion works, Mohale dam and the Mohale -Katse inter-connecting tunnel.

The construction component of Phase 1A commenced in 1991, while the construction of the hydro-power component commenced in around 1994. It was not disputed that delivery of water to South Africa was accomplished in 1998 even though by then PW1 was with Africon having left the LHDA the previous year.

The planning stage of Phase 1B commenced in 1992 and came into physical effect much later, the construction works having commenced in 1997 and scheduled to deliver water in 2004/2005.

PW1 led the court to a new topic namely the process leading up to the award of contracts. This is a process which at the end of the day brought to the court's attention the enormous power wielded by the Chief Executive in the award of huge contracts entered into on behalf of the LHDA on the one hand and the contracting parties wishing to do business with the LHDA on the other hand. These could be contractors or consulting companies such as Acres which is a company in point. In this vein the court further gained an inkling on the operation of Consultants' agents in general and the operation of Z M Bam as Acres's agent in particular. In this regard the relationship between a Consulting Company and its agent is governed by what is called a

representative agreement. More of that later.

PW1 indicated that the decision whether or not pre-qualification of tenderers would be required would at the end of the day rest with the Chief Executive.

The next stage is that of evaluation of tenders. This evaluation is effected by the evaluation committee consisting of LHDA members appointed by the Chief Executive. However should the complexity and nature of the contract require service of outside specialists in the evaluation committee, then in terms of the requirements imposed by the financial regulations, such person/s would either be directly appointed by the Chief Executive or be recommended for such appointment to the LHDA Board by the Chief Executive. Of importance again is the fact that the evaluation committee reports to the Chief Executive who in turn decides what and who to recommend to the Board.

PW1 highlighted the fact that tenders are ranked in order of preference. The highest tenderer being the one to be recommended by the chief Executive in the normal course of events. This does not detract from the fact that he nonetheless has the final decision in determining which tenderer to recommend. Then the Board would give its approval which would take the form of authorising the Chief Executive to enter into negotiations with the successful tenderer. It is important to note that the actual negotiations would be conducted by a negotiating committee which itself has been appointed by the Chief Executive. If negotiations are not successful then the next tenderer in line would be approached and negotiations commenced with him.

When negotiations are successful the gist of essential details is recorded in the Memorandum of Understanding (MOU). This document sets out the manner in which the contract is to be executed. The contract itself is to be signed by the Chief Executive on behalf of the LHDA. This authority would have been derived by the Chief Executive from the principle that, the LHDA would have in the first place given him the authority to enter into negotiations with the preferred tenderer. Of importance is to note that although the “MOU” can vary the scope of work it nonetheless cannot vary the tender itself.

PW1 stressed that in respect of large construction contracts consultants would be engaged by the LHDA to supervise the contractors on behalf of the LHDA. In this regard reference here is to engineering consultants.

PW1 gave as examples of firms which were involved as consultants supervising contractors on behalf of the LHDA, such firms as Joint Venture of Highlands Infrastructure Consultants, Lahmeyer, the Consortium of Lahmeyer MacDonald, Sogreah (a firm of French Consultants) and local consultants such as ABC meaning Association of Basotho Consultants of which LESCON was a member.

With specific reference to LESCON PW1 mentioned that Local Engineers were involved in consultancy contracts. He indicated that with regard to big consultancy contracts there was a requirement that a certain percentage of the consultancy work be done by South African firms while the rest of the work would be done by firms selected by Lesotho. Lesotho was thus at large to select international firms other than South African firms, save that a certain percentage i.e 10%

or 15% would consist of local consultancy firms from Lesotho. This in effect is how ABC and LESCON came into the picture.

PW1 testified that he first met Masupha Sole in 1981 when PW1 returned from his studies in India. He had contact with him again from 1987 onwards.

PW1 was quick to inform the court that Sole was very influential. He stressed that the effect of his influence derived from the fact that Sole had set up the LHDA organisation and was responsible for the filling in of posts by most of the people who worked for the LHDA. PW1 made a point of indicating to the court that Sole, even after he had left the LHDA, still exerted or had influence on that organisation. Incidentally PW8 Charles Putsoane corroborated this aspect of the matter to the full. The submission of Mr Penzhorn for the Crown is indeed apt based as it is on unassailable evidence that it was through the Chief Executive that matters in respect of which the JPTC and the World Bank had to concur were channelled through him and if he wanted to block them he could. Also, these bodies largely acted on recommendation emanating from him. This influence remained even after his dismissal in October 1995. I accept the conclusion that clearly, having built up the LHDA as the two Putsoanes have testified, there would have been considerable loyalty owed to Masupha Sole. The testimony of PW1 to the effect that Sole clearly favoured Acres has had in this court an added impetus on it therefore.

PW1 testified that he knew the late Z M Bam. He knew him as an engineer and also as the Managing Director of LESCON. As indicated earlier LESCON is Lesotho Consulting Engineers.

PW1 worked with Z M Bam in the early 1980's when the latter was working for the Ministry of Works, Roads Branch for whom the two did some work. LESCON was involved as a subcontractor in road projects between Malibamatso Bridge and Katse. LESCON was subcontracted for Construction Contract LHDA 13 and the supervision contract LHDA contract 16. The other contracts were Construction Contract LHDA 104 and supervision Contract LHDA 17.

The consultants to whom LESCON was subcontracted were Sogreah, Coyne et Bellier in the first section and HIC - BCOM in the second.

PW1 was involved directly with Contracts 17 and 104 on behalf of the LHDA. It should be borne in mind that Contract 17 was the consultancy contract in respect of contract 104. In the capacity set out above PW1 was the Project Engineer within the LHDA and the Sub-consultant was LESCON. In this sense PW1 worked with Z M Bam.

PW1 in brief pointed out that during his employment with the LHDA first as a senior engineer, next as infrastructure Manager, also as Acting Chief Executive and finally as Deputy Chief Executive he worked with Acres personnel. He explained that Acres provided technical assistance to the LHDA. He elaborated that Acres personnel occupied line positions within the LHDA in the engineering divisions. He concluded by laying great stress on the fact that Acres personnel in the capacity just pointed out "were actually part and parcel of the LHDA. They acted similar to every other employee of the LHDA." See page 169 of the typed record; lines 16-17".

Needless to say the Acres personnel within the LHDA were housed in the same office building as the LHDA.

Of senior Acres people that PW1 knew and who filled positions in the LHDA, PW1 mentioned Mr Jonker who became the assistant to the Chief Executive. The other one was Mr Witherell who initially was the chief design engineer and later became the technical manager and ended up as Assistant Chief Executive finally. PW1 next referred to Mr Brown who occupied the position of Mr Witherell as Design Engineer when the latter vacated that position. He later became technical manager and Design Manager in tandem when the Technical Division was further divided into two divisions.

PW1 testified that he worked closely together with Mr Jonker, Mr Brown and Mr Witherell.

He however did not know DW1 Mr Hare nor did he know or work together with Mr Reinhardt both of whom came to occupy senior positions in the LHDA on behalf of Acres.

PW1 told the court that he knew nothing about a firm called Associated Consultants and Project Managers (ACPM) as a sub-consultant for whoever working in Lesotho for the LHDA or otherwise. In fact he never got to know of such a firm. He however knows and has known the wife of Z M Bam namely Mrs Margaret Bam. But he did not know that she was in any way involved in the Water Project. Nor did he get to know Z M Bam being a representative of Acres or representing the interests of Acres on the Water Project. PW1 only got to know for the first time

that this was the case or said to be the case during the course of this instant litigation. I accept as true PW1's professed lack of knowledge set out above.

I may just take a brief pause here and reflect that indeed PW1 has in evidence been demonstrated to have been an important member of the LHDA organisation whose career there culminated in his being appointed an Acting Chief Executive for two years spanning the years 1994 and 1996. Z M Bam as evidence showed used to go to see Masupha Sole in the latter's office at LHDA. Yet not once does Z M Bam go to that office in regard to, presumably, his function as someone looking after the interests of Acres in the LHDA when PW1 is there. The ACPM regarding which evidence later showed that it is no different in essence from Z M Bam, is unknown to as important a man as PW1 who for two years was Acting Chief Executive for the LHDA; apart from having been a senior member of that organisation for years before. I am constrained to indicate that it is too early a stage to come to any conclusions but nonetheless a nagging feeling is not misplaced even at this early stage that unless a deliberate effort was made to keep this information away from PW1 in his capacity as the Acting Chief Executive of the LHDA he surely would have easily come by it as, on the surface, it did not seem to be that inaccessible to Sole regard being had to the totality of evidence heard in this case.

This becomes even more poignant when consideration is had of the fact that when PW1 was working on contract 104 and LESCON was a sub-consultant Acres technical personnel would have been and indeed were involved with PW1 in the supervision of that contract. These were Jonker and Witherell who worked in the division that reported to the Chief Executive. Yet strangely indeed none of them nor anybody for that matter from Acres ever mentioned to PW1

that they had a relationship with Z M Bam or that Acres had one with him other than Z M Bam's sub-consultancy work to LESCON. It should not be overlooked that PW1's assertion that, when he was the Acting Chief Executive from 1994 to 1996, he at that stage worked closely with Acres people such as the Deputy Chief Executive, was never assailed nor was there any need for it to be assailed because to me it has a distinct ring of truth to it.

PW1 told the court that when he was Acting Chief Executive for the period spanning 1994 and 1996 he used to have meetings with Acres people. Various problems were discussed in these meetings relating to the Project. Meetings were of various types. For instance there were technical management meetings, management meetings and project co-ordination meetings in which even outside consultants participated and reported to the LHDA. Yet at none of any such meetings where PW1 participated was it mentioned by any of the Acres people to the LHDA that Z M Bam was an agent for Acres. I find this very strange indeed to say the least.

Going further in his evidence PW1 indicated that Acres was contracted as consultants under contract 65 which in effect was an extension of services rendered by Acres under contract 19. What this entailed was that there would now be more personnel and some positions would be upgraded. With regard to Mr Witherell the court was told that under contract 64 he became Acting Assistant to the Chief Executive, and that later became Deputy Chief Executive, (Environment and Public Affairs)

PW1 reiterated that Acres' contracts were administered within the LHDA at executive level. He further emphasised that the Acres personnel remained very close to the Chief Executive,

“worked very close with the Chief Executive” he added. See page 173 of the typed record.

It was PW1's further evidence that Basotho Engineers in order to get into senior positions in the LHDA had to be trained by Acres as counterpart Basotho staff so that ultimately they could take over.

Asked to explain the meaning of a sole-sourced contract which is a character that was ascribed to contract 65 earlier and how such a contract works, PW1 simply stated that a sole-sourced contract is one where only one contractor or consultant is invited to submit a proposal and then the contract is negotiated. He indicated that there are problems associated with a sole-sourced contract. Asked to elaborate he indicated that in a sole-sourced contract there is no competition, and that consequently the contractor or consultant can actually put whatever price he wishes.

PW1 thus pointed out that there were problems that he knew of and which were experienced with regard to the promotion of Acres people and the bringing in of Basotho Personnel or engineers to take over Acres positions. PW1 in this regard pointed out that some Acres people who had been in contract 19 were promoted to higher positions yet the expertise and experience did not warrant that. PW1 said also that there was little or no training undertaken by Acres people for the betterment of their local counterparts. He named Mr Lightfoot as a person perceived to have been promoted above his capabilities. PW1 demurred at the fact that Mr Lightfoot was promoted to a position of a principal engineer in the face of Basotho candidates who were better qualified than he was for that position because in the first place he was not even a

qualified engineer.

The court was favoured with Exhibit "D2" a document constituting contents of the minutes of the meeting held between six Basotho Engineers and the Chief Executive Masupha Sole on 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> February 1994. At this meeting the engineers including PW1 whose statement was handed in marked Exhibit "D" raised their concerns with the Chief Executive. The major problems entailed in these concerns related to Acres. These had to do with the fact that Acres was not providing the training service that they were supposed to. Acres was providing none whatsoever. One other concern was the unsavoury closeness Acres seemed to be enjoying with the Chief Executive. The Basotho engineers in the LHDA felt that this closeness was to their exclusion and therefore their detriment. The visible and unwholesome consequence of the closeness referred to above was, according to PW1, that Acres personnel were seen to be "extended" without the Basotho engineers being given the anticipated responsibility. The end result was that, because the Basotho engineers were offered no training, any hope of them actually ever taking up the eagerly desired positions would remain only a pipe-dream.

PW1 informed the court that the outcome of the meeting referred to above was that the minutes thereof were distributed to the Government of Lesotho delegation to the joint Permanent Technical Commission (JPTC). The Chief Executive Masupha Sole who was furnished with the copy of these minutes was not happy with them at all.

A point of major significance that PW1 raised in his oral evidence was that there is no record of LHDA being involved with a firm called Associated Consultants and Project Managers

(ACPM). He stressed his utter lack of knowledge of such a firm. Thus he confessed to court that it had been a matter of great surprise to him when he was earlier shown a document entitled a representative agreement between Acres and ACPM dated 23<sup>rd</sup> November 1990, during consultations with Crown Counsel when preparing for this case. In all the above evidence by PW1 the court found no trace or suggestion of an attempt to mislead it or conceal the truth from it.

He went on to indicate that reading from the representative agreement referred to above Z M Bam is shown as going to (i) perform for Acres certain functions outlined therein, namely look after Acres' interests, (ii) help Acres secure a contract, (iii) make Acres known in Lesotho and so on. Yet it was the unchallenged and indeed unshakeable evidence of PW1 that while he was in the LHDA he was not aware of Z M Bam ever performing such duties for Acres.

Asked if Acres would have been in need of such duties as outlined in the representative agreement including, among others, providing political intelligence, PW1's well-thought out and logical answer was "No, as far as I was concerned they would not have had any such need, seeing that they were integrated in the LHDA. Their top man was ..... closest to the Chief Executive and at a working level. We worked in the same offices with them. We shared all facilities that the LHDA provided." See pages 179 and 180 lines 22 onwards and 1 respectively. Needless to say Acres' top man referred to in the abstracted quotation was none other than Mr Witherell.

In paragraph 23 of Exhibit D, PW1 buttresses the needlessness of Z M Bam's services as Acres' agent by pointing out that as at 23<sup>rd</sup> November 1990 negotiations relating to contract 65 had been concluded and that this contract was in effect in place and in that sense was in Acres' bag.

He elaborates in very lucid terms that the Acres' personnel who had been engaged in contract 19 largely continued under contract 65. He throws more and more clarity on the point he is trying to make by illustrating that by the 1<sup>st</sup> August 1999, which was an effective date for contract 65 to take off additional Acres' staff had been mobilised in Lesotho for purposes of contract 65. Thus all that remained to be done, in essence, was for the contract to be signed. PW1 thus rams the point home by stating that it is in this context also that he finds it strange that Z M Bam would have been engaged in respect of any of the services, referred to earlier. The court finds it difficult to dismiss PW1's sentiments in this regard as merely fanciful. Thus the court concludes that if Z M Bam had any role such to fulfil as set out in the representative agreement on behalf of Acres PW1 would certainly and necessarily have known about it. After all PW1 knew Z M Bam as a local engineer involved with LESCON and ABC. I do not see what could have obscured him from knowing about Z M Bam being Acres' local agent regard being had to the fact that PW1 had during a considerable length of time been an infrastructure manager, later he occupied a position of influence and confluence of all matters which could not affect the LHDA without catching the attention of the Acting Chief Executive that he was for two years, bearing in mind also his close working relationship with Mr Witherell.

It is simply mystifying that people such as PW5 Mrs Sophie Mohapi, and JPTC people such as PW6 Johan Classens and PW10 Ugo Hiddema knew nothing about it. Indeed one feels compelled to come to the view that this sits Acres' rather ill in view of their avowed and proclaimed policy as a company to avoid secrecy because they are alive to the fact that secrecy generally betokens underhand dealing, suspicion and therefore deceit and dishonesty.

PW1 indicated that with respect to TAC 2 which otherwise is known as contract 65 the effective date was 1<sup>st</sup> August 1990. He indicated that this date marked the moment from which Acres started mobilising with respect to contract 65.

With regard to the extensions of Acres personnel PW1 testifies that these extensions in order to be effective required the approval of the Chief Executive.

With reference to Exhibit D a graphic illustration of contracts with regard to Acres and payments by LHDA to Acres and Acres to Z M Bam it was acknowledged that the financial part of this document, i.e. the part about payments related to the evidence that would later come to be given by PW7, Jean Roux. However it is in evidence that PW1 himself compiled this document in conjunction with PW7 of PriceWaterhouseCoopers. PW1 was thus able to inform the court that “this document shows payments that were made by Acres to Mrs and Mr Bam”. See page 181 line 9 of the typed record. PW1 acknowledged that the top name appearing on this graphic representation relating to Acres i.e. M M Bam is Mrs Bam while the middle one is Z M Bam. He immediately brought to the court’s attention that “ They [illustrations] show the payments that were made were made from Mr Bam to Mr Sole. It [document] also shows the time when these payments were made and what contracts Acres was involved in within the LHDA”. See lines 10-15.

PW1 indicated that in the early mid 80's Masupha Sole before being involved with the LHDA was associated with LESCON (as its founder member)

The court has had reference to document 31 in which appears a letter from Acres to the World Bank where in the second paragraph there is reference to the experience gained by Acres in Lesotho while engaged in the main Lesotho Airport contract. PW1 acknowledged that he was aware of Acres involvement at the time and went further to indicate that the main consortium that he knew was involved there was Delcanda International also a Canadian firm. The letter was written by F H Jonker as early as 3<sup>rd</sup> June 1982.

Document 34 embodies the opening of the proposals in a brief letter signed by M E Sole the Chief Executive addressed to the World Bank on 22<sup>nd</sup> January 1987. The other documents ranging from 35 to 37 are accompanying minutes. The importance of document 37 is that it ranks Acres as the first rank bidder as compared with companies Bechtel and Halcrow which were ranked second and third respectively on 20<sup>th</sup> February 1987.

Document 55 is a letter by Acres to the LHDA dated 3<sup>rd</sup> December 1987 in which services of F H Jonker the Executive Vice President of Acres are offered to act as Assistant to LHDA's Chief Executive. PW1 acknowledges that in fact that is what actually happened. It is important to note that this was early on in the time frame of contact 19 otherwise known as TAC - 1.

Document 64 shows LHDA Management meeting minutes in which those Present include R G Witherel who is number two from the bottom in the list perused by the court.. PW1 stated that at such meetings managers of various divisions in the LHDA came to discuss the affairs of the LHDA including sensitive and confidential matters including performance of contractors and consultants for instance.

Document 121 is a cover document whose full contents outline the scope of services proposed at March 1982 in respect of TAC - 2 or contract 65. This gives credence to the view that as early as March 1982 there were already negotiations with regard to TAC -2.

On 22<sup>nd</sup> March 1989 The Chief Executive wrote to the World Bank in terms of document 135 acknowledging the clearance granted for the extension of Acres as contractor to increase the number of man months for their services from 224 to 289. With reference to this event PW1 stated that in fact variations exemplified in that regard occurred in most contracts and that this happened under TAC - 1 and TAC - 2. The upshot of this is that services would be increased. He affirmed the question of the learned counsel for the Crown that work done, the time spent and the people involved from Acres,[all that] was not constant, it would change and it was changing.

Document 171 written by CJ Brown does not relate to Acres but gives notice to contractors that were involved in tenders about various matters giving them a lot of information spanning pages 171 and 177 relating to details of hotels, street maps of Maseru, a map of Lesotho including a map of certain parts of Lesotho at page 179. PW1 said this is the sort of information necessary for people who are not familiar with Lesotho. Conditions would be explained to them as well as information about what to expect in Lesotho. CJ Brown an Acres man working in the LHDA is able to furnish all this information and more. One wonders what should be the function of Z M Bam in such circumstances at a later stage in contract 65. On the face of it Z M Bam who also performs the same functions on behalf of Acres would seem to be serving in this regard as nothing else but a fifth wheel to the cart. The question however remains what could he be doing for Acres

who are prepared to pay him money for services that their own personnel in the LHDA seem to be performing with undoubted competence. In brief Acres seem to be represented in the LHDA by people who are familiar with conditions in Lesotho, who have been in the LHDA for a term of years occupying line positions in that organisation, and who are men on the spot in Lesotho unlike Z M Bam who is sitting in Botswana under employment by a Botswana Housing Corporation. There surely is more to Z M Bam's relationship with Acres than what is intended to be conveyed in the representative agreement.

Referring to C J Brown at 186 lines 7 - 8 PW1 says "..... Under contract 19 he worked within LHDA, he was from Acres".

PW1 told the court that a Request For Proposals (RFP) with regard to TAC 2 was given to Acres in January 1990. By 1<sup>st</sup> February 1990 E M Sole wrote a letter to Acres. See page 302.

In the penultimate paragraph of that letter he wrote as follows:

"Acres is the only company being requested to submit a proposal at this time. However, should the technical proposal be judged inadequate, or the financial proposal be judged excessive, then the LHDA intends to request proposals from a short list of consultants. Acres will not be included in this short list".

The above extract in quotes depicts what would happen with regard to a sole-sourced contract.

Even though under cross-examination PW1 conceded that when all is set and done there

was nothing sinister or illegal that this witness was aware of about the conclusion of contract 65 in my humble view that is a matter which this court would be expected to make pronouncements upon. Furthermore this witness's reluctance to make such a concession was not lost to the keen observation made of his demeanour by this Court.

I may just in passing indicate that PW1's concession referred to shortly above may not on its own prevail against the contentious issue raised by the Crown that the honouring of contract 65 by the LHDA and JPTC was nothing but a *fait accompli* forced on them by the unbridled actions of the Chief Executive Masupha Sole. (More of that later)

Document 416 in Volume 1 is a representative agreement. PW1 was taxed in cross-examination about services listed in the first schedule appearing at page 418. Under re-examination he unhesitatingly told the court that he never became aware of Z M Bam performing the services listed for Acres, namely keeping Acres informed of developments, general conditions, and making Acres known and so on. At no time or stage did PW1 become aware of Acres using Z M Bam for such purposes. See Page 413 lines 5 -10. Most definitely when PW1 was friends with Acting Chief Executive, Z M Bm never came to PW1 to make Acres known to him. Nor did he collect documents and forward them to Acres. At none of the meetings with R G Witherell did he inform PW1 that Z M Bam was Acres' representative. Not even when PW1 was the Acting Chief Executive despite that R G Witherell and he were on good working relationships. While still on document 416 paragraph 2(ii) it is worth noting that ACPM/Z M Bam while purportedly serving Acres it/he was at once serving Lahmeyer International despite that clause 2(ii)above says:

“ACPM shall with respect to any matter or thing related to LHDA in Lesotho in which Acres is in any way involved or seeking to be involved,

act exclusively for Acres and not directly or indirectly for any other person or entity”.

Needless to say reading from page 426 -429 one sees that even the World Bank shared the concerns raised by PW1 about sole-sourcing. It is not without significance that the Chief Executive was described as “an experienced engineer with a mind of his own”. Page 426 line 13.

The high water-mark of PW2 Sophia Mohapi’s evidence with regard to the propriety of R G Witherell authorising the payment of certificates in his capacity as Acting Chief Executive in the absence of Masupha Sole was that while R G Witherell in his position as the Acting Chief Executive was entitled to sign on behalf of that office she hastened to point out that “ perhaps with benefit of hindsight it does not allow for checks and balances if that [practice] happens”.

It is however a matter of some curiosity to this court that R G Witherell was able to process his own contract 64 while he was holding the senior position of Acting Chief Executive in the LHDA. This strikes me as curious for what it means is that he was able to propose and later recommend or approve.

An example of this situation was attested to by PW5 where in Volume 9 page 271 onwards appear payment certificates for advance payment to Acres in the sum of CD 1 160 000-00 and M250 000 - 00 signed by R G Witherell on behalf of the Chief Executive whereas on document 272 be signed this document on behalf of Acres. In brief what is seen here is R G Witherell claiming the money on behalf of Acres and signing his approval thereof on behalf of the LHDA. I have already indicated how this practice at least speaking from hindsight has struck PW5.

She further stated that she knew Z M Bam but not through business as she had never had any business dealings with him. She had never had social meetings with him. But she maintained that as a local engineer he was well known.

When shown a copy of a representative Agreement entered into between Acres and Z M Bam PW5 said speaking on behalf of the Finance Division of the LHDA her organisation had never had any dealings with Z M Bam. This was in response to a direct question whether Z M Bam ever to her knowledge performed any of the services outlined in the representative agreement for Acres. I accept PW5's assertion as true.

It must be appreciated that PW5 spent many years working for the LHDA and her assertion that in all the years that she was there Z M Bam did not perform any of the services referred to for Acres carries much weight indeed. The implication here is simply that if Z M Bam indeed performed any such services PW5 would have known. She struck me as a very truthful witness whose evidence was straight forward throughout. It should be recalled that she was a lady of great standing in the LHDA who at some stage in that organisation was entrusted with the important task of being an Acting Chief Executive herself. See page 480 line 12. She was also fair to Z M Bam in that having said she recalled on one or two occasions seeing him going into Masupha Sole's office she hastened to point out that many people used to go to Sole's office therefore at that stage she said this was not of any significance to her.

Again it is of great significance to this court that at the time PW5 was the financial controller and later Chief Executive Finance, first as counterpart and next as substantive post

holder it had never come to her attention that Masupha Sole had bank accounts in Switzerland.

The next witness after Sophia Mohapi was PW6 Johan Classens. At the time of giving evidence PW6 was with the highlands Water Commission previously known as the JPTC. The name of the Commission having changed in 1999 with the introduction of Protocol 6 to the original Treaty.

PW6 is a South African delegate on the Highlands Water Commission. But because events being dealt with here relate to pre - 1999 protocol 6 it is convenient to stick to the name Joint Permanent Technical Commission, in its abridged form JPTC. PW6 joined the JPTC in 1988 as a consultant to the RSA delegation.

PW6's attention was drawn to page 56 of Volume 8, a document headed TAC 2 Proposal Negotiations. This relates to a meeting with Acres held on 15<sup>th</sup> May 1990. His immediate reaction was that although the JPTC is not responsible for negotiations as such, it however has a monitoring function. Thus he explained that in the particular meeting referred to above he was involved as an observer on behalf of the JPTC at that stage.

PW6 enlightened the court about the negotiations which went on between Acres and LHDA regarding contract 65. He gave explanation about the dispute that raged around the question of taxes which were insisted on by the Lesotho side while denounced by the RSA side of JPTC. The court learnt that a compromise was reached with the result that what taxes were received by Lesotho had to be quantified and paid back to South Africa in well - calculated

proportions. Acres was represented by one John Arnett in resolving this dispute. It is worth bearing in mind that the World Bank itself was adverse to financing Consultants or contractors for purposes of paying local taxes in foreign countries where such consultants/ contractors' expertise was put into use.

With respect to the suggestion put to him at page 508 line 14 onwards that during the debate between parties about what were billable and non-billable costs to be borne by client the question was basically that Acres was going to pay fees to an agent and that such fees should be included in the non-billable costs to ultimately be recovered from the LHDA, PW6's reaction was that agency fees would be paid generally by Acres as part of their overheads on assignments all over the world all over the world.

An insistence by Mr Alkema for the defence that LHDA knew in an indirect way that they were going to pay Acres fees including representation fee or agent fee that Acres was paying to Z M Bam because we all know Z M Bam was Acres' agent, was met with a telling rebuff, namely

“I do not necessarily agree with that. .... I do not think one can necessarily assume that agency fees are payable on this assignment”.

In my humble view the reasons given by PW6 for concluding as he has done appear to be compelling. Furthermore they are consistent with the stand taken by PW1 especially and PW5 that they are not aware that Z M Bam was Acres' agent. The more pungent aspect of PW1's reaction in this regard is that surely if Z M Bam was an agent of Acres as insisted on by the defence he would have known.

PW6 denounced a parallel being sought to be made by the defence between a provision being made by Acres in its contract price for client's entertainment on the one hand and a provision in relation to the agent's fees on the other hand. His response was

“ I do not think one can say that if an organisation like Acres pays agency fees..... for assignments all over the world, ..... one can [justifiably] make the assumption that they also pay agency fees on the assignment in Lesotho. I do not see that as ..... a logical ..... conclusion”.

The way I look at this debate is that even if as PW6 admits that he does not have any personal knowledge of what are being paid by consultants internationally to their agents the fact of the matter is that if compelling reasons make it impossible for me to accept that Z M Bam was Acres' agent, PW6's confessed ignorance of what goes on in the world becomes irrelevant.

Indeed at page 12 PW6's response to the question put by the Learned Counsel for the defence was sufficient to cause a sudden but revealing change of course by Mr Alkema. In this connection it had been said to PW6 that Z M Bam was a South African citizen, and as such not subject to the exchange control regulations of Lesotho. The suggestion was that Z M Bam was at large to ask for payment in a foreign currency in a foreign banking account. The sound and therefore to my mind acceptable answer proffered by PW6 was that “If Mr Bam is a South African citizen, then he is basically under the same exchange control regulations [as] a Lesotho citizen. I think it is even more difficult to get clearance to receive payments internationally if you are a South African citizen.” Amazingly it appears Acres was prepared to go along with this breach despite that at page 1284, lines 4 - 5 their avowed policy is that” the corporation will not knowingly aid or abet

any party to circumvent exchange control laws.

It is indeed telling that the Learned Counsel for defence immediately tried to deftly betake himself from a point he had originated much to his disadvantage as follows:-

“I cannot speak on behalf of Mr Bam and I do not want to speak on his behalf, in fact it is impossible to speak on his behalf ....” See page 512

lines 7 - 22

At page 519 of the record having listened to the evidence of the case it seems fair to make a summary that a Memorandum of Understanding (MOU) followed by a letter of intent followed by the signing of the contract is a proper Procedure to be followed in the LHDA when concluding contracts with Consultants/contractors.

It will be clear later in the relevant context why it is necessary to bear in mind that with regard to Contract 65 the contract came into operation on 21<sup>st</sup> February 1991. But Acres had been allowed to start working on 1<sup>st</sup> August 1990. Thus it is axiomatic that Acres was allowed to mobilise despite that the contract had not yet come into operation then. This followed an interim arrangement that was made to allow Acres to start work in terms of a contract that was only signed the following year.

The JPTC only gave its approval in March that following year. It will be appreciated though that when signing the contract in February the next year it was stated that the effective date would be 1<sup>st</sup> August the previous year. The truth is that as at 1<sup>st</sup> August the previous year the

contract had not been signed. No contract was in existence at the time.

While the above outline appeared to be common cause there was however a dispute between counsel whether this state of affairs precipitated from a *fait accompli* or not. More of that later.

The court takes a very serious view of the fact that a company of such prominent international standing as Acres whose avowed policy is to denounce deliberate breach of the law should brazenly behave before this court to create an impression that if ACPM/Z M Bam preferred to be paid in Canadian Dollars in a foreign country in breach of financial regulations of whatever country, there was nothing Acres could do about it. Put bluntly it was no skin off Acres' nose!

That Acres should blithely adopt an ostrich's - head - in -the - sand attitude in the face of a patent breach of the law by its agent is not only reprehensible but it implies that compared with what Acres stood to gain this particular breach was but a mere mackerel sacrificed in order to bait a whale. This is where the role of Masupha Sole in his position as the Chief Executive without whose recommendations no consultants' contracts with the LHDA could come to fruition, becomes significant to the extent that he kept receiving Acres money channelled through Z M Bam as will shortly be illustrated when dealing with the evidence of PW7 Jean Roux.

Turning now to the evidence of PW7 the court observes that it confirms the report Exhibit K-1 handed in together with annexures thereto labelled Exhibits K-2 and 3 together with a graphic summary showing the flow of funds. This is Exhibit K-4 a very handy piece of work by all

manner of means.

The graphic illustration supplied by PW7 is simple to follow. The oral explanation he gave in support thereof is even simpler. His sketch gives an illustration of the flow of money from left to right represented by red lines and blue ones. On the left are listed consultants and/or contractors. These consultants and/or contractors are given as Dumez, Acres International, Lahmeyer MacDonald, Lahmeyer International, ABB Schaltanlagen and ABB Sweden.

The middle from top to bottom consists of Z M Bam mostly and (his wife) MM Bam's accounts. The witness says of these holders of the centre stage "That is where moneys have been paid into from these consultants and contractors". See page 549 lines 13 - 14.

The witness goes further and says

"the red lines illustrate payments which could actually follow through to Mr Sole's account".

He assured the court that he had reason to believe that the amounts that were paid into Z M Bam's account, a portion thereof or sometimes the full amount was paid across to Sole through those accounts. He illustrated that right of the middle are all accounts belonging to Sole held in various areas of the globe ranging between Maseru, Ladybrand, Bloemfontein and Geneva into which moneys were transferred from Z M Bam's account. The witness made so bold as to say that

"Those accounts were used as conduit almost for moneys received from

these consultants or contractors". See page 549 lines 18 - 19.

The red lines on the sketch represent what the witness describes as direct link and the blue non-direct.

It is important even at this early stage of PW7's evidence to indicate that his evidence forms the crux of the Crown case but it was nevertheless not challenged, more especially where it relates to the flow of funds from Acres through to Sole as depicted by the red lines on Exhibit K-4.

PW7 came out impressively when he indicated that if an account contained zero balance and somebody pays some money into it giving it a certain credit balance and should the credit holder the following day pay half of the amount to Mr X then truly the money that came in is part of the money that went out. Elaborating on this sort of scenario PW7 said that as he was in the instant situation dealing with money then prudence dictated that he should make certain assumptions because the money is not specifically identifiable. In tackling this problem he adopted the sound and common sense approach that if the payment was close enough from the point of view of time taken between a consultant/contractor depositing the money into Z M Bam's account and transferring it into Masupha Sole's account; or if there are sufficient circumstances such as that there was no other transaction in that specific account for a specific period until payment is made, then PW7's assumption would be that the money in question was in fact the money that was used to pay the amount to Sole.

The above scenario fits in hand and glove with the situation in the instant case in the sense that the ACPM account held by Z M Bam in Switzerland received only Canadian Dollars paid into

it by Acres. Most of the occasions a regular proportion of the money deposited into that account was paid to one and no other account than the Swiss account held by Masupha Sole. No better description fits this scenario than that Z M Bams Swiss Account was a mere conduit for purposes of transferring moneys paid there into Sole's account. But why? Sole was the Chief Executive of the LHDA. So what! Acres had an interest in securing a consultancy contract with the LHDA and continuing to serve in that capacity. The fact should therefore not be overlooked as stated by PW1 that Acres was favoured above all other competitors by the Chief Executive, Sole. Closely linked with this notion is a mighty concession made by the defence in their written submissions at page 108 paragraph 89 saying:

“..... For purposes of this case it is accepted that the payments from Bam to Sole were made *unlawfully*, and this has already been found by another court of this Division in the case **R vs Sole** .....”

The argument proceeds that on the facts placed before court it cannot be said that Acres knew of the transactions between Bam and Sole, or that it was a party thereto. In my view however it would defy common sense that Acres should pay so much money as it did consistently over a period spanning the duration of this practice without knowing that its money was being used through their agent to pay the Chief Executive of an organisation in which they had a direct interest. Again it was Acres policy to engage agents who were not tainted with wrongdoing. But the concession referred to above gives credence to the view that Z B Bam would not have engaged in the act of unlawfulness if he was as upright as some of the defence witnesses would have this court believe. Furthermore it is inconceivable that he would use this unlawful means of securing Acres' interest by, as it were, rubbing the right way the only man who mattered namely Sole

without Acres' knowledge. Moreover the fact that the usual 60% passed on by Z M Bam stops after Sole through losing his legal battle in courts, lost any chance of reinstatement in the LHDA where Acres had direct interest, leaving Z M Bam continuing to receive his usual 40%, put paid to Acres' pretence that it did not know that Z M Bam kept passing on 60% of money received from Acres to Sole. The halt to pay percentages usually payable to Sole was no more coincidence with Sole losing that battle but a conscious act by Acres not to pay him because as no longer Chief Executive of the LHDA he was of no longer use to them.

In this connection I find Mr Penzhorn's oft repeated example very apt and persuasive that - "A's" son has been arrested for breach of the law. "A" approaches the investigating officer. The investigating officer merely says to the prosecutor who is to prosecute "A's" son that so-and-so is "A's"son and hands the prosecutor money. The next thing the charges are dropped.

The other example the learned counsel for the Crown used in order to bring home to this court the devious paths that the crime of bribery often follows, and makes it difficult though not impossible to pin point or investigate is the example of a traveller who is in a hurry to cross the border between Maseru's Caledon bridge and South Africa but finds that the queue is very long ahead of him and the sun mercilessly hot. He gives something to a small boy who goes and to hand it over to the examiner of travellers' travelling documents at the head of the queue, whereupon this particular traveller is beckoned forward and has his passport stamped. Thus he has managed to jump the queue! Indeed he has thereby escaped the ordeal of a long wait in the unbearable sun heat. If later investigation shows that the examiner of passports is in possession of money or gift received from the traveller in question for which there is no apparent reason why it

was paid, it would not be wrong to conclude that that money was bribe money meant to enable the traveller to jump the queue. But again I must not be understood to mean that the act becomes bribery simply because unaccounted for money was found on him in these circumstances. It became bribery when he agreed to consider the unlawful proposition with favour.

PW7's testimony was that apart from a few isolated transactions relating to for instance American Express, as well as a few debits to the accounts which he could not identify because of the absence of documentation, the accounts of Z M Bam and M M Bam were exclusively for the transfer of monies from contractors/Consultants to Masupha Sole.

Credible evidence clearly shows that he last three payments of CAD 10 500 - 00 each represented some 40% of earlier ones. This is a remarkable pattern regard being had to the fact that Z M Bam retained this percentage as his share. It is pointedly remarkable when one considers that in respect of these payments Z M Bam did not in turn pay a portion over to Masupha Sole. This particular aspect of the case stands in sharp contrast to occasions where Z M Bam would retain 40% of the payment deposited into his account by Acres and pay over 60% to Masupha Sole. It is true that sometimes the percentages were not exactly in the 40% /60% ratio but they were close enough. What matters to this court is that in the last three occasions referred to earlier there is a clear and conscious effort to ensure that Z M Bam receives 40% which was usually his share. This conscious effort on Acres' part betrays a clear notion that the usual 60% which Z M Bam would pay to Masupha Sole is now not payable. Now that Acres pays Z M Bam only 40% to retain means Acres knew where 60% would usually go if they paid it together with the 40 % to Z M Bam in a composite form i.e. of 100%. The axiom in the proposition at hand is indisputable ,

namely that when Z M Bam receives 40% plus 60% in a composite form from Acres, Masupha Sole receives from Z M Bam 60% of that composite deposit. But when Z M Bam receives only 40 % direct from Acres Masupha Sole gets nothing. How can it seriously be maintained in such circumstances that Acres did not know who the character is who now receives nothing because they paid Bam only 40 % this time.

PW7 is a South African Advocate and speaking as such he expressed the view that these transaction in Switzerland involving Z M Bam constituted contravention of the South African Exchange Control Regulations.

This court accepts the submission based on evidence that has been tested that the Bam accounts were nothing more than receptacles for bribe monies. PW7's chart gives ample credence to this view. See Exhibit K-4 along with Exhibits K-1 and 3.

One is fortified in this view when considering the use to which Z M Bam's Swiss accounts were put. For instance the chart shows that these accounts were used for no other purpose than to receive monies from contractors or consultants on the Water Project namely ABB, Lahameyer, Dumez and Acres and then to channel a portion thereof to Masupha Sole. PW7 was adamant when he related this to the court. See page 614 lines 12 to 18. Needless to say this very damning aspect of PW7's evidence was not challenged. I may even go further to say that with regard to the figures that PW7 worked with one finds that at the end of the day DW6 Burnett does not challenge them. All he challenges is PW7's approach.

In a way, PW7's evidence adduced above gives the lie to Acres doing a thorough due diligence on Z M Bam before and whilst dealing with him because as early as when Acres were engaged under Contract 19 they knew that Lahmeyer were using Z M Bam as their agent. The Swiss Accounts of Z M Bam had been receiving monies from consultants/Contractors who were on the Water Project. Among those were Dumez, Lahameyer and Acres as shown above.

Credible evidence leads to the conclusion also that Z M Bam's role as Acres' agent was never disclosed to the LHDA as I pointed out earlier. Indeed the evidence of the two Putsoanes that of PW5 and PW9 Felix Matsoha to that effect was not challenged. As stated earlier the Court attaches weight to the fact that all these were senior and key staff members of the LHDA at the time. It is but a small stride for the court to conclude from this premiss that if Z M Bam's role was not made known to them then indeed no one else in authority was told about that role.

I accordingly accept the submission that it seems the arrangement with Z M Bam was not intended to bear any exposure to the light of any type. This conclusion rightly follows because there is not even a document copied to Z M Bam. I further accept the soundness of the argument which is in sequel that the fact that Masupha Sole knew can hardly, in the circumstances, be imputed to the LHDA. Clearly the work that he did or the tasks that he had to perform are thereby consigned to the category of clandestine ones.

It follows then that if the relationship was not generally known it would fittingly belong to the "red flag" category. It requires not a quantum leap but hardly half a step to conclude likewise

with regard to the sums involved. Z M Bam was paid huge amounts of money for not doing any of the things stipulated in the contract and for that matter while he was sitting in Botswana.

At page 263 in Volume 3 it is observed that in papers submitted by Acres to the World Bank a portentous statement appears which accords with a solemn manifestation of high corporate standards of business conduct maintained by Acres. It is to be seen that Acres says it values its integrity and therefore strives for adherence to the laws and regulations which ensure carrying out business in an honest and moral manner. Indeed at page 263 paragraph 2 the opening words read

“ ..... Acres has also had a corporate anti-bribery policy, the Acres corporate Standards of Business conduct, since 1978.”

Acres also makes reference to the United States Corrupt Practices Act of 1977. See page 287 - 291. What is of interest in this connection is that Acres acknowledges that unusually high commissions are “red flags” indicating corrupt practices. Further as indicated earlier Acres acknowledges that secrecy is the hallmark of improper transaction. It goes on to state however that care was taken to include a stipulation against unauthorised payments or commitments i.e. bribes. Page 305.

But it seems to me that these high standards which are made much of by Acres are honoured more in the breach than in the observance in the light of the fact that its dealings with Z M Bam were very much a hole-and-corner affair.

Thus I accept Mr Penzhorn’s submission that, Acres having acknowledged the caution that must be displayed with the sort of agents referred to above, it contends nevertheless that Z M Bam’s role was an open one known to everyone. This contention had to be formulated in order to

be rejected and I reject it without hesitation. I have no doubt that when dealing with Z M Bam, Acres was aware that there could be a problem and for that reason sought to keep the relationship hidden.

It is indeed revealing that the amount of CAD 34 325 coming from Z M Bam's account is received in Masupha Sole's account see page 594 lines 20 -23. From Z M Bam's account it was transferred to Masupha Sole's account number 149.70/03.01.

More revealing is the fact that after only 31 000 had been transferred from Acres' account to Z M Bam's account the amount transferred from this account to Sole's account was 34 329 - 50 which is about 2 700 more than the amount transferred by Acres. PW7 said Z M Bam could not have transferred this amount of 34 000 without the incoming deposit of 31 000 from Acres. See page 596 lines 10 - 16. One sees in the picture that PW7 is trying to make, a lucid and visible effort by parties involved to clear the over-draft created by drawing 34 000 on an account containing only 31 000. On the same page towards the bottom and proceeding to the next page the question of 60% destined from Z M Bam's Account to Masupha Sole's comes out clearly. In line 26 of 596 PW7 in offering an explanation that is unassailable said:

“The CAD 28174 is exactly 60% of the amounts that were transferred into Z M Bams' account from Acres”.

This was in response to the question that on 23 April 1992 CAD 28 174 was paid over to Masupha Sole further and more direct to the witness the question was

“..... and you say under the 28 000 amount it is 60%. Could you explain that to his Lordship”.

The same story is given in clearer detail at P 604 where PW7 adamantly says

“That money must have come from Acres” that was transferred to Sole. Lines 10 - 11. Of importance is that again it is said to be exactly 60% of the amount that had been transferred into the other account on exactly the same day the amount of 14 085 was transferred out of that account. There are no other transactions between these accounts and there are no other deposits being made previous to that account from which that money could have come.

In his submissions Mr Penzhorn at page 71 under the heading “Issues arising from exhibit “L,”” indicated that during the cross-examination of PW7 the defence sought to establish through exhibit “L”, that the payments made to Bam conformed with the representative agreement. He surmised that the defence sought thereby to give some legitimacy to this agreement and particularly also to dispel the obvious conclusion reached by PW7 that the reduction in payments from CAD 7800 - 00 to CAD 3500-00 signifies that Bam was now only being paid his 40% share. Learned counsel concludes that this document does not really assist the defence. In fact it does the opposite. I agree with this submission.

I recall during proceedings how the defence made much of the fact that at times the ratio by which Z M Bam and Sole shared as claimed by the crown the moneys from Acres did not conform to the 60/40% pattern. I however have satisfied myself that for most part or 16 times out of 20 this pattern is maintained. To argue therefore that the Crown should be tied down to the

same pattern even in odd occasions where such is not the case is, in my humble view, engaging in unnecessary pettifogging exercise. I recall in this regard D6 Eric Burnett saying 4 % is a large number and that Governments fall and elections are lost by 1% margins. That maybe so. But here the court is engaged in assessing evidence given by a witness who was not present when the events he is investigating were taking place. All he relied on were his investigative skills painstakingly applied on the data that he managed to lay his hands on while the balance thereof is not traceable. After all the Holy Book somewhere says a single crooked stone in a wall does not warrant razing the entire building to the ground.

The court bore witness to a strenuous effort by the defence seeking to establish that the reduction in payments from 78 000 to 3 500 - 00 was to the effect that the percentage payable to Z M Bam was exceeding 3.6%. I have taken time to peruse exhibit "L" and found that the defence's contentions are not supported by reference to that Exhibit. In fact reference to page 753 Line 1 reveals the opposite. The debate at page 755 lines 4 to 18 rams the point home in favour of the Crown concerning the question at issue in the sense that figures taken at random all accord with Exhibit "L".

For instance in certificate 107 the figure 21 151-60 accords with the figure in Exhibit "L". Below that is 22 101-90 for disbursements which also accords with Exhibit "L". Certificate 108 likewise accords with the amount of 26 819-08 to which Exhibit "L" refers.

The court is aware that the payment of CAD 180 000-00 is not reflected in the agreement. Thus if Exhibit "L" is to be relied on then CAD 45 000-00 multiplied by 4 should have been paid in the following order:

first , the amount of CAD 45 000-00 being the advance received by Acres from the LHDA,

next three payments of CAD 45 000-00 following receipt of each of the first three monthly progress payments received from the LHDA.

It should be borne in mind that the representative agreement provides for 69 equal monthly payments. Even though this document provides also for payments which may accumulate at ACPM's option and be paid at three monthly intervals nonetheless Exhibit "L" does not reflect any such thing.

What the court has been able to perceive as an objective factor in favour of Acres is that the amount they paid Z M Bam coincides with the payment amount only and not with the payment provision in the representative agreement. By introducing this I feel that Acres' plausible stand is undermined by what virtually amounts to throwing a spanner into the works. This, it is contended by Acres shows, that the representative agreement is genuine. The logic of this contention escapes me.

Consequently I am inclined to the view expressed by the Crown that the fact that the payment amounts coincide is neither here nor there. Common sense dictates the actual payments would have been incorporated into the representative agreement, if fears are to be allayed that this document is not genuine. If for no other reason, incorporating payments there would be a sensible thing to do for accounting purposes. Now as things stand the conclusion is irresistible that this

document was used to hide the true intention. Otherwise one is left wondering what the real purpose was for the payments; hence a feeling that all this begs the question regarding the crucial issue upon which the question of payments is hinged.

### **WHAT SOLE DID FOR ACRES**

It is fitting that immediately after treating of factors set out above I should consider and focus on the above title.

In his well-thought out judgment **CRI/T/111/99 Rex vs Sole** dated 13 March 2002 (unreported) at 12 and 10 Cullinan AJ stated that in order to establish bribery the Crown does not have to prove a *quid pro quo*. However where the Crown is aware of the bribee doing things or omitting to do things favouring the briber it should place this before court.

It was in this vein that the Crown called witnesses who might testify to the existence of factors encompassed above.

The Court has already indicated that it accepts the evidence of PW1 showing that Sole was certainly well-disposed towards Acres. PW1 pointed to examples such as what is certainly on record that local engineers were unhappy with the slow progress being made by Acres towards the advancement of local engineers.

Under cross-examination PW1 was taken to task in an attempt to show that all the checks and balances were in place and that Sole was but a small cog in a large wheel. The checks and balances encompassed what was referred to by DW1 Victor Hare at page 1674 lines 1 to 6 to the effect that though Sole was the head of the LHDA any substantial action he took or any approval that he made had the close scrutiny of the JPTC. Further that:

“It had to have World Bank approval and there were a set of approvals within LHDA they had to pass.”

Saying this it seems DW1 was blissfully forgetful of the fact that he said to the court he was puzzled when Sole kicked out one Willet for no apparent reason as a result Recnhardt came in as the corporate representative to replace him. To add pungency to the unbridled and high handed manner in which Sole was dealing with situations which were not to his liking, when he got to know from Makhakhe that DW1 himself was concerned that no explanation was given for Willet's dismissal, he in turn was dismissed from the project because Sole “considered that I was going over his head.

And because you had the temerity to go over Sole's head you were out as well -? Yes” see page 1676 lines 5 - 18.

Needless to say this was a clear indication of the unbridled, high handed and limitless powers that Sole wielded even if DW1 wishes not to describe them as such. The fact that the testimony that leads one to this conclusion comes from DW1's own mouth could not have given

any more poignancy to this contention than otherwise. So clearly Sole was no small cog in a wheel in the LHDA as shown by this and many other factors to be dealt with later. For the moment I am only say Sole's character described as of a man with an independent mind of his own could not have been more fittingly rendered in ordinary language.

To return to the charge. While PW10 Hugo Hiddema was taken to task in cross-examination because his evidence was largely of secondary nature, that of PW15 Letlafua Molapo bore not any such shortcomings.

PW15's evidence went along with the minutes of the JPTC of which he was a member at the relevant time as borne out in Exhibit "Z". That evidence establishes that Article 9 of the Treaty requires JPTC's approval in writing for any decision by the LHDA, more particularly any decision involving the expenditure of funds.

Although at the relevant time namely 1990/91 there were no formal procedures in place dealing with approval all major steps in the contract procuring process had to be approved by the JPTC. Otherwise formalisation of the necessary procedures was effected under Protocol 4 in 1992. The necessary steps in existence before the coming into operation of Protocol 4 included the request for proposals in the case of a consultant, the Memorandum of Understanding, the letter of intent (if applicable) the actual contract including any other decision involving the expenditure of funds.. See pages 1072 through 1075.

PW15 sketches a history of Masupha Sole not complying with JPTC procedures. PW15

was very impressive when giving evidence. He is what one can describe as a man of equable and resigning disposition who inspired the court with confidence that he truly knew what he was talking about without exaggerating the otherwise unwholesome attitude exuded by Sole to the authority of the JPTC.

He indicated that rather brazenly Sole ignored the need to seek approval of the JPTC when he steamed ahead and sent out a request for proposals notwithstanding that this document describes the scope of the work to be done. See pages 1072 line 13 and 1073 line 10.

Next Sole decided not to let the Memorandum of Understanding receive the approval of the JPTC.

Further, the letter of intent dated 24 July 1991 was sent out without the approval saying nothing of the knowledge of the JPTC. Needless to say the subsequent authority to mobilise dated 14 August 1991 was without the JPTC's approval. It is important to note that both these steps had financial implications and for that reason made prior approval of the JPTC imperative.

In my view if Sole regarded his disregard of the above necessary requirements as minor breaches of otherwise sound practice it was a matter of time before retracting from this form of behaviour would be as tedious as steaming ahead with it. Fact: is it not trite that impunity incites to greater crime? In my considered opinion it is on this, kind of conduct that the law has fittingly set a note of infamy.

The need to obtain the JPTC's approval applied with even greater force to the authority to pay out the advance where there was no contract in place yet and therefore no funding as at the time the preliminary requirements towards the establishment of Contract 65 were driven single-handedly and off his bat by Masupha Sole.

The summit of this unwholesome treatment of JPTC as if it didn't matter or exist is that the actual contract was finally signed on 21<sup>st</sup> February 1991 without JPTC's approval. See page 1107 lines 14 - 24 especially where PW15 in line 18 in reference to minute 8.17 almost ruefully except for his benign equanimity of spirit told the court "Well, here under 8.17 we noted that the contract had already been signed."

I entirely agree with the Learned Counsel for the Crown in his submission in paragraph 170 of his written submissions that "all these irregularities can primarily be ascribed to Sole. They were also not mere formalities. By committing the LHDA the way that he did, particularly when allowing Acres to mobilise and he paid the advance before the contract was signed, Sole placed the JPTC in an impossible situation. It had little choice then but to go along with what he had done. It was faced with *a fait accompli*. And all this was to the obvious benefit of Acres". See page 1105 lines 14 - 20. The words of PW15 are indeed revealing in this regard. When it was pointed out to him that the person who signed authorising the payment on behalf of the Chief delegate (sic) is Mr Witherall, an Acres' employee, and being asked what he made of that PW15 said: "The Acting Chief Executive; I think he would not have done it on his own without authorisation by the Chief Executive. It would have been something unheard of, because he was part of the Acres' team and to sign it *he would have sought authority from the Chief Executive*".

Mr Penzhorn submits and the records amply reveal in support thereof that the

reprehensible sort of conduct manifested by Sole not only led to Protocol 4 but it eventually led to the disciplinary proceedings against him which in turn led to his down fall. **PP 1114 - 1116**  
**GREATER FOCUS ON ACRES' NEED FOR A REPRESENTATIVE AND WHAT Z M**  
**BAM DID FOR IT.**

As stated earlier Acres' involvement in Lesotho dates back to as early as 1982, therefore quite clearly Acres was perfectly familiar with the situation in this country. Even under TAC-1 Acres' involvement with the LHDA spanned the period between 1987 and 1990. Around the threshold of the commencement of TAC-2 Acres had been in Lesotho for no less than eight years. No doubt Acres had by then been in no trouble knowing their way around. When TAC-1 merged into TAC-2 Acres' staff carried on working without a hitch as amply attested to by PW10 UGO HIDEEMA at page 1054 lines 8 -16. In fact Sole's letter dated 14 August 1990 to Acres rams this point home in paragraph 3 as follows;

"We confirm that we agree that the following Acres staff presently in Lesotho should commence on the new TAC - Engineering - 2 contract with effect from 1 August 1990"

In the circumstances set out immediately above it seems to me that the submission that the services of a representative would clearly not have been necessary is not without merit and thus should accordingly be accepted.

The above contention is further buttressed by the fact that Acres' supposed agent under contract 19 was in Botswana having already been there during the contract period of contract 19 i.e. from 30<sup>th</sup> November 1988. The indefensible question is why use a representative under contract 65 who broke his representative contract with his principal under Contract 19 by going to

work in Botswana.

While there may well be merit in Acres' contention that the use of a representative is accepted international practice for a company going into a foreign Country for the first time, this contention doesn't seem to fit in well with the circumstances disclosed by facts in the instant case regard being had to the fact that contract 19 virtually merged into Contract 65. Thus Acres cannot seriously be heard to say they needed a representative to do the usual agent/representative work that a fresh company coming to an unfamiliar foreign land would need. The untenable situation that mocks common sense is that on the one hand here is Z M Bam sitting in Botswana thousands of kilometres away from Lesotho where he is supposed to be doing an ongoing work that demands his immediate attention being "a man on the spot" for Acres while on the other hand there is Acres' intimate involvement with the LHDA under Contract 19. The puzzling nature of the situation projected above is compounded even more by the fact that Jonker was the assistant to the Chief Executive under Contract 19 and as such had indeed wide powers and by the additional fact that Witherell took over as assistant to the Chief Executive on 1<sup>st</sup> June 1989 going later on to become deputy Chief Executive on 1<sup>st</sup> August 1991.

Factors abound which show that Acres did not have the use of Z M Bam. According to his employment record Z M Bam never took leave from his housing employment in Botswana except for more than the odd long weekend. The negotiations with him in respect of the representative agreement in fact took place while he was in Botswana. Thus if indeed Acres needed him it was for something else, what is more it needed him for something that did not require his physical presence in Lesotho, such could be a telephone to Sole.

At page 1 in Volume 9 M K Rabashwa the senior corporate Counsel for Botswana Housing Corporation in a formal statement presented to this court said in paragraph 3:

“Attached hereto is a copy of Zwalisiwonga Mini Bam’s files relating to his employment with the Botswana Housing Corporation. It reflects that the said Bam was employed with the Botswana Housing Corporation from *1 December 1988 to 20 February 1991 on a full time basis as a senior civil engineer.*” (Italics mine)

I have earlier indicated but it bears repeating for the sake of clarity and the immediate context that as at 23<sup>rd</sup> November 1990 the terms of contract 65 had virtually been negotiated barring two minor items. This continued to place Acres within the heart of the LHDA. The RFP in Volume 1 pages 189 and 303 read especially with page 276 and Volume 2 page 496 more than amply bear this out. The MOU came about on 19<sup>th</sup> May 1990 essentially putting Contract 65 in place. Thus in any lawful sense then no assistance was needed to get contract 65.

The courts’ attention was brought to bear on the fact that apart from getting the contract, Z M Bam was supposed to render certain services. But the court soon realised from credible evidence led and elicited from cross-examination that these services to the extent that Acres needed them at all, were largely covered in contract 65.

The legal requirements were catered for in terms of the document titled LHDA Contact 65 Provision of Technical Assistance in Engineering - Phase 2. This appears on page 432 especially the paragraph reading “..... the Consultant has submitted a proposal dated 28<sup>th</sup> March 1990 for

the provision of the services. See also pages 451 and 461.

The important question of taxation was also taken care of as appears at P507. Acres were being reimbursed their taxes thus had no need for tax assistance as amply highlighted in PW5's smooth running and plain sailing evidence. See PP 474 to 475 and 483 lines 1 to 9. To show that even in this respect Acres were well covered to the extent that they needed help they made do with their own tax consultant John Arnedt to whom I earlier referred. PW6's evidence sufficiently bears this out at pages 502 line 5 and 503 line 5. Sole was not behindhand in offering his fair share of assistance as shown in the records presented before court where he sorted out tax matters with the Commissioner of Revenue.

In line with maintaining the spirit of affording optimum working environment to Acres, support facilities in respect of office accommodation were also provided. Furthermore secretarial services including accompanying ones relating to accounting, banking and telecommunications were also in place. In any event Acres already had all these under contract 19. What need then would there be for Bam to play a role towards enabling Acres to fill a non-existent hollow?

A further point for consideration along the same lines is that Mr Lightfoot was not only ready and available but was actually there and dealing with processing Acres' payments. PW5 and 6 are shown up as having discharged necessary functions in their respective roles in the regard stated. See pages 473 and 474 lines 25 and 5 respectively; also pages 501 and 502 lines 13 and 3 respectively. These witnesses certainly would not have needed Z M Bam to help here. There can be no doubt that Witherall as assistant to the Chief Executive would have been equal to the demands of the occasion should need have arisen.

Another factor which militates against any need for Z M Bam's services is that to the extent that office accommodation and secretarial services were not already provided for, there can be no doubt that both Jonker and Witherell as deputy Chief Executives or Acting Executives would have easily been able to attend to them. In any event, schedule B to contract 65 obliged the LHDA to provide all this.

To ram the point home it is important to note that Lightfoot and his assistant Lineo Serobanyane, not Z M Bam, attended to bank business and records for Acres. Peat Marwick, not Z M Bam, attended to matters relating to the Registrar of Companies. Exhibit "P" would serve to throw more light on this aspect of the matter.

When all the above have thus been disposed of what remains would be keeping Acres informed of developments in respect of its services, keeping Acres informed of general conditions and developments in Lesotho, making Acres known to appropriate agencies, collecting documents and promoting Acres in Lesotho. But truly speaking all this could clearly be done far better by letter Acres' own personnel inside the LHDA, rather than an outsider, more particularly an engineer employed on full time basis by the Botswana Housing Corporation in Gaborone. This is assuming of course that Acres needed these services at all. On the evidence, particularly regarding Acres' prior involvement in Lesotho and their position within the LHDA, they did not need any of these services. It was only necessary to mention them here in order to have them accordingly rejected.

Common sense seriously questions why, in any event, would Acres want to use Z M Bam to do this for them under contract 65 when, under contract 19, he disappeared off to Botswana and left them high and dry. I shall only assume without accepting that Acres did indeed have a similar contract with Z M Bam under contract 19 as they claim. However what sticks out clearly in my mind is that this is inconsistent with sound business practice. Having let them down once as a matter of probability, Acres would not use Z M Bam again for this sort of assistance.

The question that keeps coming up like a bad penny had to be answered, namely what Acres really needed Z M Bam for. Mr Penzhorn suggests that the answer is quite obvious when viewed against the situation Acres found itself in on 23<sup>rd</sup> November 1990. He contends that two things had to happen, namely Acres were looking to be paid for the work they had already done and also the advance payment and Masupha Sole had to sign. Because this suggestion has the backing of credible evidence that I vividly recall I agree with it and therefore accept it.

Mr Penzhorn submits, that if this then really is what Z M Bam had to achieve, namely facilitate payments and get the contract signed two questions arise. First, how was Z M Bam to achieve this? Next, why could not Acres do it themselves?

Mr Penzhorn gives a very compelling answer to both these questions and submits that clearly Z M Bam would achieve these things by assisting Acres to bribe Sole. For this the Learned Counsel says Z M Bam was paid 40 % of the bribe. He logically develops this theory by stating that using Z M Bam made sense for Acres because by paying through Z M Bam, *this dropped a veil between Acres and Sole which, but for the discovery of the bank records in Switzerland,*

*would never have been pierced.* The phrase in italics above provides a dependable sheet anchor to the conclusion that one is compelled to reach in this inquiry that indeed Acres bribed Sole through Z M Bam in order for Acres to secure the two vital interests outlined above. In brief the involvement of Sole as a factor in this equation as the recipient of vast sums of money for some highly obscure purpose, truly and convincingly accounts for the proverbial milk in the coconut particularly when looked at against the well thought out submission by Mr Penzhorn. Witness the spectacular manner and speed with which both came to pass after the representative agreement was signed. As with wielding a magic wand Acres was paid on the one hand while the contract was signed on the other. Witness further that in fact, Acres were paid contrary to the agreement which provided for the first (advance) payment only upon signature.

In Volume 2 page 504 clause 6 of Contract 65 it is clearly provided regarding Advance Payment and Bank Guarantee that “The Consultant shall be entitled to an advance payment of CAD 1,160,000-00 and M250,000-00 *on signature of the Agreement* and on submission of Bank Guarantees acceptable to the Employer.” Emphasis supplied.

With this scenario playing itself out, sight should not be lost of the fact that Acres’ own man, R G Witherell, authorised the advance payments on behalf of the Chief Executive on 28<sup>th</sup> November 1990, some five days after the representative agreement on 23<sup>rd</sup> November 1990. See Volume 9 page 134. R G Witherell must have known that this was in breach of the agreement. It is also inconceivable that he would have done this, i.e paying his own firm, without the blessing of Masupha Sole. He would also have been very much alive to the need to obtain JPTC approval and the fact that it had not been obtained.

As to what Z M Bam did for Acres one is struck by the fact that throughout all the events surrounding Contract 65 he is conspicuous by his absence. His character suits that of a weasel. DW1 wishes to fob off questions relating to this slyness on the part of Z M Bam as “obviously he was not one given to blabbering aloud. He was not a blabber mouth”. If so Acres may be credited with having appointed a man whose profile would suit Sole’s unwholesome scams to the full, and they in turn stood to benefit from underhand dealings. Witness their preparedness to pay Z M Bam in foreign currency in a foreign country in contravention of Lesotho’s financial regulations in respect of a job Z M Bam and Acres had contracted to perform in Lesotho. That alone is an eye-opener to the existence of something much broader and more sinister than mere breach of financial regulations much as such breach is a serious crime that therefore is highly reprehensible. Although Z M Bam was known as a local engineer through LESCON and being involved in contracts such as contract 78 as reflected in Volume 2 page 600, he was not known to LHDA or anyone else as being Acres’ representative or to act as such. Had he played the part of Acres’ representative, senior LHDA officers such as PW1, PW5, as well as JPTC people such as PW6, PW10 and PW15 would have known about it. This total blank surrounding Z M Bam regarding what he did for Acres as its representative in turn cuts a wide swath on the question whether indeed he was Acres’ representative at all. For if he was one why is it that he has nothing to show for it to people who must know about it in the LHDA and the JPTC?

I agree entirely therefore with the submission by Mr Penzhorn that the fact that key people such as I have mentioned did not know about it clearly suggests that no one else did, barring perhaps Sole. But who is he if not a bird of the same feather who stoutly stood to benefit from all this underhand operation the flames of which were enthusiastically fanned by Acres? Z M Bam

took no part in the negotiations relating to contract 65 . In this connection PW6 at Page 500 line 23 with regard to his knowledge of Z M Bam participating in the negotiations relating to Contract 65 says “Not in the context of these negotiations.” In the protracted negotiations relating to what PW6 referred to as “past taxes” where parties involved dealt direct with consultants and contractors Z M Bam was nowhere to be seen at all. See page 502 lines 12 onwards. In any event the record reveals that he was in Botswana pursuing the legitimate interests of what appears to be his real employer as Raboshwana’s formal statement is on hand to show and dispel any doubts to the contrary.

Quite clearly Acres did not need his assistance, in the lawful sense, “in obtaining a contract for ..... Technical Assistance Contract Engineering -2” as an attempt reflected in Volume 6 page 1444 would have us believe. The document is dated 23 November 1990 and to it are attached schedules 1 through 3.

Going a step further into this morass of puzzlement in an attempt to find out exactly what was going on one is struck by a total and distinct absence of invoicing showing the work done by Z M BAM.. In parenthesis contrast this with the case of one Milner who was Acres’ representative in Zambia having obtained that position by virtue of the fact that he knew the head of a massive River Project there. The point here is that unlike in the Bam case, in the Milner one Acres emphasised the need to have invoices for obvious and important accounting purposes. A clear case of double -standards. Reference to Acres letter of 29<sup>th</sup> April 1991 signed by H C Rynard bears out the contention made here as follows in the middle of the 3<sup>rd</sup> paragraph: “..... we also require a very simple ‘invoice for services rendered’ from the representative to match with the

money paid out, for audit purposes’ .” That Rynard placed the relevant phrase in inverted commas more than amply serves to stress the point I am trying to make, namely that it cannot be true that no invoicing was required in relation to Z M Bam because he was paid a fixed percentage on work done or that the invoices must have been shredded at expiry of minimum period of keeping records by Acres. Be that as it may. Now to return to the point in issue perhaps the absence of invoicing is understandable given that Z M Bam was in Botswana at the time. But I would hasten to confess to my bewilderment concerning how Acres thought that someone working in Botswana could help them get contract 65 signed. Be it remembered that Acres’ efforts to secure Z M Bam as their agent goes back to 1989 (see Volume 15 Part 6 pp 1 - 21 page 2 of which is prefaced by the hand written phrase “changes made”) when he was already in Botswana. Unless, as suggested by learned Counsel for the Crown, all he had to do was to confirm to Sole that the representative agreement had been concluded, and later that the payments had gone through a matter he could effect by telephone I find his agency for Acres very enigmatic.

Couldn’t it perhaps be for the reasons set out above that what accounts for this is noticeably the different tack adopted by Acres at the debarment proceedings before the World Bank. See Volume 3 page 276 onwards especially where it is stated that: “Post-award of both contracts, Bam’s role fell principally into two areas (1) political intelligence, and (2) intelligence concerning Acres’ personnel’s performance.” Now the curious development arising is that Z B Bam is said to have been the eyes and ears of Acres in respect of the political situation and developments in Lesotho, Volume 3 pp 293 - 4, and it is for this that he was being paid. Acres says this is also what Z M Bam did for it under TAC-1. On this basis Acres can then conveniently seek

to explain why no one heard of Z M Bam being Acres' agent and why he did none of the things stipulated in the contract. The absence of documentation showing the work done by Z M Bam can then also be explained, as Acres did to the World Bank as follows: "This intelligence function, clearly a sensitive task, was carried out largely without documentation". If one may pause here; it becomes immediately apparent that every step of the way there was an attempt by Acres to cover their tracks and that to do so they had to have resort to their vast financial and intellectual resources yet no way could they explain the inexplicable because dishonesty is slavish; only the truth is free. Otherwise in the light of what they term a *sensitive task* that necessitates absence of documentation how do they reconcile this state of affairs with the fact that in the Acres documentation underlying money transfers to Z M Bam in Geneva one finds numerous references to invoices against which these payments were being made. This is amply borne out in Volume 6 pp 1467 - 15 - 24. At page 1468 we see a transfer of CAD 180 000 to ACPM c/o Banque Multi Commercials (BMC) the payee being the Royal Bank of Canada. This is a cheque requisition for payment of agent fee for advance payments. Why are there these references to the numerous invoices yet these invoices are not produced?

Needless to say these new and sudden lurch to the side by Acres concerning Z M Bam's duties is not without great problems for the defence. It has the defects of its own qualities. First Z M Bam could never effectively have had his ears to the political ground in Lesotho while he was in Botswana. As shown earlier he was in Botswana from 1<sup>st</sup> December 1988 until 20<sup>th</sup> February 1991 according to Rabashwa's formal statement in Volume 9 page 1 to 133. There is nothing to suggest that Z.M. Bam was associated with politically influential people. So all this is nothing but

dust and ashes. True, Sole stands on a different footing. He certainly was associated with his own Minister. Next, precisely because Acres personnel held key positions inside the LHDA it does not tie in with good sense to suggest that they would need someone from outside to tell them how they were perceived by the LHDA or for that matter about political developments in general. All this would have been right up their street after Acres' many years within the LHDA. I accept therefore the submission that goes to buttress the statement that Acres did not need Z B Bam for political intelligence as amply illustrated also by the discontent felt by the Basotho engineers within the LHDA. Witness that things got so bad that they called a meeting with Masupha Sole as shown by exhibit "D" which is on hand to prove the point. At this meeting grievances were articulated. Yet lo and behold! there is nothing to suggest that Z M Bam reported to Acres on this issue, or even warn them that there was discontent towards Acres. What master would rear a ferret hamster and do himself the ferreting out of vermin in the form of rats, likewise what sort of a man would own a dog and be expected himself to do the barking!! I raise these questions because from the evidence it definitely appears that Acres people such as Witherell, Lightfoot and Clifford Brown quite adequately filled the role as local agents in this sense for Acres. In Volume 6 paragraph 1708 one sees the Chairman Mr Rynard communicating an important message to Witherell regarding invocation of means by which the important question of taxation might be resolved. Not only so, but he actually invited Witherell by that letter to consider being involved in making "some interim arrangement until the tax problem is cleared up". As we know Witherell proved equal to this task. At pages 1722 and 1776 we see Brown being entrusted with the mammoth task and his expertise being sought towards resolution of the question of requirements for terminating guarantees because according to Lesotho Laws then it was possible that unless returned to the issuing Bank the guarantees remained outstanding. At page 1776 we see C J

Brown sending an important letter to the LHDA and signing it as an “authorised representative”. I need look not far to realise that Acres people themselves were performing “intelligence” function as the documents before court are simply pullulating with examples of this. These relate to the security situation in Lesotho, to the perception of Acres’ performance and to many such related factors. In illustration of this we see in Volume 7 page 1874 the Project Manger J D Lawrence communicating to C H Atkinson an important document relating to the fact that Witherell had been given a memorandum while there with questions relating to policy. A summary of the substance of that document was given covering several items. At page 1935 C J Brown is seen addressing a telefax to Atkinson and as being quite equal to the task of supplying the other with information regarding the sensitive security situation and political events as follows:

“It is time to advise you that the security situation has deteriorated in Lesotho during the past month or so. There have been a succession of car thefts mainly from EXPATS. Handguns are being used. We are being cautious about moving around especially at night, although there have been a number of incidents in daylight hours. These incidents are not being reported in the media.” See also pages 2151 and 2154. The importance of all this is that by contrast with Z M Bam’s highly doubtful way of reporting to Acres if at all, Acres’ own people are seen invariably reporting in writing as the examples above show.

I accept therefore the legitimacy of Mr Penzhorn’s deliberative question namely, “if this [the question of security in Lesotho, the perception of Acres’ performance, and so on] was the real purpose of employing Bam, why was this not stipulated in the contract?” In this context one has to have regard to the fact that this contract was not simply a **pro forma** document. It

indeed went through a number of revisions. The parties were not uneducated or illiterate persons. The fact is the opposite is true.

The conclusion is irresistible that the fact that Z M Bam's real duties are not stated in the contract gives the lie to the entire document. I accept the soundness of Mr Penzhorn's submission that when parties sign a written contract which turns out not to reflect their true intention, any inference as to the real intention must perforce be an adverse one.

It comes therefore as a logical and indeed an inevitable conclusion then that Acres' present assertions about Bam and his "intelligence" function is just a last minute fabrication precipitated by the serious fact that Acres never needed a representative in Lesotho, as has carefully been tried to illustrate, nor, as clearly indicated, did Z M Bam act as one.

### **PAYMENT AMOUNTS**

In going about the above heading I wish to liberally adopt the introductory submissions made by Mr Penzhorn in his commendable effort to clear the decks for action.

The learned Counsel accordingly indicated in paragraph 129 of his written submissions that in 1990 one (sic) Maloti equalled 0.4715 Canadian Dollars. Indeed Volume 6 at Page 1466 bears this out per Acres' cheque Requisition dated 2<sup>nd</sup> October, 1990. In terms of the agreement Z M Bam was supposed to be paid four lots of CAD 180 000-00 which equated to M381 760-33. In 1990 this amount indeed was an exceedingly enormous sum; far exceeding the Acres' Maloti

advance. Thereafter Z M. Bam was supposed to be paid 69 consecutive monthly sums of CAD 7826-00 equalling M16 598-00 per month - a phenomenally huge monthly "salary".

It would be fruitful to make comparisons of Z M Bam's earnings with earnings of others. In this regard it will be noticed that under contract 78 and in the year 1993 Z M Bam earned M9545-00 per month on the basis that he worked the whole month. See volume 2 pp 600 and 646 where Z M Bam's title is Services Manager as it appears in Schedule 4-1A of the Professional Staff Billing Rates expressed in Maloti currency. At the time he was earning P2612-00 in Botswana. The Botswana Pula at the time was equal to the Rand or Maloti.

It should be borne in mind that Witherell was the assistant to the Chief Executive and later became the deputy Chief Executive of the LHDA. In 1990 Acres was negotiating a salary for him of CAD 7 250-00. The sum appears in the column opposite R G Witherell's name whose position is shown as Technical Manager in 1990 as reflected in volume 2 page 83. The Chief Design Engineer C J Brown's salary was CAD 6500-00 so was that of J G Clark the Project Manager. As the assistant to the Chief Engineer Witherell was paid CAD 8338-00 See Volume 2 pp 424 and 518. At that time a senior engineer for Acres was earning CAD 7579-00. This of course was in respect of full time employment as such in the LHDA. Yet Acres was then prepared to pay Z M Bam, out of its profits, comparable monthly amounts for information, indeed information moreover which Acres could largely obtain for itself using its own staff. It requires no great stretch of the imagination to perceive that this suggests more was involved here than mere supply of information by Z M Bam to Acres. If my view in this regard passes muster then it becomes par for the course to accept the conclusion that all this in itself points to an improper purpose underlying the representative agreement. It simply defies intelligence that Acres would have paid Z M Bam

these huge monthly amounts, over and above the CAD 180 000-00 for “intelligence”. In fact, even if Z M Bam was in Lesotho working honestly on a full time basis in respect of the representative agreement, it is highly unlikely that Acres would have paid him so much. Moreover, payments would surely not have been on the basis of a loose retainer but rather in respect of work actually shown to have been done. Again these figures must also be compared with LHDA salary scales at the time. PW15 testified that these would have been known to Acres and I do not think he is wrong for saying that. At page 858 a pointed question was posed to PW15 as follows:

“..... In relation to other Basotho engineers and also in relation to the salary earned by Mr Sole as the Chief Executive Officer of the LHDA what would your comment be on Mr Bam earning as an agent for Acres the equivalent of M16 378 per month in 1991.....?”

PW15 replied “Well that what he earned under that contract is certainly more than anybody else in Lesotho (sic) earning considering that Mr Sole was known to be about the highest paid public official. Mr Bam here of course was an engineer on the contract, but he certainly earned more from the Representative Agreement payments than what he got for his normal work as an engineer - considerably more”.

This amply justifies the Crown’s emphatic assertion that Acres was prepared to pay Z M Bam more than even Sole the Chief Executive was earning. Needless to say as chief Executive Sole was earning M8 365-18 per month as borne out in Volume 8 at page 336 regard being had to the fact as shown above, that CAD 7800-00 Z M Bam was earning per month from Acres equated to M16 378-91 per month. See Volume 2 page 512.

Remarkably this fixed amount of some CAD 7800-00, of which 60% was regularly transferred to Sole, was suddenly reduced to approximately 40 % actually retained by Z M Bam, namely CAD 3500-00. A remarkable coincidence which is no mere accident is that this occurred after January 1997 the period round about which the Court challenge by Sole drew to a close. This indeed is further evidence that Acres knew of the 60/40% split and the actual identity of the recipients to which the respective amounts in the split were destined. The presumption is not ill-founded therefore that because of Sole's waning influence, it was decided to only pay Z M Bam his share. It interestingly puts a bold question mark on the genuineness of the representative agreement when in fact Acres could simply ignore or unilaterally vary its own "contractual" obligation under that document without regard to what the other contracted party might need to say in the matter.

### **MANNER OF PAYMENT**

Evidence abounds to show that payments to Bam show Acres relationship with him to have been cloaked in secrecy. Acres had local Lesotho accounts. Z M Bam in fact operated a local account through LESCON which shows numerous payments by consultants such as Lahmeyer. Indeed even Canadian Embassy cheques were deposited into this account. Exhibit "V" bears out this at Page 206(b) where R478.50 was drawn on that Embassy's account. As a matter of fact all Acres' dealing with Z M Bam in the past had been with him through LESCON. But surprisingly all of a sudden Acres now pays Z M Ban from Canada for work he does for Acres, not through LESCON locally but through ACPM in Switzerland. I have not the slighted

doubt that if Acres was genuinely paying Z M Bam for true and honest Services Acres would, as a matter of overwhelming probability, have contracted with LESCON and that the payments would have been made locally. It should not be overlooked that the agreement is structured in such a way that without access to the actual bank records in Switzerland no one would have known that the recipient of the Acres payments was indeed Z M Bam . See Volume 6 PP 1468 - 1524. I need repeat just for emphasis that but for the discovery only of Swiss accounts nobody would have known of Z M Bam's relationship with Acres for at that stage Z M Bam's identity was thoroughly camouflaged as ACPM and thus cloaked in impenetrable masquerade. It was thanks only to this discovery that this thick veil was lifted. I may go further to say if Z M Bam was in truth Acres' agent not ACPM then simple and sound business acumen dictates that payment be in Lesotho were both had accounts and where services were in any case rendered. So it is clear ACPM had a convenient role to play on the basis of which nobody would have discovered that by paying into the ACPM account in Switzerland Acres was actively breaching the Lesotho Financial regulations while in doing so they were entertaining a fat hope that the true identity, which they knew, that in fact ACPM is Z M Bam would never be unveiled. It is a matter of common knowledge that funds and ill-got gains especially from various dictatorships in the world, once safely locked away in the Swiss Banks nobody even with overwhelming legitimate claim to those funds could be allowed to lay his hands on them. Thus on this basis it seems to me the game might very well have been worth the candle in the eyes of Z M Bam and Acres.

The untenable situation with which Acres is now faced is its attempt to ride on two horses at once. In this regard consider that the other representative agreements put up by Acres in order to show this was something quite normal clearly show the identity of the agent and give his physical address. As an example of this, one need look at Volume 15 part 3 at PP 1 - 63 where

one readily sees Acres having Jean Dean of Mauratious as their agent. His/her address is given at page 6. Another agent is Russel Rennet whose address is given at page 12 while yet another taken at random is a company known as Canpak International Trading Corporation whose address is at Page 17. Thus if one may ask the simple question *but why not so with this one that Acres has with Z M Bam*. Truly any reconciliation of this two positions is impossible. Thus in trying to perform that feat Acres is bound to fall between the two stools.

It certainly won't do for Acres to adopt the head-in-sand attitude concerning what they clearly knew to be the practice by other contractors or consultants. For instance Lahmeyer who were also consultants were also paying subcontractors such as LESCON locally. How certain is it that Acres knew this? Why shouldn't Acres be given a break and be allowed to mind their own business without being required to poke their nose into someone else's business, one may ask. Because they themselves helped run the LHDA with Acres' own Mr Lightfoot processing invoices that's why; and this is a fact that no one can run away from however tantalising the prospect. It can be deduced from this that clearly Acres knew that LESCON had a local account or even accounts. Likewise they knew also that Z M Bam had local accounts after all they paid him into his account in Johannesburg.

Learned Counsel for the Crown has expressed scepticism about whether Acres could possibly be as squeaky clean as it holds itself to be and was quick to point out that evidence shows otherwise. Truly speaking justification for this feeling of scepticism is in evidence. For instance there was a clear conflict of interests in Acres' very association with Z M Bam. Acres was after all supervising consultants on behalf of the LHDA. One such consultant was Lahmeyer. Lahameyer

employed Z M Bam as part of Associated Basotho Consultants (ABC) and also used Z M Bam as an agent - surprise surprise - to Acres' knowledge. The submission is therefore not without merit that Z M Bam simply could not serve both Acres and Lahmeyer without the potential for the undesirable factor of compromise. Similarly, Acres could not supervise Lahmeyer and Z M Bam and at once use Z M Bam as its agent without the potential for compromise. It is stimulating to observe in volume 2 page 446 paragraph 3.2.4 that in keeping with the common law duty in this regard contract 65 has preserved that prudence in a clause dealing specifically with **Prohibition of Conflicting Activities** by providing as follows:

“Neither the Consultant nor his subcontractors nor the Personnel of either of them shall engage, either directly or indirectly, in any business or professional activities which would conflict with the activities assigned to them under this Agreement.”

Acres is an international organisation whose policy as espoused in the documents before this Court is to maintain high business standards. Furthermore a clause such as the one cited loc. cit is binding on it if its regard for maintenance of high business standards means anything to it. But as just pointed out shortly, it seems the avowed policy is obeyed by Acres more in the breach than in the observance at all, at all, at all.

It bears repeating in this context therefore that payments overseas also constituted a contravention of both the South African and Lesotho Exchange Control Regulations. Both these countries have vested interest in the LHDA hence their respective Delegations in the JPTC. None would brook compromise of any sort by the LHDA of their respective Exchange Control

Regulations whether aided or abetted by personnel in the LHDA be they consultants or otherwise. Needless to say PW7 an admitted South African Advocate holding an LLM degree in banking law testified to the effect that payments overseas constituted the contravention referred to above. See Page 750 lines 9 to 20. As regards Lesotho; section 11(1) (c) read with section 25 of the 1989 Regulations amply spells out in clarity the point in issue. Further evidence of this is contained in Volume 5 pp 952, 953 and 959. At page 953 section 11(1) (c) provides that

“No person shall, except with permission granted by the Minister and in accordance with such conditions as the Minister may impose -

1. ....
2. ....
3. enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Common Monetary Area”

If in the eyes of Acres, a world renowned organisation, exporting money to Switzerland to pay ACPM/BAM was the best way of complying with this provision cited above it is a matter of great bewilderment to me. Section 25(a) makes it an offence for any person who contravenes any provision of these regulations and imposes a penalty not exceeding M250 000-00 fine or a sum equal to the value of the security.

It is not as if Acres was not astute to possible existence of hazards and pitfalls that might accompany any slackness in the employment of an agent. In fact Acres acknowledges that care must be taken also with regard to any legalities before employing an agent. Volume 3 at pp 276

and 298 bears this out. At page 276 Acres boldly states that ACPM/BAM was bound to comply with Lesotho antibribery laws. Acres says it “maintained control not only over who was providing services, but over any promise of payments by the representative that could implicate Acres”. Page 276 paragraph 1.

On all the facts as earlier illustrated no one knew about Acres’ payments in Switzerland. Certainly the Lesotho Commissioner of Revenue would not have known. It thus must have occurred to Acres that they were facilitating tax evasion on Bam’s part. But it seems casting a blind eye to their role played in this patent breach of the law was an infinitely minor misdemeanour in comparison with the prospective gain to be made in the process.

Acres was in clear conflict with provisions of Contract 65 with regard to picking an agent to pay whom is in contravention of both SA and Lesotho Exchange Control Regulations.

Under pressure of events felons are known to do stupid things sometimes. Thus one does not know why Sole kept being paid by Acres even after he had left the LHDA. What is known however is that the 40/60% share for Sole stopped when he lost his legal battle in the courts. There is also evidence of residual loyalty towards him. Some of it was inspired by fear that should he win his legal battle and be reinstated those concerned should not be caught on the wrong foot regarding their attitude towards Sole. How far Acres felt contractually bound by this loyalty is unknown. What is known is they kept paying even afterwards perhaps out of force of habit.

After May 1997 evidence shows that Acres only paid Z M Bam his 40%. What is patent is

that the arrangement to do so was reached before Sole left the LHDA.

The court is called upon then to determine primarily whether or not the payments made before Sole left the LHDA were corrupt. Once this has been done and it is accepted that they were corrupt, it seems to me that later payments would be similarly regarded more so because the taint of untruth told by Acres relating to the representative agreement would affect all the payments.

It is therefore worth seriously considering the submission by the Learned Counsel for the Crown that while there is no running away from the fact that Acres' money was used by Z M Bam to pay Sole it is inconceivable that Z M Bam would have done this if not instructed to do so by Acres.

### **COURT'S SCRUTINY OF THE 23 NOVEMBER 1990 AGREEMENT**

On the face of it this document contains an agreement between Acres and an entity named ACPM. The court's attitude is that the submission by Acres to the World Bank that the real contracting party was Z M Bam is not evidence of that fact before this court. However for purposes of applying judicial search light to factors relevant to this relationship between Acres and ACPM it would perhaps be fruitful to assume that Z M Bam was the real agent.

The very first step that the court tries to take in that direction leads to nothing but dust and ashes. A careful perusal of all the documentation consisting of not less than 28 lever arch files each of which is brimful of paper work, leads to no reference of an entity called ACPM. No one

had ever heard of it. Nor was it registered in any form in Lesotho. At pages 873 line 26 and 874 line 6 PW12 Mrs Mohau despite making a diligent search in her office where she is employed as the Registrar General of Companies of Lesotho turned out nothing. It is the high water mark of the entity called ACPM that Z M Bam never operated a bank account in its name, not even in Switzerland. Considering that Z M Bam was a well known engineer in Lesotho partly so because of his company LESCON it is totally strange that all of a sudden he should want to conclude this agreement with Acres in the name of ACPM yet he operated an account in Lesotho in the name of LESCON. Acres certainly knew this.

I accept the submission made on behalf of the Crown that clearly a conscious decision must have been made to adopt the name ACPM and no doubt this sudden appearance of a new name must have raised serious questions with Acres which knew Z M Bam very well and his LESCON. It is not without cause then that initially it was contemplated that the agreement be concluded with LESCON as borne out at page 1392 - 1395 where the name of Lesotho Consultants Limited appears on the first page and is abbreviated thereafter in the same page as LESCON as well as in the two schedules which follow.

In terms of this agreement ACPM was to assist Acres in getting contract 65 and also perform certain services during the life time of the contract. For this Z M Bam would receive 3.6% of the net value of the contract with Acres. Bearing in mind Acres' mark up of 14.7% this meant that he would get approximately 25% of Acres' profit. The question that immediately arises is why pay him 25% occasioned by the mark up in circumstances where contract 65 is in the bag.

Before the World Bank Acres claims that the LHDA was not made to pay for Z M Bam's services. Appearing in volume 3 Page 281 the actual words are:

“Acres did not conceal its payments to ACPM on its books and records. Because they were part of the negotiated contract price, Acres paid commission out of Acres' profit on TAC Eng-1 and TAC Eng-2, rather than charging them back to the customer, LHDA.” This claim stands in stark contrast to the credible evidence of PW6 Classens that at the end of the day costs such as these are indirectly debited to the employer, in this case the LHDA. At page 489 lines 5 to 13 PW6 says

“..... as part of the structure of the contract, you have billing rates for the professional staff that work on the assignment. That billing rate is made up of a basic salary and then some overhead charges that gets (sic) added onto the basic salary. The sum of the salary and the overhead charges and in this instance there are a number of charges, social charges, overhead charges, support services and taxes-that then becomes the total mark-up factor that you apply to basic salary which then becomes the billing rate for a specific individual.” See page 295 lines 10 - 12 as well as page 498 lines 12 - 13 where PW6 indicates that as part of the overhead “it gets indirectly charged back to the client”.

As I indicated earlier for Acres to be taken at its word one may presume that as a basic and sound way of guarding its back yard against an uncanny agent in the world of trade, Acres would

have wanted a signed contract enforceable against its agent in the event of defaulting on the part of that agent. Indeed the monthly payments would also be a constant reminder to those being paid of their obligation to their payer, Acres. But how would this be achieved either way in view of the fact that the contract does not describe ACPM, what entity it is, who or what controls it or even who acts on its behalf. There is an irredeemably gaping hollow in that department. Thus in the event of a breach Acres would find itself up a stump and with nobody to sue. Why? Because Acres could not sue Z M Bam for Acres had no contract with him. Even the Swiss Bank accounts would be out of reach for Acres because they were in the name of Z M Bam. It is in these circumstances that I find the argument compelling and worthy of credit that if Acres could have no recourse against its “agent”, the point of this written document is none other than as an “insurance” or to be produced as an “alibi” if and when needed. No better moment seems to fit that bill than now.

ACPM had no address except the address for a banker in Switzerland. It is hard to imagine this not raising any questions for Acres, when they were after all the authors of the previous drafts of the representative agreement. It is thus inconceivable that an honest and diligent business man would have accepted ACPM’s address, i.e a bank in Geneva, for a genuine representative agreement. More by token even Acres’ own documentation relating to payments shows the recipient to be ACPM rather than Z M Bam. See Volume 6 pp 1468 - 1524 where reference is made to ACPM invoices. Epitome of surprises when one takes into account that Acres was in full realisation that the accounts it was paying into were those of Z M Bam and his wife M M Bam. The intensity of this surprise is compounded and rendered more pronounced by the fact that no ACPM invoices are produced saying nothing of any correspondence with ACPM. I can only

conclude that it cannot be true that payment of this into Z M Bam's Swiss account did not raise any suspicion.

Indeed the words of **Cullinan AJ in CRI/T/111/99 Rex v Sole** (unreported) on 20<sup>th</sup> May, 2002 at Page 200 are very apt and I feel compelled to cite them four lines from the bottom as follows:

“What need was there for either party therefore, purportedly associated by the common bond of business in Lesotho, to enter into contractual agreement and conduct financial transactions in a foreign country, far removed from the LHWP, if their relationship was *bona fide*?”

Camping on the trail just blazed by the Honourable Judge immediately above I am constrained to observe that the bona fides of this relationship between Z M Bam and Acres are further called in question by the fact that the context of the representative agreement were sometimes cryptic, even nonsensical in the circumstances. This comes out clearly in Volume 15 part 6 Page 31 where Z M Bam talks about submissions instead of payments and “the address for submissions” instead of referring to his bank account. I share in the Crown's conjecture that this must have been cause for considerable doubt for DW1 Victor Hare, the person to whom the letter was addressed and the principal driver of the representative agreement. The letter in question is addressed to V Hare in Niagara Falls by Z M Bam and is dated 4<sup>th</sup> June 1991.

It is a matter of great concern and perplexity to this court that although the payment

documents make reference to invoices against which respective payments were effected, no such invoicing is produced. The inference in such a situation is twofold but in either direction it is adverse to participants in an enterprise. The twofold inference means either that Z M Bam never submitted invoices, a practice condoned by Acres contrary to the insistence by Acres in the Milner case, or if he submitted them Acres is not prepared to disclose them. In the latter event this must be because their content is damning to Acres. In either event the absence of invoices points to a guilty mind. Assuming the invoices do not exist, then reference to them in Acres' documentation could have been for the benefit of its auditors or other anxious entities like the World Bank. Any auditor considering these documents could easily be hoodwinked into assuming that invoices existed and that the payment vouchers were prepared pursuant to them.

It was stressed on behalf of Acres in submissions, in oral evidence and from the documents filed for the defence that Acres' relationship with its agent was not something hidden under a bushel. However the documentation placed both before the World Bank and also before this court has put it wise to what seems an unassailable fact that an audit would not have revealed the fact that Z M bam was, as Acres now claims, the actual agent. All that would be revealed is that an entity called ACPM, whose address is a bank in Switzerland, was Acres' agent. Thus should a diligent auditor call for further documentation, such as invoices, it would have been the most facile thing for him or her to be fobbed off with a simple "sorry, we just can't find them for the moment ...". Even at the cost of being repetitive it should be stressed that in fact had Z M Bam's Swiss Bank records not been discovered, and obviously the intention was that they would not be discovered - witness that at the time of opening the accounts there any records kept there were watertight - then the fact that the actual "agent" was Z M Bam and not ACPM would never have

come to light.

I have also earlier alluded to the fact that Acres seems to blow hot and cold with regard to representative agreements it put up. By comparison the other representative agreements put up by Acres in order to demonstrate the genuineness of this one, invariably show a physical address and they clearly identify the actual agent. In the instant matter Z M Bam's alleged first representative agreement under Contract 19 is, for some obscure mishap, lost; a matter of surprise that this important document should get lost when documents dating back to that time assisting Acres' case are remarkably still in existence, not only those but even older representative agreements. A further strange coincidence of the phenomenon of disappearance of documents relating to Z M Bam is demonstrated by the fact that although Acres makes mention of an earlier payment to Z M Bam, there is no evidence of such payment having been made in the context of contract 19 under a representative agreement. This accordingly casts a great doubt whether there ever was such a representative agreement.

As earlier illustrated this agreement of 23 November 1990, from whatever angle it is viewed, is bedevilled by more and more questions concerning its genuineness and true purpose.

#### ANOTHER BEDEVILLING FEATURE IN THE AGREEMENT IS ITS TIMING

I accept in toto the submission made on behalf of the Crown that if the true reason was for Z M Bam to help Acres with contract 65 the expectation would have legitimately been that this representative agreement had been entered into at a time when contract 65 was still in the air. But

as has been noted by 23<sup>rd</sup> November 1990 TAC 2 was to all intents and purposes in place. Evidence which is unassailable shows that Acres began to mobilise on 1<sup>st</sup> August 1990, i.e. some four or so months before the representative agreement was concluded. A simple parallel would help demonstrate the absurdity of concluding a representative agreement in these circumstances. A is engaged in a fight to the death with B. A sees C at some distance away and desperately beckons to him to enter the lists in his favour in order to quell B. However by the time C gets to the spot of the fight *rigour mortis* has set in on B. C nonetheless delivers a blow on B. Can “C” seriously be heard to say he helped A against B even though the blow C dealt on B came after B’s death? Common sense says, no. It is for this reason that I accept the Crown’s submission that the conclusion of the representative agreement on 23 November 1990, was both irrelevant and illogical. By then the game was over bar the shouting.

In other words what still had to happen, from Acres’ point of view, was for Masupha Sole to sign on behalf of the LHDA and for Acres to start receiving payment. All that the conclusion of the representative agreement at that stage represented was not the securing of Contract 65, perhaps it served as straws in the wind for strange occurrences to come and which soon culminated in the can of worms that affected all key characters that evidence in this case has pointed at.

If one is to accept that events where money is involved don’t just happen, one should, by token of that rule acknowledge the existence of one thing triggering a reaction in the other where that happens. In this connection it becomes hard to ignore the patent possibility that the representative agreement was concluded to expedite payment under contract 65 for this is precisely the effect it had. Be it remembered that as at that time Acres had been engaged in the proposed TAC 2 since 1<sup>st</sup> August 1990 and was putting in payment claims shortly after then.

Invoice number 1 dated 17<sup>th</sup> September 1990 is in evidence in Volume 9 page 134 showing that contractual provisions have been met signed on behalf of the Chief Executive by Witherell. At pages 139 to 140 of the same Volume appears a telexed message from Sole to Acres (attention H C Rynard) dated 14<sup>th</sup> August 1990 at paragraph 3 of which is stated:

“We confirm that we agree that the following Acres staff presently in Lesotho should commence on the new TAC-Engineering-2 contract with effect from (sic) 1 August 1990:

C J Brown

M S Taylor

B Lightfoot

D N O’Neill

Of importance is to note that within six days of signing the representative agreement, on 29<sup>th</sup> November, Acres received its Maloti component of the advance payment as also evidenced in Exhibit “U” page 32, and then soon thereafter it received the Canadian dollars component of the advance i.e CAD 1 060 000.00 on 4<sup>th</sup> January 1991. See Volume 9 page 195

As pointed out earlier all this was expedited by Witherell who signed the necessary payment authorisation. Doubtless this occurred with Masupha Sole’s approval after all paragraph 6 of document 139 - 40 in Volume 9 dated 14<sup>th</sup> August 1990 was written under the hand of Masupha Sole who stated:

“We are therefore prepared to make the advance payment envisaged under the contract upon receipt of the appropriate bank guarantee.”

Even though all this sounds in money and huge expenses at that, it was nonetheless done without authorisation by the JPTC. Needless to say shortly thereafter Acres paid Z M Bam CAD 180 000-00. Amazing to behold still, all this preceded the signing of contract 65 on 21<sup>st</sup> February 1991. To compound the irregularity even the more, Acres' payment of CAD 180 000-00 was not in terms of the representative agreement. Under the agreement the CAD 180 000-00 was supposed to be paid in four instalments of CAD 45 000-00 each over a period of time.

According to Sole's passport reflected in Vol 9 page 360 it seems that shortly after the conclusion of the representative agreement he visited Canada. The Canadian stamp shows his entry in that country on 29 September 1990. That he went there at this time also appears in Acres' own documentation. See volume 6 pages 1429 - 1438. Z M Bam on the other hand was in Botswana as his leave record at page 113 Volume 9 shows that for the month of September he took only one day leave making it rather unlikely that just in one day he could be in Canada with Sole.

### **THE DEFENCE EVIDENCE**

Starting briefly with the general impression the court had of the defence witnesses, it appeared that each one of them was an expert or had vast experience of the general background to issues they came to testify to. Their experience was impressive but there was always a great problem on their part on how to reconcile the theories they espoused with facts relating to this case. DW4 Johanes Meyer a man of neutral disposition decided in my opinion wisely to go along

with suggestions made to him by the Crown and in mostly supporting the crown version left the defence high and dry. He is an important witness who served in the JPTC therefore the evidence that he gave under cross-examination in support of the Crown version is all the more worthy of credit.

The vast experience of defence witnesses formed a facade of impenetrability to the massive edifice within which they had walled themselves. The superiority of their otherworldliness was made all the more manifest when learned counsel for the defence in cross-examining the Crown witnesses would ruefully and self-reproachingly say: “But do you know what is the practice in the international corporate world” on an issue that the Crown witnesses would dutifully own up that they know nothing about. It was a mark of the defence preparedness for this case that their witnesses backed up in evidence-in-chief the version introduced very competently by the learned defence counsel in putting questions to the Crown witnesses. But unfortunately under cross-examination of the defence witnesses, that outwardly robust citadel much like Prince Rupert’s drops disintegrated at a mere touching. Why? Because it was founded on inevitable attempt to hail the integrity of both Masupha Sole and Z M Bam. The integrity which has been shown in the analysis given earlier to be totally lacking. Not only so. But that Acres could not have been unaware of this. In any event they at its very lowest aided and abetted this. So adamant was the defence witnesses’ blind faith in backing Sole’s integrity that each time when testily referred to adverse comments made against him DW1 for instance would repeatedly say “that is preposterous”.

When the court had thought perhaps it was time DW1's attention was brought to bear on

the other side of Sole he might have not known, and asked him “where is he now” DW1 in answer gave something the Court was not really expecting namely that “he is under going a criminal trial”.

I should hasten to indicate that the court merely sought to find out if DW1 knew as a matter of fact and record that Sole had been dismissed from the LHDA after finally losing the legal challenges he had put up in courts even up to the court of Appeal. Of course this was brought to this witness’s attention for his attention. Not only so but also the fact that during his gallant battle in litigation Sole made no bones about how he used bribery as a tool to attain results; that he would use bottles of brandy which he would cause to be delivered to a Minister before whom Sole had sent a document for approval and signature; that later when he would meet with the Minister in question he would ask

“Mr Minister did you get the parcel?” and the Minister in reply would say “by the way has the document I signed reached you yet”. Thus this court suggested to DW1 that it appeared from the foregoing that for Sole the practice of bribery was in fact a religion or faith pursued with religious fervour he was clearly in a cleft stick. I accordingly fought shy of appearing to gloat at DW1's obvious agony and embarrassment at this stage because after all the cross-examination was in the capable hands of Mr Penzhorn.

At one stage during proceedings when the Court sought to have some minor clarification on a point with DW1 he out of the blue said he was not being evasive. No suggestion in the slightest was made that he in fact was. But however minor this observation was at that stage it served as a prelude to things to come in the total picture projected by this witness in his evidence.

As for DW3 Gourdeau, his evidence was characterised by stone-walling even when confronted with small hurdles regarding which a simple “yes” would suffice to answer the question truthfully. Otherwise it was not unlike him to give the impression that he was out and out being untruthful. Compare this with PW1 Putsoane who, although obviously uncomfortable with the answer he felt compelled to give agreeing with the cross-examiner’s stance that as of now PW1 is aware of nothing that would make contract 65 a subject of dispute, nonetheless gave it. The point I am briefly making here is PW1 was uncomfortable with the answer he had to give but gave it because it represented the truth namely that contract 65 had finally been concluded and it was a valid contract in the context the answer was rendered. DW3 had a field day in this court always fencing with the questions. Truly the court was at large to call him to order but at the same time if it did so it would deny itself the opportunity of seeing him persistently and gleefully heap coals of fire upon his head.

Suffice it to say generally speaking the defence witnesses namely DW1 Hare DW2 Brown DW5 Gibbs (especially) and DW6 Burnett (to some extent) seemed to be jobbing backwards in their effort in seeking to present before court the sort of case they had pondered.

Learned counsel for the Crown aptly indicated that defence witnesses sought to explain what was in effect a *res ipsa loquitur* situation. I agree with him having addressed my mind to various features characterising this case and relevant factors attendant thereon that the context in which the payments were made, the very amounts, their timing, the manner in which payment was effected taken individually and collectively all point irresistibly in one direction and one direction only, namely that the payments were unbearably reeking of bribery.

In like manner, the representative agreement when viewed against the situation in which Acres found itself in 1990 within the LHDA, the status of the negotiations relating to contract 65, the help that Z M Bam could and did legitimately give Acres in respect of this contract, as well as all the other factors enumerated above, overwhelmingly point to this agreement being nothing but a cover up.

It is in this situation that DW1 and 2 were called and their mission struck one as clearly to try to explain the inexplicable, justify what obviously cannot be justified, make seem credible what on the face of it cannot be believed and explain that which appears quite incapable of innocent explanation.

DW1 when giving his evidence spoke well and induced a lot of confidence in the process. In his evidence he was nimble in his responses betraying possession of a good memory. A combination of these two factors namely agility in giving answers and possession of a good memory stood him in good stead and gave an impression that he knew what he was talking about throughout his evidence-in-chief. As Mr Penzhorn aptly observed, “in fact, he looked quite impressive in the witness box. However, the substance of his evidence is another matter all together”. I am in agreement with this observation by Learned Counsel for the Crown.

The thrust of DW1's evidence in brief was this. Acres is a company with a proud history which would never even consider doing anything improper. The very thought that Acres could be involved in bribery is quite simply preposterous. The term preposterous is one which he repeatedly used with, no doubt in my mind, studied assertion whenever a suggestion was made of

wrongdoing either by Acres, Sole or Z M Bam in the context of the involvement of either in bribery with the aid of one other. He buttressed his assertion by pointing out that Acres has a strong anti-corruption policy to which it strictly adheres. It was in line with this policy that Z M Bam was employed as agent and this was also only done after thorough due diligence. However as I observed this policy as applied in the case of Milner who was eventually appointed agent in the Zambezi River Authority the so called due diligence to my mind was a mere will-O'-the-wisp. For the highest water mark of the criteria they used appeared to be that Milner was the Cousin of the Chief Executive of the Authority one Mpala. This factor alone seemed to dispel otherwise patently dubious factors which arose immediately prior to Milner's appointment. Have regard to the curious manner which in the mind of Rynard betokened a lie as to how Milner got to have his name and his hotel and room number. See page 1464 - 1473 & 1494. Despite indications, as shown in Milner's appointment, negating Acres self-gratification at the policy of which they are so proud, DW1 maintains that any suggestion then that Acres would even have suspected that Z M Bam did anything improper is similarly preposterous. Yet there is no running way from the fact that in a parallel situation Milner's big selling was his contracts, more particularly, with the Chief Executive of the Project i.e. Mpala. See Page 1469 line 17 read with 1433 lines 9 -14.

DW1 was an experienced engineer, a vice president of Acres and this Organisation's person responsible for overseas business. He had been in Acres from 1967 to 1996 when he retired. See Page 1265 line 25 to 1. See also Page 1449 where DW1 indicates from line 11 onwards that in the competitive world of consultancy such as Acres was engaged in "..... of course governments would assist but in an honest way, in an honest and appropriate way". My mind cannot help harking back to the assistance offered by Canadian High Commissioner in the appointment of

Milner in deference to the invaluable counsel and advice that Rynard credited Embassies with. See Page 1470 line 10 and Page 1474 lines 7 - 10.

As an employee of Acres at one stage DW1 was the director of overseas operation for a concern that is primarily export driven. Page 1216 and Page 1447 lines 15 - 17. Thus no doubt he is a highly experienced and very intelligent person well steeped in working with contacts. Undermining these highly valued attributes in him however is the fact that he claims it was not intentional that Z M Bam's name was omitted from the representative agreement in favour of contracting only with the firm ACPM. He says it did not occur to him to include Z M Bam's name in the document and that Z M Bam's provision of a Swiss bank account number at a Swiss bank as ACPM's address for purposes of the agreement did not arouse suspicion in him - this even though Z M Bam changed that address more than twice. Confronted with the absurdity of this all, in credit to him, he readily concedes that in hindsight all this is suspicious but, rather imprudently spurning the credit just generously endowed on him, he insists that it did not occur to him at the time. It is the Court's view that the suspicion was as plain as the nose on one's face throughout. How else, in the face of the fact that he was careful enough to protect Acres by asking Z M Bam to put up a bank guarantee, utilising his vast experience, by in the process even providing Z M Bam with a draft and later a finished version of the bank guarantee? How indeed in the midst of the extreme caution he demonstrably exercised on his part. More by token he even insisted that Acres get paid first by the LHDA before Acres could be obliged to pay Z M Bam.

I accept the submission by the Crown that it is no white lie but a blatant one that it did not arouse suspicion in him when Z M Bam in **Lesotho** said pay me in **Switzerland**.

Suffice it to say that besides being improbable in the extreme all this simply cannot be true. This is borne out by the fact that after DW1 had prepared the various drafts he would refer them to Rynard, the Chairman of Acres (See Page 1292 lines 14 - 16) for checking. If DW1 is to be believed, Rynard also never noticed these curiosities. But this is the height of absurdity. As Chairman of Acres Rynard was obviously an extremely able, intelligent and experienced man. When he checked he even made amendments to typographical errors. In the instant regard he changed “and” to “or” i.e the conjunctive to the disjunctive an exercise that requires a conscious effort to perform. Thus it is again obvious that Rynard too intended the agreements to be with ACPM without reference to ZM Bam’s name, this, because of the real purpose behind the representative agreement, i.e. that it should be a vehicle to commit bribery. The force of the above argument leads to no other conclusion than just that.

The submissions is therefore well grounded that even an average person would have detected peculiarities in the representative agreement. Common sense dictates that on the instance point concerning specialist persons of vast experience and high intelligence the ability to detect the said peculiarities would be all the more pronounced. I agree therefore that the obvious conclusion then is that DW1 was being deliberately untruthful on this aspect of the matter.

### **COMING NOW TO MILNER AFFAIR - PROPER**

In the contract of the Zimbabwe agent, Mr Milner, DW1 testified that, as far as he was concerned, there was nothing suspicious about what took place in the process of engaging Milner.

In the light of DW1's experience this simply cannot be true. Given that it appears patently clearly from Rynard's letter to the Canadian Embassy that all Rynard was interested in was confirmation that Milner was very close to Mpala the Chief Executive of the Zambian River Authority, what DW1 tells the court in this connection cannot be true for it defies not only the spirit but the letter of Rynard's quest. Needless to say if Rynard did not have improper intentions this would not have been his only focus. Be it called to memory that Rynard's file note dated 27<sup>th</sup> February 1991, and copied to DW1 shows that Rynard bristled with suspicion regarding Milner's advances. Clearly honesty and integrity were not uppermost in Rynard's mind when he did his "due diligence" on Milner, but rather "ability to produce". The same charge of lack of honesty and integrity would equally, in my view, fit in well with DW1 following his pretence that it did not occur to him at the time that Z M Bam's behaviour aroused suspicion. These highly qualified people for all their intelligence even, lacked the eternal jewel of basic humanity, namely integrity. Intelligence minus integrity in my view betokens the same form of emptiness of character that the English language itself aptly warns against in the expression "if you expecorate you should not expect to rate".

It is a matter fit to raise one's eye-brows to consider the eagerly pursued policy of "ability to produce" in comparison with DW1's statement at page 1285 lines 1 - 25 to the effect that by due diligence is meant [that] " ..... we would ensure that the agent has a good reputation, – he has had no problem with the law, .... he is well respected in his society .. He comes from a responsible background, [ ... he has] whatever we feel is necessary to have the confidence that he would not violate our business ethic ..... we would ensure that our agreement prohibits him from doing that [breaching business ethic] and of course throughout the course of time we would carefully

monitor and observe what he is doing to the extent that we could and make sure that he was complying with our requirements.”

In response to a pointed question that “Mr Penzhorn [has said] that it is all very good and well to have a standard document containing the terms of your standard business ethics which you will conveniently use as a shield to hide behind when you agents act unlawfully....?” with his hackles rising as of an agitated cock, DW1 said “..... without in any way wanting to offer any insult to Mr Penzhorn I find the idea ludicrous. We are a respected company, we have been in business for over 75 years, we have never had a problem, we have never had an ethic problem until this unfortunate issue today. We have, what I consider to be a well thought out code of ethics, we insist that our senior Managers sign that code of ethics on an annual basis. We do everything we can to ensure that our business is always conducted in an ethical way. You can only do what you can”. He concluded.

What I found truly comical was when DW1, finding himself confronted with a statement regarding which he and Rynard were on opposite ends thus making DW1 unable to change the statement staring in his face, suggested that Rynard was confused when the latter wrote to Milner on 29<sup>th</sup> April 1991 confirming Milner’s appointment as Acres’ representative in Zambia and telling him that Acres would require an invoice “to match the money paid out, for audit purposes”. See Page 1471 lines 8 - 11 See Also Page 1473.

I have already indicated that Raynard was a highly placed, intelligent man in the Acres hierarchy. He was even Chairman as just shown. That it can be said he was confused for doing

something which he clearly and consciously invites attention to focus on by placing it in inverted commas as he did with the phrase “invoice for services rendered” which occurs in the sentence: *We also require a very simple invoice for services rendered from the representative to match with the money paid out, for audit purposes* is an exercise in gimmickry of the type that pays scant regard to the intelligence of this Court. Suffice it to say DW1's evidence that Rynard was confused in this regard is simply not true. Quite clearly as Rynard has emphasised the point by use of inverted commas to show what he meant, he amply indicated that he seriously meant what he wished to convey in his letter to the addressee. Obviously this suggests that evidence “be cooked” in the event of need to cover up Acres’ glaringly exposed hindquarters in the future. I take a special note of Mr Penzhorn’s submission that Rynard took the trouble to place the words “for services rendered” in inverted commas. The submission further consists with a plausible and palpable explanation that this [use of inverted commas in the contest in question] in itself suggests that these words were used to convey to Milner [the addressee] that he would be doing something other than “rendering services”. It is obvious that Rynard wanted invoices from Milner for auditing purposes. The reference to invoices in the documentation relating to Z M Bam points to just this. Thus DW1's suggestion that these were “internally generated invoices” is not only indicative of malpractice but also of an intent to deceive or create a false impression.

DW1 in his evidence in chief said that Acres used agents as a matter of course, as part of their business plan for overseas operations in recognition of the fact that they were in unfamiliar territory. He stressed “ we would normal (sic) [not dare] think of entering onto foreign soil to operate without the *one* or the *other*.” Italics mine see Page 1268. The italicised words above refer to the agent [or] the insurance which appeared in context previously in the text.

In this context the defence created the impression that those representative agreements to be found in Volume 15 part 3 were just a few random examples and that Acres in fact had “literally hundreds” of other agreements to show the Court. Indeed in this context it dared the Crown at the risk of wasting time to cross-examine DW1 on “a bundle containing literally I think hundreds, the use of hundreds of agents historically” see page 1286 lines 9 to 22.

Under cross examination indeed a completely different picture emerged. Now DW1 says that although Acres might have as many as 20-30 overseas projects on the go at any one time, of which maybe a handful were large ones (page 1452 lines 1-18), they “definitely” don’t have agents for all of them. See P 1452 pages 19 - 22. True enough one is alert to the fact that DW1 was at this stage giving approximate figures of what he was talking about, so he said that there were all sorts of exceptions to the almost invariable practice of “using agents as a matter of course” See Page 1268 line 4, he emphasised “it is part of the Acres’ business plan if you like for overseas options”line 5. Examples were where Acres was sub-consultant, as with Delcanda on the airport contract, where the project is small, where CIDA contracts were involved and the like. The actual text is rendered at P 1295 lines 10 to 18 as follows by DW1 in his evidence in chief:” Acres first sent people to Lesotho in connection with the new airport at that time, in 1980 ..... At that time Acres was engaged for the Lesotho Airport by another Canadian firm called Delcanda and Acres’ role was one of a sub-consultant providing some specialist services to Delcanda in their contract to provide design and the supervision of structural services for the airport authority. So Acres was here, it had people here, but we were in the capacity of a sub-consultant. So in that respect there was no need for us to have an agency arrangement.” See Also Page 1452 lines 23 - 25.

It is important to note that this evidence was given by DW1 after it emerged in cross-examination that Acres had not used “literally hundreds” of agents but that instead there were agreements for only 28 in total spanning a period of some 22 years of which 21 had expired. See pages 1685 - 1687. The court at this stage could observe DW1 looking and sounding constrained to change his evidence obviously so, because clearly the facts did not square with what he had said in chief. What emerged in cross-examination being that representative agreements are only used in exceptional circumstances. Thus it emerged it is definitely not Acres’ almost invariable practice. Thus further giving a strong flavour in this case of the fact that more likely than not they are used only when a bribe has to be paid.

Another matter of importance which shall ever dog Acres and therefore which they cannot wish away however eagerly they might feel so inclined for their peace of mind is that when Jonker first came to Lesotho, way before the airport contract, to look for work for Acres, he never engaged an agent. See page 1297 line 21 also 1298 lines 1 to 6 and finally lines 14 - 16 which rounds off the point neatly as follows:

“[Mr Jonker] he and Mr Bam had some discussions but the opportunity with the project did not develop and therefore the **agency did not develop from that stage** [The pre-Airport stage]. And it was by coincidence that we ran into Mr Bam again on the Airport Project” because P 1298 line 1 indicates that when Jonker came he was not associated with the Airport Project but came “Quite independently.....[his coming] predated the start of the Airport Project.” The contradiction contained in the text is pungent that on the one hand there is Jonker clearly not engaging an agent when he first came to Lesotho yet on the other hand the purpose of engaging an agent was to help you “acquire work” as made so patently clear by the reading of P 1269 lines 9 -

12 to the following effect: “what would the functions be generally of an agent appointed by a big corporate client .....? I think you could put them under two general headings: the objectives of the consultant would be to **acquire work** and then to-and then to execute it successfully”.

To have engaged an agent at this stage then would have been harmless because the agent only gets paid once the Acres contract has been concluded and Acres is paid - so the reality in this case painfully belies Acres’ stated policy.

DW1 acknowledged that Acres’ corporate records are of a high standard and that a careful record has to be kept of dealings with representatives, especially “if action was needed”. Page 1286 lines 2 to 8 show that Acres’ record keeping practice goes back for upwards of 75 years and that “it certainly has an extensive record of agents employed throughout the world.” DW1 pointed out.

Yet when he was asked about the whereabouts of the records, although acknowledging that there would be a record, he was vague about where the records were kept, i.e in which file. It is indeed amazing that DW1 should talk about proper keeping of records as a practice faithfully followed by Acres yet when it comes especially to those relating to Z M Bam the avowed practice seems to be upheld in the breach. Either this or rather that suddenly there was a need to be discreet - agents do not want to be known as blabber mouths. His own files had been destroyed. Acres’ policy was to destroy documents after ten years - yet there are some records which have been produced which relate to Z M Bam’s two agency agreements as well as others, such as Milner records. The reason cannot be far to fathom why DW1 did not want to commit himself as to the whereabouts of the files and their contents. Obviously and as a matter of irresistible

inference a selective cull of Acres' records has been done.

The learned Counsel for the Crown cannot be faulted in his observation that if DW1 is to be believed about Acres and the way it conducts business it must surely be the finest example of an ethical company that exists on this planet. In support of this utopian belief DW1's evidence creates an impression that Acres is without blemish, incapable of any impropriety and unassociated with any wrongdoers. In accepting that this evidence cannot be correct I entirely reject it as not only untrue but as unreliable for clearly being founded on fallacy and tainted with exaggerations.

For instance at P 1272 lines 11 - 26 when referred to a column on ethics he glibly said business ethics of EDC required "themselves and others to operate lawfully. I think Canada *is well-known for its adherence to lawful practices*. I say that as a Canadian with certainly a lot of pride but I think that is recognised throughout the world". Emphasis supplied.

Asked specifically about bribery he said "... obviously bribery is an illegal practice *and obviously I do not think they even need to say that. If they had said illegal practices everyone would have recognised that bribery was one of those*". Emphasis supplied.

At page 1284 lines 25 to 26 DW1 when asked what Acres does to ensure that agents don't indulge in unlawful activities said " ....we would do extensive, due diligence before actually engaging an agent".

At page 1285 lines 1 - 5 with regard to diligence in application he said: "... we would ensure that the agent has a good reputation, ... has had no problems with the law, .... is well respected in his society ..... comes from a responsible background, whatever we feel is necessary to have the confidence that he would not violate our business ethic". See pages 1282 line 12 to 1284 line 18 and line 26 . See also 1287 to 1288 line 15.

The difficulties I have with DW1's evidence are not just few and far between. One bedevilling feature concerning the proposition deservedly formulated for purposes of rejection immediately above is that DW1's evidence does not chime in with the facts. He said for example that Witherell, as assistant Chief Executive, was given firm instructions not to have anything to do with the establishment of Contract 65. Putting this side by side with DW2's (Clifford Brown's) evidence for purposes of reconciliation results in the impossibility that was envisaged when the phrase **putting quart into pint pot** was first fashioned. DW2's evidence contradicts him yet he was the principal person in Lesotho responsible for Acres business.

Another vital area where DW1 is contradicted in a material respect is that PW15 Mr Molapo who is backed by credible evidence said there was no finance in place when various documents relating to contract 65 were signed. DW2 also supports DW1 in their baseless contention to the contrary. I have no hesitation in rejecting their evidence to this extent that it is in contradiction with PW15's credible evidence therefore.

In yet another closely related area DW1 having conceded that Witherell received all communications between the LHDA and the World Bank and the JPTC he however insisted that

Witherell did not and would not have passed information relating to these on to Acres in Canada. If one were to believe this one would believe anything at all, at all. Not only does it deny human experience but also it flies in the face of Witherell's appointment as Acres' most senior employee in Lesotho responsible for looking after Acres' business there. On DW1's evidence it has been learned that Witherell was virtually an automaton when he signed the various documents. He made a big thing about the fact that the letters signed by Witherell *prima facie* bear proof that they were prepared by some other persons whose initials as a rule are reflected in such letter. Anybody possessed of the minutest grain of common sense would know that the author of a letter cannot be freed from responsibility for the contents of such a document on that flimsy ground inasmuch as he could not on the other hand be denied a reward he would deserve for writing it, on grounds that it was processed by someone else whose initials appear thereon. The simple principle here is as with a curate's egg the advantages are to be taken along together with disadvantages. Thus the notion by DW1 implied in his persistence that Witherell merely "signed off on behalf of Sole" cannot be entertained. I therefore reject it. Otherwise where would the question of the "automaton" feature in instances where he authorised the various payment certificates to Acres itself. In this instance, having regard to his job description under Contract 64, he must have known that neither the JPTC nor the World Bank had approved contract 65. He must also have known that funding was not in place to finance contract 65. But he signed notwithstanding. I accept therefore that the only palpable explanation that is reconcilable with reason is that Witherell signed obviously because Acres was desperate to be paid: thus Witherell did the necessary to facilitate payment. This credible explanation is in sharp contrast with the assertions by DW1 and DW2 that bridging finance was in place. I therefore reject those explanations to the extent that they seek to detract from this explanation. The assertions of DW1 and DW2 could not have been

true in the light of the desperate pressure and strain imposed on the JPTC to tell the LHDA to ensure that a plan was necessary to make in order to effect payments under Contract 65. Reference to PW15's evidence read with Exhibit "Z" at page 219 would suffice to highlight the point where the JPTC said to the LHDA that a plan would have to be made to make payments under contract 65. This was long after Witherell had authorised the payment certificates.

The telling points contained in Exhibit "Z" at page 219 are to be found in the JPTC minutes of 19 September 1990 relating to Contract 65 in clause 7.18 reading:

**Noted**

That although repeatedly requested from the LHDA no further information had been received regarding the status of the above Contract.

**Resolved**

2. That LHDA be informed that mobilisation of Acres personnel under the "unawarded" contract is not acceptable to JPTC
3. That the above action by the LHDA without JPTC's prior approval is in contravention of the Treaty, and that this fact is brought to the attention of the LHDA
4. That LHDA be advised to consider funding of the above interim services under VO [Variation Order] to TA1...."

While keeping at the back of one's mind the lofty ethical standards that Acres would have the court believe it maintained it is important to see how far these are reconcilable with the actual practice by Acres. In this connection the court is immediately struck by failure on the part of Acres to dispel the observation that it was not acting in a perfectly ethical manner as betrayed by

examination of the two Royal Bank of Canada bank guarantees where a deliberately misleading impression was created by the indefensible suggestion that contract 65 had been **“awarded”**. This patent untruth could not be transformed into something else. Even on the rather recherche construction attempted by Mr Alkema on the words based on the letter of intent the sort of hurdles that beset that exercise made that exercise fruitless because it was obvious that the letter of intent had all sorts of conditions that had to be met. These had not been met when the bank guarantees were obtained. Every indicator points to Acres having been in the know of this. Suffice it then to say that, whichever construction is used, Contract 65 had not yet been awarded as at the date of the bank guarantees. This too was not outside the pale of Acres’ cognizance. Can this be consistent with the ethical paragon that DW1 tried to portray Acres to be? I think not.

A further indication of Acres’ disregard for acting in seemingly ethical manner that it would have this court believe formed its sheet anchor is the way Witherell worked with his own contract, i.e . Contract 64. In Volume 1 page 387 in a letter dated 3<sup>rd</sup> June 1990, addressed to the World Bank, marked for J Renkewitz’s attention and signed by Witherell on behalf of the Chief Executive, the contents read:

“ we enclose two conformed copies of contract 64, services of Acting Assistant to the chief Executive”. The submission has merit that if Witherell was to behave consistently then not only would he have avoided dealing with Contract 65 but he would also have avoided working with contract 64; more so because contract 64 too was in effect a contract between the LHDA and Acres as was contract 65. But it is clear to me that Witherell by his conduct saw nothing unethical about it; thus he variously

worked on his contract without any qualms as he saw nothing wrong in that; prompting in this Court's mind a recall of a recital of a phrase in a play performed more than 30 years ago in which an actor aptly responded to a scene in the words "as with vomit malice inconveniences not the perpetrator but the passer-by"

Along the same lines emerges something which, if the previous incidents were to be regarded as mere accidents prompting the deliberative question **so what**, gives an impression that after all it seems wrongdoing is a way of life with Acres. Fact: DW1 admitted that he knew that Z M Bam and Masupha Sole were close; and that Masupha Sole had been involved with LESCON. That Z M Bam and Masupha Sole were close can be gathered from pages 1678 line 19 to 1679 line 6. DW1 knew this at the time he negotiated the representative agreements for he admits at page 1694 lines 12 to 13 in response to the question put as follows "... how did you know that Mr Sole was involved in LESCON...? Through Mr Russel".

This notwithstanding DW1 throwing caution to the winds went ahead and used Z M Bam. Thus I accept with approval the submission that if Acres was so ethical as it would have this court believe it to be, DW1 would not have used Z M Bam because of his unduly close relationship with Masupha Sole. But looking back on the Milner connection it would seem behaving as Acres did in the Sole/Bam relationship was just par for the course because the very reason that Milner was a cousin of Mpala the Chief Executive in the Zambezi River Authority was Milner's selling point as far as Acres was concerned despite that that obviously unduly close relationship existing between the two would militate against employing him.

It has more than once in this judgment been pointed out that DW1 is obviously an intelligent man, clever and experienced. But features continue arising which either point to his truthfulness or deliberate untruthfulness. One thing when it came to remembering small things it was with amazing clarity and monumental aplomb. But there was always this nagging feeling that he inspired; namely that he remembered them because he wanted to. Otherwise how come things which by their sheer prominence are big enough to form unmistakable mile-stones along his memory lane become completely obliterated and absolutely forgotten. Things that he remembered were those which were either beneficial to Acres defence or simply not harmful thereto. Examples abound in this particular area. In illustration of this can be cited the fact that he could not remember a really important event like the proposal that he put to Z M Bam at their meeting together in November 1986 in relation to which the proposal was subsequently put to the “**relevant parties**” by Z M Bam. Now he conveniently contends that these things all happened a long time ago and for that reason he could not remember details. The next brand of forgetfulness emerged on the scene strikingly like a ghost at the feast when attempts by the prosecution to have DW1 identify Z M Bam’s source or contract within the LHDA drew a complete blank. Common sense dictates that if you know Z M Bam that well and what he is doing the next logical and indispensable thing is knowledge of his connection point within the LHDA and remember it as indelibly as you remember Z M Bam because the two are but the sides of the same coin. Thus I accept the submission that on these important matters DW1's forgetfulness is convenient in the extreme, regard being had to his sharp remembrance of old and minor details which either favour Acres or mean no harm to it.

The court was spell-bound by the facility with which DW1 confidently stated in his evidence in Chief that Acres' invariable practice was to use representatives in foreign countries. But a small scratch by the cross-examination on the surface relating to this issue revealed that as a matter of fact the first time Acres engaged an agent in Lesotho was when they engaged Z M Bam in 1986. It should be recalled that by this time Acres had been in Lesotho for years and had attempted to get TAMS' technical assistance contract with WEMIN, as well as the feasibility study awarded to LMC which was under the supervision of TAMS. Like Tac-1 these were obviously large contracts. Yet they never used an agent. However the moment there were invited to submit a proposal under Tac -1 they were stung into engaging Z M Bam. Be it recalled that on DW2's evidence at this stage an agent would not have been necessary. Why then despite all this. Truly the reason would seem to lie way beyond what a mill of the run agent is required to do. Nay not even just within the pedestrian requirements such as providing political intelligence or the like which Acres maintained would serve as good enough reason to proffer to the question why in the light of the fact that Acres was neatly covered in all areas by its local personnel rendering the use of an agent unnecessary, did it feel it needed an agent nonetheless. But the need for an agent in these circumstances was so as to please Sole and share with him Acres' money in turn for promotion of Acres' interests outside their avowed policy of acting lawfully, outside what contents of the representative agreement purport to convey.

DW1 testified that he met Z M Bam at the letter's offices on 10<sup>th</sup> November 1986. Nothing of note was focussed on in their discussion. However DW1 says he used this opportunity to meet Z M Bam when he came to Lesotho for a site visit. Yet he put a specific proposal to Z M Bam, which the latter "again highlighted" to the "relevant parties": part of paragraph 2 in Volume 15 part

4 at Page 16 reads:

“Did take care to again highlight proposals of November 11 to the relevant parties”.

DW1 conveniently could not say what this proposal was. He tried to explain it with reference to the Acres' proposal TAC -1. But this vain act of spatchcocking was set at naught in its tracks by virtue of the fact that Acres' Tac - 1 proposal had not even been submitted yet. This was only going to be submitted on 19<sup>th</sup> December, 1986 as amply vouched for in Volume 15 part 4 pp 11-12. How else then could DW1's proposal to Z M Bam have been at this meeting but that it must have been a separate, improper, proposal. Were it not so, common sense dictates that there would not be any need to highlight it to the **relevant parties**. That the proposal was improper also gives an explanation why DW1 has conveniently forgotten what the proposal was. Be it remembered here too that Acres only engaged Z M Bam as its agent after it had been invited to submit a proposal *but* before the contract award.

The court puts a premium on the significance of the timing of the engagement of Z M Bam as Acres' representative. Once regard is had to DW2's evidence taken along with that of DW1 that in effect there was nothing that Sole could really do to assist, there would have been no need to engage Z M Bam at all: that is assuming their story is true in that regard. There was after all, on their evidence nothing that Z M Bam could do for them. Here one is introduced to a morass of vague and unconvincing answers by DW1 putting his glib tongue to optimum use in that regard. The bare truth established by credible evidence is that there was a lot that Sole could do for Acres. Further evidence points to the fact that Sole did a lot for Acres. I may go further and say it was no sheer coincidence that as it turned out the money that Lahmeyer paid Z M Bam also was shared

with Sole. Page 1673 lines 20 - 23 “Were you blissfully unaware of that.....?”

Completely” was DW1's response in cross-examination. It is strange that even though the German Government, as admitted by DW1, made all sorts of moves to get Lahmeyer back in the “fray” - page 1673 lines 1 - 10 Dw1 didn't want to know what Z M Bam was doing for Lahmeyer. This is another example of incredible failure to observe things which by their nature are striking to one's eyes unless one covers one's eyes to obstruct viewing them. In such instance the failure to see is deliberate.

DW1 was repeatedly asked both in cross-examination and re-examination what Z M Bam did for Acres between April 1989 and February 1991 to lawfully assist Acres in relation to contract 65. He stuck to singing his pet theme, namely that Z M Bam performed general intelligence work for them and gave them advice. Apart from the fact that DW1 appeared to be scrupling to give it the answer itself was simply vague. DW1 could point to no specific thing that Z M Bam did for Acres. I accept the submission that DW1's vague answers in this regard suggest that Z M Bam did nothing lawful for them. The inference is irresistible from this instance that instead Z M Bam was paid to do Acres' dirty work for them namely to bribe Sole. If this were not so Acres would have notes of precisely what Z M Bam did and these would in turn have been produced. Serious consideration should be given to the fact that those scanty notes that Acres have produced are peppered with suggestions of irregularity.

According to DW1's testimony when Acres got the instruction to mobilise on 14<sup>th</sup> August 1990 it believed that all the contractual conditions had been met. This observation is vouched for at page 1423 lines 19 - 25 especially 21 to 25 reading:

“.....what was your perception at home office in regard to the suspensive conditions or the conditions contained in the letter of intent of 28 July 1990 \_\_\_\_\_?”

..... we would believe that if the owner has taken the step of ordering us to mobilise, then all conditions would have been removed.

What was your belief \_\_\_\_\_? That was our firm belief.”

This evidence cannot be true because Witherell was the assistant Chief Executive at the time. DW1 admitted that all World Bank and JPTC communications would pass Witherell’s desk. Meaning in brief that Witherell would have known that the conditions referred to in the letter of intent had not been met.

Under cross-examination DW1 made what amounted to dropping a bomb-shell. A very telling thing he said which naturally made the court raise its eye-brows with curiosity. He said after Acres had mobilised it was performing contract 65 work but it was not getting paid. He said that Acres was then in effect financing contract 65. This in part appears to me to be an acknowledgement that JPTC had not granted its approval thus it would have been absolutely true that Acres was doing so since its staff was working. Therefore Acres was having to pay salaries, mobilisation costs and the like. For all this Acres was not being paid or reimbursed by the LHDA. Truly this was obviously an untenable situation. If allowed to go on too long it had the potential not merely of leaving Acres with an egg in the face but seriously embarrassing Acres financially. Therefore it could to be allowed to go on indefinitely.

Amidst all this untenable situation Acres was keenly aware that it had absolutely no leg to stand on. Fact: Acres could not invoke any of the protection clauses relating to non payment or

late payment as provided for in contract 65. Indeed one is tempted to ask how could Acres have opted for this foolhardy course when the other course as provided for in Contract 65 would have none such uncertainties. At the end of the day the ultimate answer seems to lie in the greed of the Chief Executive and Acres' eagerness to benefit in turn for slaking it. The immediate answer was that Acres found itself "financing" the LHDA because contract 65 had not even been signed yet. In fact at that stage important contractual considerations, like for instance Acres' mark up, had not even been agreed. This relates to the time around 25<sup>th</sup> September 1990. In a letter by Renkewitz the task manager to the LHDA dated 25 September 1990 in Volume 1 pages 402 - 3 last paragraph the contents read:

"We consider the proposed fee of 20% excessive for contracts of large value and long duration. This usually ranges from 10 - 12% and the appropriate fee should therefore be in the neighbourhood of 10% ..."

Thus clearly this shows important things still needed to be put right before Acres, with the blind and enthusiastic cooperation and encouragement of the Chief Executive, could leap as it did before it looked.

Needless to say it was only after the above date that Acres' mark up was reduced from 20% to 14.7%. Acres was thus firmly at the LHDA's mercy and Masupha Sole who was at the helm of the LHDA had got them by the short hairs in this instance. Thus Acres had no option then but to resign itself to the tender mercies of Sole.

But wonder of wonders all this as if by magic wand was put to bed very quickly after the representative agreement was signed. The equation is simply too close to deny existence of a connection between its extreme ends. Signature on the representative agreement equals loosening

of the grip on Acres' throat by Sole! On the outside signing of the representative agreement should mean nothing beyond payment by Acres' to its agent Z M Bam. What is in it then for Sole that he should loosen his grip on Acres' throat? Truly something that is paid to Z M Bam to use his account to pay Sole with and **not without** Acres' knowledge. It turned out then that within days of the representative agreement being signed Acres was paid its Maloti component advance of M250 000-00. Not long thereafter, on January 4<sup>th</sup>, 1991 Acres was paid its Canadian advance. Clearly the conclusion of the representative agreement on 23<sup>rd</sup> November 1990 had the direct effect of removing Acres' nightmare of effectively financing contract 65 on behalf of the LHDA.

As peripherally alluded to earlier under cross-examination DW1's carefully grafted halo of self-righteousness completely crumbled. And when it did it not only showed up inconsistencies, contradictions and improbabilities, but it revealed DW1's evidence to be quite simply untruthful.

Examples abound in the typed record of proceedings to support the above observation and finding. They are to be found in:-

- Page 1535: lines 5 - 7 : DW1 after beating about the bush ultimately says Z M Bam was going to help Acres' get a contract which as the court now has seen for itself had already been secured without Z M Bam's assistance. What explains why he could not answer the simple question with a direct answer is that he knew it could not be true in the circumstances that Z M Bam could be of any assistance in getting the contract for Acres.
- Page 1521 lines 5 - 23. The sudden need for an agent after Acres had been

in Lesotho.

- Pages 1525 line 8 - 1526/8: The need for an agent where Acres had been invited to make a proposal. Invitation to submit a proposal betokens that the stage for securing an agent had clearly past. See lines 22 - 24.
  
- Pages 1527 line 11 to 1528 line 13: No clear answer about what Z M Bam was going to do for Acres except that he was discreet and did not blab. Nothing indicated about what the role of Z M Bam's contact Mr Makhakhe was. When questioned closely on the due diligence to which he attached so much weight concerning Z M Bam, whether DW1 did this due diligence he suddenly said Mr Russel and not him.
  
- Pages 1529 line 7 to 1530 line 26: Qualification of Z M Bam to do agency not going to do engineering work is that Russel knew him and Jonker found his name in a telephone book. This is the indicator of the extent done of due diligence to enable Acres to pay Z M Bam CAD 132 000.00
  
- Pages 1533 line 15 to 1535 line 18: The particular attraction of Z M Bam and what he was going to do for his money.
  
- Pages 1540 line 2 - 1543 line 17 Z M Bam's contacts inside the LHDA and who they were.

- (1544 lines 5 - 9.) DW1 is unable to help court evaluate how good and reliable Z M Bam's contact is.
  
- 1554 Lines 6 - 10 : Inclination to involve the Canadian Embassy and the reason for doing so, namely to influence the minister (1555 line 18 to 1558 line 22).
  
- 1683 DW1 denies what otherwise had been for a long time a common perception that funds once stored away in Swiss accounts could not be touched by anybody else.

The instances which constitute inconsistencies in DW1's evidence are well summarised by learned counsel for the Crown under distinct headings set out in paragraphs 201 to 211 of the written submissions. I could deal with each of them at great risk of prolixity to this Judgment. Suffice it to say in paragraph 202 I have highlighted as an example of the circumstances in which

Z M Bam was engaged in respect of contract 65 sub-paragraph 202.3 referring to “Advice from EDC on the use of agents, control over agents and as this applied to Z M Bam (pp 1589 line 4 - 1592 line 6.)

With regard to paragraph 203 headed

“The representative agreement (RA) and the various drafts it went through”, the first sub paragraph thereof sufficiently illustrates the point being made namely that the representative agreement was not simply a *pro forma* document. The entire text bears reproduction as follows: “The point I want to make here is this is not a *pro forma* document where you just fill in the right name, this is a document typed out in respect of LESCON, in respect of TAC - 2, right \_\_\_\_\_? That is correct”, replied DW1 to Mr Penzhorn.

In paragraph 204 relating to other events at the time learned counsel for the Crown has among other points for consideration pointed at Sole’s visit to Canada at this time, September 1989 Paragraph 204.1, payment to Z M Bam on 1<sup>st</sup> October 1989 in respect of his disbursements in Canada Paragraph 204.2;

..... Payment by Acres of Sole’s travel expenses, also in the light of its corporate policy, paragraph 204.4.

Under paragraph 205 headed as circumstances leading up to the RA on 23<sup>rd</sup> November 1990 is earmarked among others for consideration sub-paragraph 205.3 styled “Authorising of the advance payments and the position this put Acres in (pp 1646 line 13 to 1653 line 9.) Reference to the text, in the record of proceedings clearly shows that DW1 was hard put to it to provide

answers to this. He was simply in a quandary to do so.

Under paragraph 206 whose heading is what the R A provided for as opposed to what Z M Bam was needed for stood the unforgiving question in sub-paragraph 206.4 whether the RA was not really a form of insurance for Acres. (P 1669 lines 12 to 19) This question clearly effected a stunning blow to the facade of impenetrability that DW1 had initially assumed at an earlier stage when he appeared to be on top of the situation in this court. It simply left him out on a limb as presently illustrated in the text as follows:

“ ..... At the end of the day was this agreement with Mr Bam not just a form of an insurance policy .... ? Was it not just a form of an insurance policy?” came the reply in the form of another question to the question clearly put. Not only so but clearly understood! See page 1669 lines 12 to 14.

Paragraph 207 highlights the double conflict with Lahmeyer being a consultant on the water project. A truly poor way of Acres holding itself as above reproach in the sphere of keeping away from conflict of interests.

Paragraph 208 illustrates DW1's poor show in trying to deny that Sole wielded tremendous influence and power that went well and far beyond limits of normality let alone acceptability. DW1's denial was despite what he himself struck him as an unreasonable and puzzling behaviour on the part of Sole who first booted out Willet for no reason whatever and then DW1 himself for “daring” to bend to the natural curiosity by whispering to someone else why Sole did kick out Willet.

Paragraph 209 relating to payments outside Lesotho i.e. in Switzerland puts on the spot Acres' code of ethics and calls in question its violation of Lesotho's Exchange Control Regulations and tax laws. Especially the part of conduct that is akin to behaving as if butter wouldn't melt in its mouth

Paragraph 210 relating to the relationship between Z M Bam and Sole questions in 210.3 whether, in the circumstances neatly set out to indicate one thing and one thing alone, Z M Bam would not have told Acres that he shared the money with Sole.

Paragraph 211 under the heading contact with Sole after his departure from the LHDA deals in the first paragraph with the question of there being no further dealings with Sole after that (P 1714 lines 20 - 23);

next with Acres sharing lawyers with Sole. This appears in the record at pp 1717 lines 11 to 1718 line 24 where the sheer irregularity of the practice that Acres indulged in in that regard was highlighted, leaving DW1 not knowing where to put himself as he remained stuck in a cleft stick;

finally with consulting with Sole for purposes of this trial. See pages 1717 line 11 to 1718 line 24.

In sum then I am convinced not only from my own observation, but from submissions by

counsel and discussions with my assessors that in each one of the points raised in paragraphs 201 to 211 of the Crown's written submissions there is some or other unsatisfactory feature ranging from DW1's evasiveness, display of a selective memory, contradicting other credible evidence, uttering such improbabilities as cannot be believed to downright being untruthful in plenty of instances.

DW1's evidence appears to be calculated to achieve only one thing, namely extrication of Acres from the intricate web of intrigue in which it wove around itself. For achievement of that goal it seemed to me that telling the court the truth was not something he had set his sights on. In the process he put not only his credibility at stake but Acres' own *bona fides*.

DW1 testified that he arrived in Lesotho about four weeks before he gave evidence and that although during that time he had made contact with Sole he did not ask him about allegations made in this case. He further pointed out that although he had good working relationships with him Sole did not confide in him. His reason for not asking Sole about these allegations was that DW1 thought they were very sensitive. See page 1905. Yes, they did at times discuss items relating to Acres though however he would not use the word "confide" as implying anything other than open discussion. See page 1905 lines 20 - 21.

The next defence witness to give evidence was DW2 Clifford Brown whose evidence was characterised by consciously measured pauses giving an impression that he was giving serious thought to what he had to say as well as giving the impression that he was saying carefully rehearsed things. At page 1891 line 18 a particularly long pause ensued following a very fair but

truly poignant question in line 17 - 18 namely “..... my question to you is this, instead of speculating why did you not ask Mr Sole why Mr Bam paid him all this money \_\_\_\_\_ ? (Pause)

I notice that there is a long pause here, Mr Brown \_\_\_\_\_ ? I did not regard that as my business. I do not go around asking sensitive questions like that of anybody” DW2 replied snappily.

Otherwise after every pause he would make, giving as he did so the impression that he was being extremely careful what to say, he would then ramble on and on. He has also a trick of asking a question to be repeated even though he obviously understood it. At page 1883 line 13 the text goes “Mr Witherell was an Acres man, not so \_\_\_\_\_ ? That is correct, yes. So he presumably is on Acres’ side \_\_\_\_\_ ? I am sorry, I did not understand He presumably is on Acres’ side....? *Would you repeat that again please.*” Italics supplied.

At page 1886 the same thing happens in the following text after much hedging previous questions about and dodging to answer them straight:

“So you did apply your mind at the time to this question as to why Mr Sole was being disciplined, did you? And you concluded that it must be because of the friction between the LHDA and the JPTC ....? *Repeat that again please*”. Italic supplied.

At page 1996 the court had to intervene having realised that his trick had an added aspect to it namely of interpreting what the question means and at the end of such irrelevant interpretation

instead of giving an answer to that question, blissfully basking in the make believe that he had responded to the essence of the question.

Perhaps sensing the Court's disapproval of this form of behaviour, Mr Alkema, after the simple question had been put to DW2 again by the cross-examiner, dutifully tried to intervene but the court set the learned Counsel at ease by pointing out at page 1887 line 15:- "Oh, but he struck me as ... a man of fairly elastic mind". To this day this is the impression firmly imprinted on the Court's mind by the agility with which he avoided answering questions while in fact saying very many things which did not amount to anything of substance in the process. The court paid him homage for having been a teacher at one stage therefore no doubt given to talking as a matter of acquired habit.

I accept the observation that the over-all impression of DW2 was that he was extremely anxious to say all there was that could be said in Acres' favour. He admitted at P. 2022 line 25 as follows: "I am certainly always batting for Acres," but now here as ever often the truth of what he said was of little importance. Suffice it to say then DW2 was not an impressive witness. The outstanding feature in his evidence was one of a holier - than -thou attitude biased all in favour of Acres. Examples of repetitiveness, verbosity, argumentativeness, inclination to fence with questions and many instances of improbability illogicity and obvious untruths liberally litter his evidence.

For instance even though he was in Lesotho at all times material to contract 65, having arrived there on 15 January 1988 and left in August 1994, he knew little or nothing about Z M Bam

that is of relevance to Z M Bam's relationship with Acres, other than that Z M Bam was Acres' agent.

At page 1938 lines 9 - 15 the above account is vouched for pauses and all. The text goes:  
"..... did Mr Sole know about your arrangement with Mr Bam\_\_\_\_\_ ? (*Pause*). I believe so.

That Bam was Acres' agent in Lesotho\_\_\_\_\_ ? Yes

I see ...? *I assume, I never discussed with him, but Bam was our agent .....*"

Italics supplied.

At pages 1939 to 1940 lines to 9 this court was treated to much weaving and dodging of the question by DW1. The simple question was whether Z M Bam being an agent of Acres was not in breach of a clause 3.2.3 in Volume 2 at page 446 prohibiting consultants or entities affiliated with the consultant from being interested in the project during the term of the agreement and after its termination. The question turned on whether Z M Bam being such entity as envisaged in the prohibition by virtue of being an agent was not disqualified from providing services specifically named.

The text goes in line 24 page 1939

"My question to you is any entity affiliated with the consultant, doesn't that include Mr Bam, Acres' agent in Lesotho, was he not affiliated with the consultant [Acres]? I am not trying to give a legal interpretation of this, I am asking you what you understand by this\_\_\_\_\_ ? He was Acres' agent" DW1 was content to say.

"Representing Acres' interests in Lesotho ...? Yes.

Now at the same time does that not ... make him affiliated as its agent \_\_\_\_\_ ? I would not like to make that statement, I would make the statement he was Acres' agent, yes," he stonewalled. Now the Court asks itself how in matters of obscure nature this witness can be trusted to be of assistance to the court when in matters of patent simplicity needing obvious answers he hedges around and brazenly at the end tells the court that he would not like to make such and such a statement. Contrast this with that of PW1 Putsoane who despite his discomfort in accepting that after Contract 65 had been signed nobody complained, truthfully recorded his agreement with the defence counsel in that regard. Obviously the court is entitled to a lasting impression that nothing could prevent DW2 from truthfully answering that simple question whose answer seems so simple especially for a man of his experience intelligence and what is more, a man who has been a teacher, thus been trained presumably to impart the knowledge and the attendant truth it contains.

Why DW2's knowledge of Z M Bam should be so shallow as to belie the essence of DW1's evidence that DW2 was at one time Z M Bam's handler, puts Acres' case in very dim light because, either DW1 was not truthful in saying DW2 was Z M Bam's handler, or that in truth DW2 was no such handler hence he knows so little about an important entity like the only agent Acres' had in Lesotho, namely Z M Bam. The court would be strengthened in this regard because DW2 said nothing of it in his evidence in chief. Furthermore he at no stage said he knew where Z M Bam lived. See page 1949 lines 3 - 5

"At no time did I ever know where Mr Bam lived" DW1 said. At pages 2034 lines 24 - 26 and 2035 lines 1-2 he said. " My lord, the Prosecution is now asking me in my position and my position is that I was not aware that Bam was the agent of Lahmeyer or that LESCON, and I did not know whether he was even still with LESCON or not, he was a businessman in Lesotho and I

was not aware that LESCON was part of ABCC. ....” he rambled on with every sign of impatience with the simple question which had been patiently put with all the decency that Mr Penzhorn was at pains to maintain, to wit “Mr Brown, the question is simple, and I suggest to you you understand it perfectly well. Here you are supervising the work of *inter alia*, somebody who is also working for you to serve your interests *vis-a-vis* the LHDA. That is a clear conflict situation \_\_\_\_\_ ?”

Compared with that of DW4 Johannes Meyer the evidence of DW2 betrays the attitude of a witness who was not prepared to answer questions with sincerity except to put Acres in the good light only. The contrast with DW4 is not only enlightening it is sharp and stimulating: this is to be found at page 2174 lines 2 to 20 more especially the underscored words in line 18:

The text goes:

“And one of the prominent firms that would have been involved in this was LESCON \_\_\_\_\_ ? I do not know whether it was prominent, it was one.

He was the Managing Director of LESCON, Bam or do you not know that \_\_\_ \_\_\_? I know only that he had a leading function, I think he was a partner, so he had even owned part of that company. His official function I do not know. Would I be correct in saying that that was a reasonably well-known fact in the engineering world in Lesotho that - LESCON - Mr Bam was involved in \_\_\_\_\_ ? Yes, it was a well-known factor to me and the community.

We know from an affidavit of Mr Witherell before the court that Mr Bam was the agent of

Lahmeyer in Lesotho from about 1987 onwards. Were you ever made aware of that \_\_\_\_ ? No, not at all.

I am not suggesting you were, I am just asking a question \_\_\_\_ ? I definitely was not aware of that. [Line 18]. To be clear in my answer, I heard about it in the context of my evidence given here today. In that context it was the first I heard about that" (Relevant phrases underlined). The underlining merely serves to indicate a witness who does not want to lie in the sense of giving the court half-truths or deliberately withholding evidence that he clearly senses could be material I have only good commendation for DW4 in this regard therefore.

As just indicated according to DW4 everybody knew of the Z M Bam/LESCON ASSOCIATION. If DW2 indeed knew little or nothing about Z M Bam then this corroborates the Crown's case that Z M Bam never performed genuine representative services for Acres in the context of contract 65.

DW1 gave extensive evidence round about the period when contract 65 was established " P 1760 lines 17 - 19. Despite clear documentary evidence to the contrary he insisted that "[t] here was nothing that I was aware of during my tenure at LHDA during which Mr Sole's influence appeared to favour Acres and the establishment of contract 65". See page 1876 lines 5 - 8. This was obviously untruthful evidence I therefore reject it.

DW2 was closely cross-examined at pages 1880 line 9 to 1882 line 11 in an attempt to let his mind focus on the truth concerning the obvious power and influence wielded by the Chief

Executive whereupon he begrudgingly conceded that the one person “ among everybody in the LHDA to be on your side” would be the Chief Executive. As I have stated the witness begrudgingly conceded the point made by the prosecution. It may well be worth one’s while to show just how begrudgingly and in the process show justification for the criticism earlier levelled at DW2's evidence. See page 1882 lines 20 onwards. The text there goes

“ Who would you choose among everybody in the LHDA to be on your side, if you could \_\_\_\_\_ ? I start again, that is a loaded question and it would not come into my mind to frame such a question in my mind to be addressed. I did join the LHDA in order to have people on my side and against me. I recognised various people and their positions in the LHDA and I would address and relate to those people with respect to their positions. I would not be looking for somebody to be on my side except if, in the course of my duty, I am looking to attain a certain objective and then I may look, as the prosecution wants me to address, to somebody to support me in my objectives and the highest person in the LHDA is the chief Executive, so yes to the loaded question”. In the light of the above exposition I accept the submission without hesitation that DW2's reluctance to make this simple concession is demonstrative of clear bias.

A further demonstration of DW2's bias is that even though he admits that the two people comprising the LHDA executive at all times relevant to contract 65 were Sole and Witherell, he does not and wouldn't concede that Witherell was “ on Acres side”. At page 1883 lines 11 - 17 the text goes: “so at the time that we are talking about in respect of contract 65, the two people comprising the Executive were Mr Sole and Mr Witherell \_\_\_\_\_ ? Yes.

Mr Witherell was an Acres man, not so \_\_\_\_\_ ? That is correct, yes.

So he presumably is on Acres's side \_\_\_\_\_ ? I am sorry, I did not understand ...

He presumably is on Acres' side \_\_\_\_\_ ? Would you repeat that again please

He presumably is on Acres' side, he serves Acres' interests \_\_\_\_\_ ? In his capacity as Acting Assistant to the Chief Executive? No.”

This court is in no doubt that in general terms DW2 was very much alive to the tension between the JPTC and the LHDA relating to Sole's “not following the Treaty requirements in terms of approvals. See page 1886 lines 4 - 11 where after going in a round about way and saying the audit was not made following rumours circulating in Lesotho or within the LHDA he stated that “because of the friction between the JPTC and the LHDA” resulting from JPTC's thinking that the LHDA and the Chief Executive did not follow the Treaty requirements in terms of the approvals ... this was precipitated. But surprisingly DW2 could not bring himself to admit that Sole variously acted without JPTC approval in establishing contract 65 as already illustrated by an extract from page 1876 lines 5 to 8.

Indeed with regard to Acres' demonstrable shortcomings in this proceeding DW2 was not prepared to make any concession. He instead adopted a protective attitude like that of a hen with one chicken. For instance when questioned about the cash flow chart. Exhibit “K” and the forensic evidence establishing that Acres' money was used to pay Sole through Z M Bam “about half a million Canadian Dollars” he was not prepared “to express a view on these limited assertions” or “reach any conclusion or view on that very sensitive subject at this time” despite that in his evidence in chief he had expressed strong views on all sorts of other matters. See page 1888 lines 4 to 5, line 23, lines 12 - 13 as well as page 1905 lines 8 - 16. As far as he was concerned

“t [here] are too many presumptions” the hedging about presumably would afford him refuge he maintained. In the light of the fact that “K4” truly established a *prima facie* case an irrational refusal to candidly acknowledge this obvious fact is manifest indication of unadulterated bias.

When DW2 was asked why Z M Bam paid Sole all this money he explained that he would answer this one because he didn’t want to appear obtuse, and because he thought his opinion really matters, thus he was quick to venture a possible explanation and suggested that maybe “.... Mr Sole was paid for past services or past assets or something “ see page 1890 lines 25 -26. At page 1891 line 9 he came to terms with a likely possibility that “it is speculation” on his part. Instead of welcoming the offer to relieve him of this speculation - which seemed to be bothering him-by Learned Counsel who assured him that speculation on his part was unnecessary for the easiest thing to have done was simply ask Sole who was after all “sitting at the back of this court and speaking to various Acres people” DW1 spurned it with a curt reply clearly manifesting a holier-than-thou attitude that “I did not regard that as my business. I do not go round asking sensitive questions like that of anybody” he grunted out his reply after a very long pregnant pause. See page 1981 lines 1921 and 1892 lines 3 - 9. See also page 1905 lines 8 - 16. Indeed this is a telling piece of evidence which about sums up all I have been trying to express as the negative impression that Dw2 has portrayed in his evidence.

DW2 was disinclined to express opinions when questioned by counsel for the Crown yet he was quite content to express these “at the question of my counsel”. See page 1892 line 16. His reason being that questions from Counsel for Crown were “loaded or mis-directed” see page 1892 line 21.

At page 1977 of Volume 7 is a handwritten note by DW2 to Acres in Canada. In it is shown that Sole gave advice as to when Acres should submit a particular variation order. Not only that but advice is given as to the content of their letter. Be it noted that Sole had rejected the first two drafts. When questioned about this patently not so dispassionate preference displayed by Sole towards Acres DW2 could be seen straining unconvincingly to explain Sole's indefensible conduct. In the process he failed to justify Sole's undeniably improper interest in wanting to protect and advance Acres' private interests.

The substance of the letter dated 8<sup>th</sup> February 1994 is set out at page 1909 and the cross-examination thereon continues from there to page 1911. The substance of this is as follows:

“ Attached is a copy of the letter to LHDA re: notice of Military disturbance. This is the third draft. Mr Sole did not like my first two drafts which asked LHDA to agree that we submit our claim for costs as a VO [Variation Order].

He did not want a letter that required a reply from LHDA and too stated that Acres, as part of LHDA, should not be the first ones to claim, that we should hold off until other claims come in”.

On page 1910 reference is to page 283 of Volume 3 where the 2<sup>nd</sup> paragraph reads:

“There is no evidence that Mr Sole ever solicited any payment from Acres. He appeared to

take decisions based upon the merits including the governing contract provision”. Yet in footnote 20 Acres says:

“Acres did pay for certain lodging expenses incurred by Mr Sole on a trip to Ottawa, Canada in October 1993 to visit the CIDA Training Funding”. This on all accounts suggests a very comfortable relationship between Sole and Acres yet DW2 chooses to call it a good business relationship. He prefers not to use the word “comfortable”. In my view the discomfort it causes him is all too plain. It causes him discomfort because the description of the relationship as comfortable is true.

Further discomfort was suffered by DW2 when again his attempt to say why Sole gave advice to Acres as to how Acres should protect its interest against competition from Bechtel because he could not run away from the fact that Sole’s advice was intended to give Acres an unfair advantage over Bechtel who did not know that behind their back Sole was saying to Acres you had better do a good job because Betchel is knocking at the door.

Another example is reflected in a handwritten note by DW2 to Acres in Canada relating to the appointment of a technical evaluation team. Acres were interested in having Hugh Reinhardt, an Acres man, appointed. In this Memorandum DW2 undertakes to discuss Reinhardt’s candidacy with Sole and says:

“I will test the waters with Sole quietly” DW2 admitted that he had the kind of relationship with Sole that enabled him to “speak to him off the record”. See Page 1916 line 17. He went on quickly to water down the impact of his admission of such a relationship by saying. “It was not a

unique relationship by any means”. Page 1916 line 19. Needless to say the damage had been done. The first impression was what counted especially when contrasted with the lame attempt to reduce its impact.

Pages 1917 line 23 to 1924 line 3 provide another window of opportunity to gaze over the lengths Sole was prepared to go to in advancing Acres’ cause. The relevant memo on this is at Volume 7 page 1812. In this memo DW2 says to Acres in Canada that “Sole is going to *bat for* the extension [of Mr Priestman’s contract] so we have more confidence that it will eventually be approved”

Notwithstanding that it is obvious that Sole would be advancing Acres’ interest in a matter “against the JTPC”, DW2 insists that this was not so and that instead Sole “ is batting for the LHDA”.

At page 1918 lines 7 to 26 the text (incredibly) goes

“What is that all about? Why is Sole going to bat for the extension and against the JTPC \_\_\_\_\_ ? Because Mr Sole very strongly felt that he needed a very senior economist on staff.

He is also batting for Acres here \_\_\_\_\_ ? No he is not. He is batting for the LHDA.

He is for Mr Priestman \_\_\_\_\_ ? He is batting to fill the senior economics position on the LHDA, he did not want that position to go vacant.

Mr Brown, I am sorry if I am smiling but: “ re Priestman. Still up in the air regarding extension. As of today Sole is going to bat for the extension of Mr Priestman”. Not so? Who else, what other extension is there, is it the extension of Mr Brown or Mr Smith, this was Mr Priestman’s extension, not so \_\_\_\_\_ ? That is correct.

Right, Mr Priestman is an Acres man right \_\_\_\_\_ ? Yes, he is also .....

Sole is going to bat for him \_\_\_\_\_ ? He is also the senior economist in the LHDA Project” he insisted.

“Yes, and it is his extension that Sole is now going to bat for against the JPTC \_\_\_\_\_ ? Yes, it just happens to be an Acres’ man and his name happens to be Mr Priestman”; the stuffing ultimately appeared to have been knocked out of him despite his lacklustre but strong persistence to talk himself out of a conflict situation.

It is to be appreciated that of the five top-most persons in the hierarchy of the LHDA at the commencement phase of the project three were Acres’ appointees. DW2 concedes that the five consisted of Sole, Witherell, Ramollo, Clarke and Brown himself (DW2). See pp 1924 lines 16 to 1927 lines 18 to 19.

PP 1929 line 17 to 1930 line 26 the record of proceedings in this court reveals DW2 being referred to a document contained in Volume 1 page 171 wherein at page 173 appears under DW2's on name information reading under paragraph 1 as follows:

“ the following information has been sent to registered contractors for guidance in making travel/hotel reservations”.

Needless to say the contractors referred to above are told when the site visit is going to be, where they can find hotel accommodation in Maseru. They are given direction on how to get to Maseru Sun Cabanas. It is made known to them where the place is of the delivery tunnel south core. They are given all detailed information including available transport and car rental. DW2 conceded that he would have been involved in facilitating all these for the benefit of the contractors including providing them with maps. He conceded the purpose of the information would be to familiarise these people with the situation in Lesotho. In the light of all the above it becomes clear that Acres would never have needed a representative for purposes of assisting Acres acquainting itself with conditions in Lesotho. I accept the submission therefore that in the document referred to above DW2 informs potential tenderers for various construction contracts all they need to know for a site visit to Lesotho, right down to such details as car rentals as has been pointed out just shortly above.

Less wonder then that DW2 was more than unconvincing on the subject of Acres' conflict of interests arising out of Acres' use of Z M Bam as their agent in Lesotho in circumstances where they were also supervising contract 45, under which Z M Bam through LESCON was also engaged as a part of LHC. This has direct relevance to DW2 admitting that Z M Bam had been Acres' agent in Lesotho from about 1986/87 onwards as conveyed in the text as follows:

“You see, we have also heard evidence that Mr Bam was Acres’ agent in Lesotho from about 1986/87 onwards, right \_\_\_\_ ? Yes “ see page 1937 lines 3 - 4.

DW2 is observed vainly trying to contend that he did not know what Z M Bam’s involvement was with LESCON as clearly borne out at page 1936 lines 23 to 24. This makes unconvincing reading when considered against the background of DW4’s evidence at Page 2174 line 2 - 13; compounded with his (DW2’s) presumption later that in 1990 Z M Bam was involved with LESCON. See page 1937 lines 1 - 2 where in reaction to the question “In 1990 did you not know that Mr Bam was involved with LESCON \_\_\_\_ ? “ and he replied “I knew he had been involved with LESCON in the past but in 1990, if you asked me I would have *presumed* so, but I did not know” (emphasis supplied). It is amazing that despite his presumption DW2 said “I did not see the conflict”.

The text goes as follows at page 1937 lines 3 to 15 onwards:-

“Yo see, we have also heard evidence that Mr Bam was Acres’ agent in Lesotho from about 1986/87 onwards right \_\_\_\_ ? Yes

Does that not create a serious and I mean a serious conflict situation? Because now you are on behalf of the LHDA supervising a contract which includes ABC which in turn includes LESCON at the same time that LESCON through Mr Bam is your agent in Lesotho, is that not a serious conflict problem here \_\_\_\_ ? I do not see the problem ....” he proffered after the characteristic deep pause and then rattled away paying scant regard to the point of curious consternation in the question. Amazingly though, DW2 believed that Sole knew of Acres

arrangement with Z M Bam.

The text goes as follows at page 1938 lines 9 to 15:-

“... did Mr Sole know about your arrangement with Mr Bam \_\_\_\_\_ ? (Pause). I believe so.

That he was your agent \_\_\_\_\_ ? I believe so. I never discussed it with Mr Sole, but I always assumed that he knew.

That Bam was Acres’ agent in Lesotho \_\_\_\_\_ ? Yes.

I see....? I assume, I never discussed it with him, but Bam was our agent...” I accept the submission that DW2's evidence in this regard simply cannot be true. I therefore reject it as just another vain attempt by DW2 to talk himself out of a conflict situation which as the text palpably indicates is indefensible.

Even more unconvincing was DW2's evidence dealing with the conflict arising out of the Z M Bam/ Lahmeyer relationship alluded to earlier in this judgment. See pp 2027 line 19 to 2038 line 1. But to illustrate the point it may be fruitful to quote the text at P. 2035 lines 8 - 19 as follows:

“... I was not aware at any time that LESCON was a part of ABCC.

Mr Brown, I will not keep hammering at that but surely, if I may use the word surely, you were aware that LESCON was involved in various sub-consultancy contracts in Lesotho \_\_\_\_\_ ?

Yes, and these contracts, to my knowledge, were all in the infrastructure division.

Not consultancy\_\_\_\_\_ ? They could be consultancy contracts in the .... sorry, did I say construction ? I am sorry, I meant to say infrastructure, in the infrastructure division. From my knowledge and I do not know what .... I cannot say what contracts they were on, but I was well aware that LESCON was looking for business and any business that I knew of that they had or might have had, was with the infrastructure division and never with the engineering and construction department”. Needless to say it is very difficult to make head or tail of what DW2 is trying to say here apart from the fact that he thought he had said construction instead of infrastructure in circumstances where he had not alluded to the word “ construction”. See pp 1937 line 5 - 1938 line 8.

The deepening of DW2's difficulties with Acres' obvious conflict situation became even more apparent and pronounced when it was pointed out to him that Acres' conflict also arose by virtue of the provision of Clause 3.2.3 of Contract 65. By the time he was questioned about this clause he had already conceded that he knew that Z M Bam was Acres' agent in Lesotho at all material times. When confronted with Acres' obvious difficulty, at first he vouchsafed the court no audible reply, just an indistinct mumble that I recall similar to the rumble of a distant volcano. When it was pointed out to him that he could take as long as he wanted, ( again it looked to me that the cross-examiner was relishing this moment of obvious perplexity occasioned by vain attempts to avoid the truth) DW2 insisted that “ this is a very legal clause and I would like to take a minute to read it”. The simple manner in which the question had been put left me in no doubt that DW2 was merely stalling for time hoping meantime that per chance he could land on some bright

answer thereto.

When it was pointed out to him that he is an experienced engineer accustomed to working with engineering contracts, he asked for more time to read it. Then he wanted the question asked again as he was wont to do a good number of times before whenever an obvious truthful answer appeared to him to be likely to compromise Acres.

When he did eventually give a reply he tried to suggest that he did not know that LESCON was a member of ABCC. See page 1940 lines 5 -19.

When pressed the best he could do was to say that he “did not have enough knowledge of ABCC at the time”. As I indicated earlier the above was but an illustration to show the lengths to which DW2 was prepared to go fencing with questions, waving and ducking, improvising and avoiding the truth. I have no hesitation in rejecting this evidence as highly unconvincing and obviously untrue. It is just in keeping with obvious but vain attempts to wiggle out of awkward situations occasioned by hope to successfully escape the course of the truth as has been shown to be the case in reference previously to PP 1937 line 10 to 1938 line 8.

Confronted with the above pattern of unconvincing answers to simple questions whose answers should at worst be obvious it was like adding liquid fuel to raging fire. His answers became even more and more unconvincing and no doubt instant fabrications some of them. For instance reference to pp 1941 line 18 to 1942 lines 14 to 26 will help ram the point home. The text goes:

“But Mr Brown you must have [knowledge of ABCC]. All these contracts had a local Basotho content, that was the requirement that local Basotho be allowed to participate and that is why they were involved in these contracts on the Lesotho side. They were involved in these contracts and the association that acted for the Lesotho consulting Engineers was ABC, that was a fact well-known to everybody in Acres \_\_\_\_ ? No, it was not.

Pardon \_\_\_\_\_ ? it was not

Sole, ..... you said earlier on, punted the participation of local engineers with the World Bank and with JPTC \_\_\_\_ ? Yes that is exactly what I said.

And that is the association, that is the ABC that he punted \_\_\_\_\_? That is right and he pushed this for these contracts 45 and 46 ..... So it was not something that I was looking at over a period of three or four years. It was something that came up in these contracts, it was the Association of Basotho Consultants (sic) was for the first time mentioned and I did not have and in -depth knowledge of that association.

Are you saying to day ..... ? It was an independent company as far as I was aware.

..... Are you saying to his Lordship *on oath that at that time* you did not make the connection between ABC on the one hand and LESCON on the other, you did not associate the two? Let us just have an answer and I will move on \_\_\_\_ ? **(Pause)** Yes. I did not associate the two and certainly I did not associate the two in terms of any conflict of interest”. Coupled with the pause with which the reply is prefaced, it sounds starkly familiar in its hollowness to the notorious

phrase “ I never had sex with that woman” when the culprit a married man of highest standing in society was charged with encouraging his girlfriend to conceal their liaison.

The case favoured by Acres does not hold. It seems to give in at the seams as will presently be illustrated when considering the divergent paths followed by DW 1 and DW2 concerning a point where in truth they ought to converge. That emerged when DW2 was confronted with the fact that an Acres person namely Mr Lightfoot is shown as having dealt with Acres’ contracts on behalf of the LHDA particularly contracts 19 and 65. Again instead of answering the question directed to this anomaly DW2 prefacing his reaction with the usual pause that gives away his devious mind he finally landed at the stunning answer that as far as he was concerned this was “nothing unusual” see page 1945 line 1 read with pages 1943 line 20 to 1946 line 24.

On page 1944 lines 18 - 19 DW2 is observed in his element as illustrated in the text to the following effect: “The question simply is how is it that an Acres’ person is dealing with the Acres’ contracts on behalf of the LHDA ....? **(Pause)**. I presume that Mr (...) In the case of contract 64, I presume that the Chief Executive asked Mr Lightfoot to prepare the draft.....” If anything this answer instead of responding to the obvious essence of the question simply begs the question in much a similar manner where a question is asked what is the process by which sunlight enables us to see; and the answer is: we are able to see because sunlight provides us with light. Put in another way how is a frog able to swim? It is able because it can move and float in water.

All in all the essence of the question, even if the question was framed in such a way as to

leave no room for hedging around by DW2 as for example why is it that the Chief Executive found it fit to ask Lightfoot an Acres person to prepare the Acres draft on behalf of the LHDA, remains unanswered. Yet the capital finance division had to deal with contract 65 and on DW1's evidence Witherell was given strict instruction to have nothing to do with the establishment of Contract 65. Needless to say DW1's evidence is not only improbable but it is also contradicted by DW2 who in re-examination, conceded that when Witherell signed the advance payment he "would have known as a fact that the final terms of contract 65 had not yet been finalised in relation to taxes and fees" see page 2056 lines 11 - 26.

When closely questioned about Acres' bank accounts DW2 conceded that Acres' local expenses would have been met through these accounts. I may add that this would have been a sensible and common sense move to adopt. From this concession it is a matter of no anguish to me to accept the submission firmly founded on good reason that makes for sound commercial sense that had Z M Bam been Acres' lawful representative in Lesotho he could and would have been paid through these accounts. Not even the otherwise elastic mind of DW2 could take this aspect anywhere. Thus he sought the exit from the all too familiar escape route "That question would have been appropriate to Mr Hare"

DW2 was not only closely cross-examined but extensively so about the failure to obtain JPTC's approval in terms of the Treaty for the various milestone steps in the establishment of contract 65. I incline to the observation expressed by Learned Counsel for the Crown in his submission that the overall impression here is that DW1 was more than disingenuous. Fact: in his earlier evidence and in a different context

he candidly admitted that there was serious friction between the JPTC and the LHDA regarding the LHDA and the Chief Executive's failure to follow JPTC requirements in terms of approval. Yet in the context of Contract 65 there he was digging his heels in and not giving any quarter for accommodation of supremely legitimate concessions at all. For him there was a difference between "approval" and what he said they as Acres did namely "we would consult and we would ask for their concurrence" for him there was a meaningful difference between the two, albeit a "small difference". See Page 1963 lines 4-18.

The text goes as follows:

"When you say concurrence can one also equate that to approval \_\_\_\_ ? You can discuss, debate the terminology, but I believe I gave the definition, our definition of concurrence and approval earlier and I will give it again, My Lord, it is very short. By concurrence we were asking for the JPTC's agreement with what we were doing, but we regarded it in accordance with the Treaty that we did not have to have that concurrence before proceeding. Approval we regarded as we could not proceed unless we had the approval of the JPTC. *There is a small difference*, but it comes to what the Prosecution in his opening remark on this point was, that all along we consulted with and received their concurrence or approval ..." Suffice it to say for a man who expressed his phobia for legalese earlier to indulge in the sort of subtlety that he has projected in the above statement this serves as inexcusable hypocrisy.

I accept the submission that the distinction described is artificial and merely calculated to serve as a red-herring across the trail. Moreover the subtlety contained in this distinction is what in law is reprobated.

What is clear to me reading the function and purpose of the JPTC in the over all picture of the LHDA is that the JPTC's approval had to be obtained before any step involving costs could be taken. Yet DW2 couldn't bring himself to concede that anything improper went on in the establishment of contract 65. Thus when confronted with PW15's (Molapo's) evidence in this regard he sort refuge in the use of an inapt expression that " I think Mr Molapo's testimony is being turned a bit" "see Page 1964 lines 5 - 6. The expression is inapt because apart from casting aspersions on the integrity of the cross-examiner in what it implies, it is simply not true that there was even the slightest attempt to turn PW15's testimony. PW15's testimony in effect showed that there was a lot of impropriety that went on in the establishment of contract 65. The minutes of the JPTC and the fact that he was not shaken in cross-examination on this point are a clear indication that this was the effect of his evidence. Nothing in it was turned a bit. Once more I reject DW2's evidence as untrue in this regard.

DW2's main proposition was that the JPTC knew what was going on. The reason for this proposition was that they (JPTC) attended meetings, negotiations etc. This in turn according to DW2 was tantamount to approval. The emptiness of this largely mistaken belief was dealt a shattering blow by the simple example advanced by Learned Counsel for the Crown at page 1965 lines 12 0 15 resulting in DW2 undergoing a momentary numbness of his faculties typified by a long deep pause before he responded. The text goes:

"Mr Brown, if I know my wife is committing adultery and I do not say anything about it, does that convey approval ..... ? (pause) I think that is an odd question, but in fact in my reading

of some court cases I believe that might be taken as approval". In my view the essence of this question was to highlight that the JPTC's approval had not been given let alone sought. That essence has, in my view been successfully highlighted. In the result the court is of the firm view that the essential JPTC's approval which was absolutely necessary before the establishment of Contract 65 was not given as it should have been were the essential milestone steps not ignored by the Chief Executive with the connivance of Acre's personnel who were in the LHDA. Surely this couldn't have been for nothing in the light of all the points already considered in this judgment.

At one stage DW2 even went so far as to say the "issuing of the letter of intent didn't require JPTC approval" because "in accordance with the Treaty I do not believe it was required".

See pages 1965 lines 24 to 26 and 1966 lines 1 to 13:

The text goes:

"... but as I understood his [Molapo's] evidence ..... the LHDA never came to them for approval. And by the end of the day they were faced with this situation that here was Acres, they were here, they were working, *a letter of intent had been issued*, they were mobilised and the JPTC was sitting there faced with this situation; what did they do now? That was the crux of Molapo's complaint as I understood his evidence \_\_\_\_? Well, I accept Mr Molapo's complaint as has been brought out in this case. There was tension, there was friction between the two groups, and I am sure the JPTC would have liked to have received a formal written statement saying gentlemen, we are issuing the letter of intent, here it is, please provide your comments and okay, it appears that such a *formal letter was not written, but in accordance with the Treaty I do*

*not believe it was required*. But I believe that although Mr Molapo maybe felt that there should have been more communication and I would accept his concern in that regard ....” Emphasis supplied.

I have no doubt that now here DW2's train had completely left the metals; so much so that he even suggested that PW6 (Classens), when he attended the contract 65 negotiations leading up to the MOU, was not there just as an observer. I reject DW2's contention in that connection as a total misconception of the practice of JPTC's members attending the LHDA's meetings.

So thoroughly stuck was DW2's in his self-serving misconception that even when shown that PW6 had no approval powers during the negotiations and therefore that he could not speak on behalf of the JPTC, for he had no authority to do that, DW2's stubborn answer was “that is not true”. I accordingly reject his contention in that regard as a misconception having no basis in reality and in turn in the truth. When later he was pressed on this same issue as learned Counsel was properly entitled to do , DW2 said “ I am trying to think how to answer this M' Lord.” He then tried to suggest that it would be “just bad management” to refer matters to the JPTC. If all this was not more than sufficiently stunning performance by DW2 what immediately follows amounts to him out doing himself by the superlative degree. Thus he even went so far as to suggest in answer to a question that the LHDA needed JPTC approval before committing itself to money *vis-a-vis* Acres that “that is a point at which you are stretching it” see page 1979 lines 3 to 6.

Further down the text says:

“ Mr Brown, Acres got the LHDA to commit itself financially to Acres \_\_\_ ? Yes.

At a time when Acres full well knew that this requires the prior approval of the JPTC, that is the bottom line \_\_\_\_\_ ? No, I, the LHDA, need to have funds in order to finance the contract .....

At page 1980 lines 23 to 25 the Court was astounded to learn from the question “ you... Acres are the ones that got LHDA to commit itself to funds well-knowing that the money was not there \_\_\_ ?” the following answer “ well, the money was there”. It is as I have indicated immediately above, indeed astounding that DW2 should insist despite obvious truth to the contrary, that funding was in place for contract 65 when Acres got the LHDA to commit itself to contract 65. For all it is worth he was adamant that “the prosecution is (sic) way misunderstanding the financial arrangements here” See pp 1980 line 23 - 1981 line 8. He insisted that the documentation proved this and made an appeal to his counsel to help but his counsel did” not know which document this witness is referring to ....” as Mr Alkema dutifully informed the court. See 1984 lines 18 to 24. Indeed truth is stranger than fiction for there DW2 was, having stunned the court with his histrionics, he appealed to his counsel for support to no avail, and instead of giving this up at that crucial stage as never going to pay; his one more attempt was to suggest that “the point coming out from all these references is there was money and it was available”. P 1988 lines 9 to 10. At this stage it may not be presumptuous to suggest that DW2 was by then a lone traveller in the thickets of despair he had sought to traverse despite indications that his Counsel was in obvious distress about what to do to protect him against harming himself.

Indeed while money may have been available, bearing in mind that Acres was paid, this is a

far cry from prior JPTC approval in writing. DW2 must have known this, yet he would not admit. The question is why. The answer is obvious. Because he was bent on trying to mislead the court with untruths any admission that would be consistent with the truth would not fit in with his scheme of things.

I accept the submission that at the end of the day DW2's evidence does not take the defence case anywhere for he does not address the core question whether the representative agreement was valid. Instead he was manifestly biased and came to Court to "bat" for Acres. In his own words he said "I am certainly always batting for Acres" see page 2026 line 25. I do not think it would have been difficult seriously speaking for a man who has been a teacher to simply say he is prepared to bat for the truth. But because he took his particular option he was then prepared to say anything, whether it was true or not, logical or illogical, probable or improbable, so long as it was in favour of Acres.

It is my considered opinion that both DW1 and DW2 who seemed to constitute very important artillery in Acres' arsenal have dismally failed to help Acres' cause. In a way Acres, by having them give evidence in the manner they did, has shown its true colours namely that it is prepared to bend the truth in order to secure an acquittal. A company which is prepared to do this will also not shrink from paying bribes. These two witnesses came to extract Acres out of the bad situation and in the process have exposed it in worse light. Never could the expression suit the situation more fittingly than they went for the wool and have come home shorn.

Consider for instance at page 1902 lines 14 onwards where no satisfactory answer was

rendered to the question why Acres had concluded that there was no wrongdoing, not even a hint of bribery, when the World Bank initially asked Acres for documents and statements. The question was indeed a pertinent one and required a straight answer. The initial reluctance to provide these documents coupled with the loaded justification for that conduct that the World Bank would not be given access to them for fear that the information may be shared between it and the prosecution in Lesotho is most telling as an indictment against Acres' good faith and much flaunted -bout uprightness.

### **REGARDING DW3: JEAN PAUL GOURDEAU**

I have already made a few preliminary remarks about DW3 who was called by the defence to play the role of an expert witness for purposes of enlightening the court about engineering practice relating to the use of agents. The over-all impression of this witness' evidence is that he was clearly not the independent objective witness Acres held him out to be.

When confronted with specific situations clearly relating to instant facts he would either refuse to commit himself to a view or simply stonewall and thereby often refrain from coming to the inevitable destiny lying ahead of the path along which he might be treading if thereby Acres would be put in dim light.

DW3 was perfectly prepared to express views in his evidence in chief when asked to do so.

At page 2067 lines 7 - 14 he commented expansively as follows in his evidence in chief:

“ I have looked at the document and it contains what has generally been suggested in the framework of the guidelines, whereas it outlined the services which were expected from the representative, the support from Acres, the remuneration and I have noticed that the remuneration is 3.6% of services. Services mean that normally the taxes, reimbursable expenses is (sic) excluded, therefore from the total contract price it would be less than 3.6%....”

Contrast the above with answers at page 2101 lines 6 - 18 where Mr Woker for the Crown asked pertinently:

“ .... All I want to do is suggest to you in conclusion, Mr Gourdeau, that by the simplest strategy, a representative agreement, like the one that you have been shown in this particular matter, can be made to look like a representative agreement when in truth and in fact it is just a disguised agreement regulating the terms of bribery .....?”

I do not agree.

Well, I am suggesting to you that is possible, that it can be done \_\_\_\_\_ ? I do think it is possible, but I do not agree.

..... you do not agree what \_\_\_\_\_ ? I do not agree that just because you have a success fee, automatically you are enticing an individual to corruption”.

The above text is self-explanatory.

Clearly in cross-examination when asked to express a view which he perceived would rebound against Acres’ interests he refused to commit himself as was the case at page 2078 lines 10 - 22 where the text is rendered as follows:

“At a hypothetical level, sometimes it is difficult to visualise a factual situation that is consistent with the hypothetical example which has been given to you but just as at a hypothetical level, if you, the consultant, already were absolutely sure that you were going to get the contract, would you still engage a representative to get you the contract \_\_\_\_\_ ? That is a hypothetical question and I am not [prepared] ..... in a manner to answer a hypothetical question but I would say that even if I were sure to get the contract, which I have never been, I would also use a representative for the execution.

But you would not engage him to get you the contract if you were sure you were going to get it? You would engage him to help you after you start implementing it. That is what you say \_\_\_\_ ? That depends on the circumstances, I cannot answer that, because that is hypothetical and hypothetical gives you wrong, how would I say, insinuation, and a real problem”.

What is clear is that the hypothetical question posed by Mr Woker dovetails simply too well with the facts of this case for DW3's comfort.

DW3 disarmingly professed not to know too much about the facts of this case: at pages 2973 line 23 - 1074 line 24. He said for instance “ ... I did not know Dennis Hare but knew of him and I did not know Cliff Brown.

.... i.e the Crown vs Acres in these criminal proceedings, what is the extent of that knowledge \_\_\_\_\_ ? Very general.

..... read the record in this matter ..... the transcript of .... the proceedings \_\_\_\_ ? No

.... studied Mr Jean Roux's report ..... know who [he] is .....? No, I do not know ... seen his report

\_\_\_\_\_ ? No

..... and annexure thereto \_\_\_\_\_ ? No

Have you looked at the exhibits \_\_\_\_\_ ? I have looked at the Representative Agreement and I guess that is about it.

So we can conclude then that what you know about the facts of this case is what you have been told by Acres \_\_\_\_\_ ? That is correct”.

Notwithstanding the above apparently scanty knowledge of facts in this case his answers to certain hypothetical situations put to him clearly reveal a far deeper knowledge and understanding of the facts than he would have the Court appreciate.

See for example at page 2081 lines 1 to 5 where in relation to the question put that Acres had a contract to staff the LHDA he said:

“I know, I will just repeat what I was informed. The contract had not been signed, they had a letter of intent, they were asked to mobilise. Before they mobilised they got a financial commitment for the cost of mobilisation. They did mobilise and the contract was signed later on. That is what I was informed”.

But despite all this knowledge above nobody told him that Witherell of Acres was the second most important person in the LHDA as Acting Assistant to the Chief Executive. How strange indeed. How sectarian his source of information and knowledge. Compare this with the vivid knowledge he had of an agent leaving the country and going somewhere else. Clearly he was very much alive to the Z M Bam/Botswana situation as revealed at page 2083 lines 14 to 24 where

the answer to the question says: “..... if he [the agent] was corrupt ..... we would walk away from him. If he lives in another country, we have had such cases because he was there on a temporary basis or for periods of time and he was still available to assist us, so yes, it has happened”.

To DW3 this was perfectly acceptable. Another example relates to the timing of the engaging of a representative. When questioned about engaging a consultant for the time after having been in the country for some years and in circumstances where the consultant has already been invited to submit a proposal. DW3's answers clearly indicated that he knew what the present facts are and that he was seeking to cover for Acres.

Consideration of evidence in pages 2084 line 5 to 2087 line 9 makes very telling revelations in support of the view that DW3 for all his pretence at the beginning of his evidence is very much steeped in the knowledge of facts of this case.

For example he indicated that as soon as possible after a consultants' arrival in a foreign country he should engage a representative as

“that would be a desirable asset”. Further that after starting work for a few years he would not afterwards engage a representative. Developing this view he was however quick to say “there is quite a difference between having a representative with a firm contract and having a representative whereby since we have decided to be partners, we have had handshake agreement for two years before a contract was actually signed, we acted in good faith and that has happened”.

Nothing can mirror the situation relating to contract 19 and preceding contract 65 vis-a-vis-

the involvement of Z M Bam with Acres in this instance.

It was the highwater mark of the debate in this connection that Mr Woker properly in my view warned DW3 “ But you cannot have it both ways, Mr Gourdeau you cannot ...? “ and the latter interrupted him and said “ Yes, I can because I was not involved .....” True enough DW3 was astute enough to appreciate and defend the importance of not having been involved yet unfortunately he had so overplayed his hand in blindly leaning over in support of facts favouring Acres that he undermined the foundation stone of objectivity upon which expert evidence is normally erected.

A further example relates to the signing of a representative agreement in circumstances where the consultant is already mobilised and the contract is all but signed. Again here DW3 was obviously alive to the facts of the present matter. See pages 2078 line 23 to 2079 line 5.

Mr Woker had put to the witness finally that Acres engaged a representative to get them a contract which they already had. “Why would they do that \_\_\_ ? That is not what I have been told, so I cannot answer yes or no on that.

So your information is that the facts are different to what I have put to you \_\_\_\_ ? Yes”

This has an added feature to it which cannot be to Acres comfort either way. First either their briefing of DW3 on facts is deliberately wrong and twisted or in his over-zealousness for the protection of Acres DW3 himself has in the last answer shown above, fatally shot Acres in the foot.

It is revealing that when pressed along the lines intimated above DW3 became evasive. DW3 truly cooked his goose in the eyes of this court when, in another example going to show the vast extent to which he was alive to the facts of this case, his evidence revealed that an agent were to be paid in circumstances where he was not needed. Here his answers were not only evasive but illogical as well. Reference to pages 2079 line 7 to 2083 line 13 would suffice to buttress the view that his answers were unaccountably inconsistent with normal business practice.

Consistently with this trend was a particularly blatant example of DW3 covering for Acres during cross-examination which pertains to Acres paying Z M Bam 25% of its profit. At first DW3 appeared as though he did not understand what was being put to him hence the desperate look in his eyes as I watched him cutting a pathetic figure like a duck in a thunderstorm. Then simultaneously he recovered his composure, and the penny dropped as appears at P 2096 lines 10 to 15 where the text goes:

“Okay, I am suggesting to you as his Lordship is doing, that reimbursable costs is excluded from staff costs \_\_\_ ? Right .....

That staff costs is the same I am to further \_\_\_ ? *Now I see it, yes you are right .*

That staff costs is the same thing as is contemplated in schedule 2 to the Representative Agreement, namely services \_\_\_\_ ? That would seem to”. Emphasis supplied.

Then DW3 stubbornly refused to commit himself to an answer or an opinion which was self-evident, namely that to pay Z M Bam 25% of Acres’ profit for nothing more than

“intelligence” is ludicrous. Unless there was some other reason for the payments which is rendered even more audible by this evasiveness and total stonewalling on the issue. Pages 2092 line 19 to 2098 line 5 sufficiently vouch for my comments in this regard.

Suffice it to say generally DW3's failure to acknowledge that the present circumstances are at least very suspicious - in particular the objective fact that Z M Bam paid Sole using Acres' money - makes his evidence in the light of his international experience and obvious intelligence, highly unsatisfactory. Furthermore it has indeed been shown in a number of major instances to be downright untruthful.

In keeping with his intelligence and in deference to his international experience DW3 in certain circumstances found himself confronted with no option but to concede the obvious, for instance that a consultant would not encourage its representative to, for instance, contravene foreign exchange regulations or tax laws - page 2091 lines 15 - 22 - or otherwise allow a conflict situation to arise. (Page 2090 lines 4 to 26). To this extent Dw3's evidence rebounds against Acres and contradicts the evidence of DW2.

Apart from always fencing with questions DW3 when confronted with the obvious dilemma of paying the agent for results on the one hand and placing temptation in his way thereby on the other, DW3 became vague and argumentative. Instead of acknowledging the obvious and thereby establishing his credibility and objectivity or better still enhancing them, he tried to fudge the issue. Compare this with the discomfort that PW1 rather tolerated than risk being damned for denying the obvious, namely that he was aware of no one being queasy about the signing of

Contract 65. From which fact PW1 must have been painfully aware that an inference would be drawn that Contract 65 was perfectly legitimate, so what's all this that Acres is being bothered to come to this court to answer: that would be a question constituting a thorn in PW1's flesh.

But as indicated by contrast set out immediately above DW3 testified in the manner that left no doubt that he did in order to avoid having to concede this very real danger posed by the dilemma referred to above. This then flies in the face of the protests by DW3 and vicariously or directly by Acres itself that they took care to ensure that the representative didn't do what he should not . In this instance DW3 and Acres are hoist with their own petards. See page 2098 line 24 to 2101 line 4 especially 21 00 line 3 onwards where the test shows the following:

“ And you yourself said that the reason why consulting engineers conclude success type representative agreements with representatives, is because it motivates them to go and get the contract —? True.

Yes. How do you propose they do that? They will do anything to get paid, will they not, to get the contract? Unless of course they are completely squeaky clean \_\_\_\_ ? I do not like the word “anything” because if you are an honest individual, you would do the utmost to get the job, but that does not mean that you will use a dishonest thing ... you could be ashamed of or regret.

Look, I accept that, you know it is easy to sit in the witness-box and theoretically say these things, but at the same time it is equally true, Mr Gourdeau, that these thing ..... that these success type agreements invite corruption surely. It is possible \_\_\_\_ ? They motivate people to do things, they do not invite corruption.

If people are corruptible, which you accept, and you give them this success type motivation: you succeed, we pay, are you not inviting people who are not completely scrupulously clean to perhaps do things that are not acceptable \_\_\_ ? Well, that is why you go through a pre-due diligence arrangement. You want to make sure that you are both in the same boat than you partner. So we are both motivated to do the job, but in an honest fashion because each one has a reputation to uphold and that is very important .

On the one hand you do a due diligence and on the other hand you put temptation in the representative's way \_\_\_? Well, just because it is a success fee, does not meant that it is temptation because business itself - you have bonuses and I am sure you have taken jobs where you have a bonus. Now, does that mean that because you have a bonus or a success that means you are corrupt?" DW3 ended his answer with a deliberative question.

I find it difficult to banish from my perception the existence, or to put it more lightly the real possibility of the existence of an inherent contradiction is saying due diligence is done on the one hand but then placing temptation coupled with promise of a huge reward in exchange for results under the representative's nose on the other. However Acres does not seem bothered that framing their agreements in this fashion compromises their integrity and their business ethics. Now in reference to the situation under consideration this blot on Acres' escutcheon becomes takes an even more significant character than could have been the case otherwise.

Example are teeming which detract from DW3's objectivity. One outstanding example

manifesting this particular defect in DW3's evidence is to be found in his answers to questions relating to questions about the timing of the conclusion of the representative agreements with Z M Bam and what the latter could lawfully do for Acres. Needless to say his answers in this regard were vague and unconvincing. See pages 2086 line 22 - 2089 line 7. See for an example the plea by the Cross-examiner to DW3 to project himself in the character of an expert witness that he is supposed to be. Page 2086 lines 15 - 18.

“ .... I am putting to you and am asking you to be an objective expert witness that this court must rely on, you will agree with me that is odd [that Acres people only began to negotiate the representative agreement after they were invited to submit a proposal] \_\_\_\_ ? Well, it depends on the timing but let us put it this way and I will phrase it differently because I do not like ... so if they believe they had a job and if they signed the contract and only then start discussing negotiation with a representative, that would be odd”. It is to be realised that DW3 landed at this answer because the debate around it was dubbed a debate at a general level by the cross-examiner. Otherwise as it turned out later DW3 reverted to his accustomed hunch that “ so when you are invited to submit proposals, yes, immediately thereafter. I would negotiate with a representative”. Page 2087 lines 8 - 9.

Further still as an example of the above reference to lines 17 - 20 would prove fruitful as follows:-

“What is he [representative] going to lawfully do to help you get the contract \_\_\_\_ ?  
Make sure that the proposal you are going to submit is in line with the expectation of the client ....

But why can you not yourself do that ? You are a consulting engineer.

..... you know what the client's expectations are, it is in the request for the proposal \_\_\_\_\_ ? No, sir, consulting engineer is a people business, people change continuously and you have to realise that the big obstacle to realising a project too often, is just personal conflict....”

The vagueness of DW3's answers in this regard was accentuated by the fact that everything that he said the representative could do Acres itself could have done for itself. In any event even if Acres for argument's sake could not do these things for itself, what DW3 suggested the representative could do would have been improper in the circumstances because this would have entailed giving Acres an unfair advantage over other competitors. This would certainly be the case in a competitive bidding situation, like contract 19. But in the context of contract 65 which was being sole -sourced, it would not have been necessary for Z M Bam to perform any of the services that DW3 suggested Z M Bam might have performed. In any event given that Z M Bam was sitting still far away in Botswana.

I am enamoured of the Crown's parallel employed to highlight the point and submitted as follows:-

*“Gourdeau's evidence to the effect that if you genuinely need a representative and what he does for you is honest and perfectly lawful, then this carries the blessing of the international engineering community, is almost laughably obvious (PP 2074/25 - 2975/24). It is*

*analogous to saying that it is perfectly acceptable to use a driver to take one to the bank so that one can draw money from one's account. It is however a totally different situation if, on the facts, the driver is employed to drive one to the bank to effect a bank robbery and for that same driver thereafter to drive the getaway car. It is in this latter context that the witness showed his bias towards Acres.*

It is patently clear to me that DW3 refused to commit himself to the obvious once more in this regard. I accept the Crown's submission to that effect therefore. One would pay pounds to know why DW3 refused even on hypothetical level to acknowledge that a representative agreement could be used to obscure what in truth amounts to a bribe agreement. This unreasonable refusal to acknowledge the obvious is much reminiscent of herd boys who were in the habit of stealing and eating a farmer's sheep. Because they feared that little boys who participated in the eating might let on that this act of illegality goes on in the veld the bigger ones busied themselves drumming into the heads of little culprits that this is not a sheep but a springbok. So it occurred that even where an innocent resemblance was noted between the hooves of the sheep and a springbok he was fetched a vicious blow with a cosh for mouthing that innocent observation within hearing of the bigger herd boys who once more made him repeat after them "this here thing is not a sheep but a springbok".

Another outstanding feature in DW3's evidence that rebounds to Acres' disadvantage is his concession that due diligence is an ongoing obligation as reflected in pages 2091 line 23 to 2092 line 18 especially lines 3 to 5 to this effect:

“Okay, but one thing is for sure this thing about due diligence, it is an ongoing thing. You keep an eye on your rep, you do not want him to do anything wrong that could embarrass you \_\_\_ ? Yes”

On the facts of this case it would have been obvious to anyone within Acres who knew that Z M Bam was Acres’ representative and that he was being paid so well for little or no work, that he was not the run of the mill type of “rep”. Yet Acres personnel did nothing to discharge their much avowed ongoing due diligence duty. Instead they pleaded blissful ignorance. What? all of them? Where all that money was involved to boot? Absolutely incredible.

The fact that there is an international practice concerning the lawful engagement of representatives is not strictly speaking either here or there provided that the practice is carried out for *bona fide* lawful purposes. It interests this court that this always happens hence this inquiry. Use of expert witnesses in that endeavour is something that the court does and would treasure immeasurably. But regrettable use of DW3 who qualifies eminently as that rare and precious asset has proved manifestly unhelpful as an expert. What is telling in the evidence of DW3 is that what happened in this instant case cannot be reconciled with lawful practice yet this very inexplicable pursuit by Acres of a practice that defies the sensible norm is what DW3 sought avidly to extricate Acres from. To that extent logic dictates that DW3's evidence necessarily should rebound against Acres.

Then the question why in the light of these patent defects in DW3's evidence, did Acres call him must rebound against Acres because, first it held him out to be an objective and impartial

witness. Next because although it transpired that he was not what Acres held him out to be, they called him obviously to come and help. It can be assumed with little margin of error that the purport of what he told this court, Acres knew before hand. So they must bear the consequences for their good faith is fittingly called in question.

### **CONCERNING DW5 CHARLES GIBBS**

The crown's thrust of attack against DW5 revolves around the notion that the representative agreement (RA) was a document designed to cover up the fact that the payments were bribes. Thus it would seem the question whether or not the payments did or did not "comply" with the terms of the agreement is of no consequence in that panoramic view of the present forensic landscape.

The court is keenly alive to and vividly recalls that in the course of his evidence PW7 (Jean Roux) pointed out from the outset that the payments by Acres to Z M Bam did not always comply with the RA, and next that there was a remarkable coincidence between Sole losing his court battle and Acres reducing its payments to Z M Bam to approximately 40% of what they had previously been, which amount roughly equated Z M Bam's share, and with Z M Bam then not sharing this amount with Sole.

As part of its defence Acres sought to show that the payments did indeed conform with the RA. When however it was shown that this is not so, by reference to PW7's report i.e. Exhibit "K1" Acres then sought to explain deviations from the RA through exhibit "L". To this end it

seems DW5 through exhibit “L”. To this end it seems DW5 was called to testify and also to explain the rather embarrassing if curious reduction from CAD 23, 478 - 27 to CAD10 500-00 in 1997. Going through DW5's evidence reveals him making heavy weather of how there was this reduction to CAD 10 500-00 and in particular the explanation for its timing. In his evidence in Chief DW5 seeks to explain it in the context of projections done at the time as to the contract and the total amounts of services Acres expected to perform over this time. At page 2302 line 14 is rendered the following:

“I see going back to the second page of Exhibit “L” that the instalments to Mr Bam to ACPM were reduced in October 1997 from the 23 479-27 to 10 500 \_\_\_\_? That is correct”.

DW5 takes it from there to page 2305 line 4 trying to explain how contract 65 was supposed to run for 72 months and how by the end of that period 20 million would have then been paid for services and then trying to explain this taking into account the terms of the agreement etc.

In cross examination it was pointed out to him with reference to the document Volume 15 part 6 at page 38, first that if the intention was to bring down the payments as a result of Acres getting less work this would have logically been done before this date, because Acres' services amounts had already come down. Also at the time there was a positive variant in favour of Z M Bam that had to be worked down. In this sense there is then no gainsaying the fact that the timing of the reduction was both arbitrary and in fact illogical. DW5 had great difficulty explaining this and ended up saying that it seemed to be “an opportune time” to do so, particularly when Witherell was coming to Lesotho in any event. I may remark that the answer arrived at seemingly

by default sounds both hollow and unconvincing. As for the rider that Witherell was coming to Lesotho in any event sounds to me to be no more than DW5 making a virtue of necessity.

At some stage during this judgement I pointed out that one of the features which strikes me in the witnesses for the defence is an over all nagging feeling that there is a distinct attempt to job backwards in order to make the facts square with the happenings in this case. The question posed by Mr Penzhorn seems to have highlighted this feature as the Learned Counsel seems to have touched the thing with the needle when he asked: “the point is at any time you could have done this [working down the variance] The point I am making with you is this exercise could have been done at any time. You could at any time have taken a computer, given it a projection, and that projection would have told you what it told you, and then you could have *brought it down at any time* if you wanted \_\_\_\_ ? Well, you must remember this particular memo was given to Mr Witherell because he was coming to Lesotho and therefore it was *an opportune time* to discuss it with him...” See page 2324 lines 16 to 23 read with 2322 line 17 to 2327 line 7.

The other justification for the timing of the reduction was that the percentage being paid to Z M Bam had to be reduced to the agreed 3.6% Furthermore in this regard it was pointed out to DW5 that if this was the true reason also here the timing was completely arbitrary. At the time this was done the cumulative percentage stood at 3.49%. Also, if the intention was to bring it down to 3.6% it would have been a simple matter to simply calculate the percentage on the basis of the actual services. Exhibit “NN” was then shown to him which amply illustrates this. I fully accept the sound approach adopted by the Crown in setting out the above statement and providing the underlying difficulty DW5 found himself faced with trying to gainsay it. In fact the lame response

by DW5 to all this was simply to say this could have been done but it was not. Taking it that doing it was consistent with what common sense dictated it would seem then that the converse is true that doing something else or failing to do this means senselessness prevailed. See page 2327 lines 8 - 25.

At page 2359 Mr Penzhorn took the battle in earnest to the defence lines by taking the document that was prepared by PW7 (Roux) after studying the defence's Exhibit "L" and letting DW5 go and study it overnight. He very appropriately said to DW5 "I have no objection to that, [letting you study it overnight] it is something I am *thrusting before you*." Emphasis supplied. See P2359 lines 6 to 15.

Thereafter he elaborated as follows "up to that line, in other words up to the line under 7 May and under the 23000 up to that line it is exactly your document. Now what I suggest to you is this, if you wanted to reduce the payments to bring them in line with 3.6%, on the dates that are shown thereafter, in other words 23 October, 11 December, 26 January, 6 May(over the page), 10 September 1998 and 24 March 1999, if you had wanted to bring it in line with 3.6%, you would have paid on 23 October, you would have still paid the same amount and that would have brought it to 3.50. Do you see the blackened percentage on the right \_\_\_\_ ? Yes."

The court has observed that in justification of the reduction DW5 also refers to the inter-office memorandum of 3<sup>rd</sup> July 1997. This document appears not, in my view, to really assist the defence. If, as the Crown contends, it is correct that the R A is a cover up then it would follow of course that any reduction to pay Z M Bam his share would similarly be justified by a

memorandum such as this. This exposition in my view makes perfect sense and I deem it compelling to accept it.

I also accept that from here what follows would be that Acres simply decided to reduce the payments and then adding that Witherell should discuss this with Z M Bam on the former's trip to Lesotho. This in effect amounted to an amendment of the RA. Yet most strangely the defence is unable to produce a written amendment to the RA. This despite the fact that initially the RA went through several revisions in the course of which each "t" was crossed and "i" dotted. Suddenly in 1997 the Contract is drastically amended and yet, miraculous to behold, there is no document showing this earthquake like event. DW5's evidence that there indeed is an actual amendment is hearsay for he does not claim to have effected the amendment in any event.

DW5 was cross-examined closely with a view to establishing the truth on whether Acres had a binding agreement with Z M Bam at all. See Pp 2328 line 26 to 2340 line 20. What is telling in all this is that a number of factors militate against the notion saying nothing of the reality that any binding agreement existed between the two. What part of it would be binding when evidence shows CAD 180 000-00 instead of four payments of CAD 45 000-000-00 were paid, what part of it would be binding when evidence shows that payments were suspended unilaterally for a year after October 1992, what part of it would be legally binding when evidence shows arbitrary payment of CAD 13 500-00 and payments ceasing altogether when Z M Bam died.

In respect of none of these variations from the contract is any documentation produced showing that the contract was indeed amended. In my humble view this provides overwhelming

evidence against there ever having been any binding agreement between Acres and Z M Bam.

The fact that Acres appeared not to have been too concerned with what the “agreement” stipulated also appears from DW5 saying something like “ we had a contract with Mr Bam which called for us to pay him 3.6 of the services amount. At this particular point in time we had paid him well in excess of that”. (PP 2330 line 19 - 21) “I believe it was just explained to Mr Bam” (P. 2335 line 25 to 26) and “I believe that the representative agreement allowed for the changes of the amount” Page 2339 lines 5 - 6.

DW5 tried to link the RA to the duration of Contract 65 and in that way sought to explain why payments to Z M Bam could be adjusted or even extended beyond the 72 months period. In this regard he says that there was an assumption that Contract 65 would last for 72 months, and that where this did not happen and the contract lasted longer that there was an agreement between Acres and Z M Bam to extend the agreement. What DW5 cannot explain is why there is no written document to this effect. Also, there is silence on what was to happen with regard to the services Z M Bam was to render in terms of the RA.

I accept the submission as properly founded on credible evidence that all that is shown by this inexplicable state of affairs is that the payments by Acres to Z M Bam hardly bear any resemblance to the terms of the RA. Had there been written amendments to the RA Acres would certainly have produced them in this court. It follows therefore that clearly then the intention was never that Acres should be bound by the terms contained in the so-called representative agreement. It furthermore follows that the reasons for the payments are to be found elsewhere and

not in this document. Thus wind lies in some other place than there.

**RE: DW6 ERIC BURNETT**

DW6 was called as an expert witness no doubt for purposes of countering PW7's (Jean Roux's) evidence and at the very least cast doubt on his opinion as they appear from Exhibit "KI". To this end therefore he prepared his own forensic report, handed in as Exhibit "OO" in evidence.

One of the characteristic features of his evidence which he was hard put to it to deny was that as a general observation he "usurped" the judicial function of this Court by making legal findings and virtually giving the verdict in favour of Acres on the basis of a brief exercise he engaged in as opposed to consideration of evidence of no less than two and half thousand pages of recorded evidence and a good many Volumes containing minutes of the JPTC and other voluminous documentary exhibits including his own Exhibit "OO". This is though an abridged but general pre-view of DW6's evidence.

In line with the brief outline of DW6's evidence above it is to be appreciated that in his evidence in chief he then expresses the view that the payments between Acres and ACPM were made in terms of the contractual relationship between them, constituted by i.e. RA. He goes on along this line to also express the view that payments from Z M Bam to Sole indicated a contractual relationship between the two of them. He further expresses the view that there is no evidence in the documentation that he looked at of any contractual relationship between Acres and Sole or any evidence to support the proposition that Acres paid Sole with the intention of bribing him. Thus he concluded by making an undisguised legal finding.

At pages 2393 line 22 to 2394 line to 8 is to be found the following reaction to the following question:

“..... so what is your opinion in the light of what you said, Mr Burnette \_\_\_ - ? My overall opinion into the various aspects of the relationship between all the parties has been that in my opinion the financial transaction between the LHDA and Acres were in terms of he contractual relationship between them. And secondly, in my opinion the financial transactions between Acres and ACPM are in terms of the contractual relationship between as amended from time to time. There appears to be evidence that payments were made to Sole from the Swiss bank accounts of Z M Bam and that would indicate a contractual relationship between them. However, there is no evidence in the financial and supporting documentation provided to me of any contractual relationship between Acres and Sole or any evidence to support the proposition that Acres paid Sole with the intention to bribe”

The first problem with DW6's evidence is the basis from which it proceeds. His basis is that the RA correctly reflects the relationship between Acres and Z M Bam. Yet the inquiry into this is precisely what has exercised the mind of this court for many hours of sitting in Court till the conclusion of this case. See pp 2396 page 1 to 2400 line 2 especially page 2398 line 20.

“ .... you proceed from that basis and you say:

‘I have been requested to consider various documents together with the report of Roux to

determine whether in my opinion there is support to the allegation that Acres paid Sole:’

I suggest to you that once you have accepted that agreement as a basis to work from, you cannot otherwise but (sic) to conclude that there is no support to the allegation that Acres paid Sole. Would you agree with that \_\_\_ ? Sorry, I would like you to repeat that for me?”

The question was repeated but the response was an amazing “Well, I think that is the same question you have asked me a few times, but .....(obviously in no hurry to face up to the question)

All I am saying is that from there you proceeded to the issues which you now address, that is what I am putting to you \_\_\_\_\_ ? For the purposes of my investigation of the financial transactions the validity or otherwise of that RA, I did not and I would never have been in a position to test its validity. That is certainly the purpose of the matter before the Court” he said with tongue in cheek. Hence the immediate questions that was to follow:

“You see then your report makes interesting reading because that is as I read your report [Page 7] [paragraph] 3.1:

‘I have reviewed the contractual relationship between Acres and LHDA ..... And between Acres and ACPM’ how did you do that to conclude .... ? I read the agreement.

Yes, and you proceeded on the basis of that agreement being the agreement that determines their rights and obligations, because you talk about the contractual relationship

between Acres and ACPM \_\_\_\_ ? That is correct.

And you assume that contractual relationship to be as set out in that agreement \_\_\_\_ ?  
That is correct”.

I accept the Crown’s submission that once this is assumed then obviously the fact that Z M Bam paid Sole is completely irrelevant. What immediately surfaces from this is that it becomes quite clear that DW6 is not the objective expert he holds himself to be as further buttressed by a number of examples which should shortly follow.

First DW6 did not address the issues that PW7 addressed, namely what these accounts of Z M Bam were used for. The immediate reaction from those expecting objectivity from an expert witness would be a legitimate why not. Then when PW7’s conclusions in this regard are put to DW6, for instance that these accounts were simply used as conduits between the Contractors/consultants in question and Sole, he refused to agree to what was obviously the case. At pages 2400 line 8 to 2401 line 14 this comes clearly out as follows: “From your investigations what other use were these accounts put to apart from receiving moneys from these consultants and paying the moneys through to Sole? What other use were these accounts put to from your investigation \_\_\_\_ ? Well, not from my investigation, but from my review of Mr Roux’s report it would appear that there were very little other uses put to those funds” he conceded reluctantly. But I may just add that credible evidence conclusively indicated that the Z M Bam account into which were deposited Canadian Dollars 60% or so of which was transferred to Sole was used exclusively for the purpose. Not even the American Express payments for Z M Bam’s personal expenses were made into or out of this particular account.

DW6 gave a rider that there were possibly some American Express payments that would be some personal expenses of Z M Bam. Hence the following close questioning: (Page 2401 line 14 onwards)

“To be more accurate, over the whole period covered by the two Bam accounts relating to Acres’ payments, there was one payment to a company called Guestemar, I think it was, for 17 000 and one payment made by Mr Bam to his own American Express account. Those were the only two payments out of that account that were not made to Mr Sole. What do you make of that? Just as a general proposition, speaking as an accountant, speaking as an expert, what do you make of all that \_\_\_\_ ? Well, obviously Mr Bam paid Mr Sole money.

From the money he got from Acres\_\_\_\_\_ ? Or other contractors. No, no, no, this is why I asked you whether you examined these accounts. If you look at the Acres’ accounts, at least if you look at the Acres at *the Canadian dollar account*, if you look at Mrs Bam’s account and you look at *Mr Bam’s account, did you not notice that the only*, and I mean the **only depositor** into that account, was Acres\_\_?

Yes that is correct”

“Well, why do you [say] other consultants and contractors if that account only concerned itself with payments coming from Acres’ what is the relevance of other consultants \_\_\_\_ ? Well, the way I answered your question I was looking at Mr Bam operating, as set out in Mr Roux’s report, a whole number of accounts which he used to pay money to Mr Sole”.

To say the least the above answer is totally unsatisfactory and shows evasiveness of a witness who had understood and appreciated the obvious barb in the question. This is a typical example of an unconvincing answer to a pointed question here; that the *only depositor* into that Canadian dollar account was Acres and no other consultants or contractors. The use of other contractors and consultants serves no other purpose by DW6 except to cloud the issue or deliberately draw a red herring across the trail.

Suffice it to say it became embarrassingly obvious that DW6 never actually looked at the accounts themselves and simply assumed that the consultants/ contractors involved paid into the same fund. See pages 2401 line 23 to 2402 line 2. Even when it is pointed out to him that the Canadian dollar account was only used to receive funds from Acres and in turn to pay funds over to Sole Dw6 still digs his heels in and refuses to acknowledge that this is indicative of some arrangement whereby Z M Bam is paying Acres' money to Sole.

Contrast this with the evidence of PW7 (Roux) which is very satisfactory on the issue at page 747 lines 3 to 20 rendered in the text as follows:

“ Is there anything on record, Mr Roux, to indicate that Acres made payments to ACPM for any other reason than in terms of the Representative Agreement, on the information available to you and on the figures available to you \_\_\_\_ ? If I have to make the assumption that that Agreement was a valid Agreement, which again is something I have not tested, the payments that were paid were done in accordance with the Agreement that was shown to me, yes.

So is your evidence then ..... on the figures available to you ..... Mr Roux, there is

nothing to indicate that Acres made direct payment to Sole using Bam as an intermediary, is that right \_\_\_\_ ? That is not what I am saying. What I am saying is if one follows my report through, it is pretty obvious from the report that moneys that were paid by Acres into the account of Bam were used to pay Mr Sole. There is no way which I can try and *understand or try to speculate what the reason was why Acres* paid the money into Bam's account and why Bam paid the money into Sole's account. It was not part of my investigation, but there is a **definite pattern**, that I can say". (Emphasis supplied).

To return to DW6

When questioned about the 40/60% split identified by PW7 in paragraph 4.29 pp 24 to 25 of Exhibit "K1" DW6 steadfastly refuses to acknowledge that there was indeed such a split. At page 2411 line 13 onwards appears the following:

"But there is a pattern here, is there not, 14 086 on ....22 occasions .... does that not say something to you as an accountant \_\_\_\_ ? Yes but 60% of these transections were paid by Mr Bam of moneys he received he paid 60% to Mr Sole, but in this particular instance and the one on the following page there was no receipt from Acres, so I just do not understand what the pattern is." At page 2412 line 2 onwards the text reads:

"You see the other oddity we find on page 23 which Mr Roux points out is in the fourth line [where] we have a reverse [situation] where Mr Bam pays the 40% before he in fact gets his money from Acres, do you see that \_\_\_\_ ? I do

The share to Mr Sole of 14 100 was paid to Mr Sole in July 1995 and he only got his

moneys from Acres in January 1996, right \_\_\_\_ ? Yes I see that.

So he was giving him credit or something expecting the moneys to come in no doubt \_\_\_\_ ?

I do not know what he thought, but the point is that .... it is a 60% but the timing is not forming part of the usual pattern”.

To my mind once the pattern exists as DW6 acknowledges existence of the usual pattern to which the instant point being debated is only an exception does not detract from the generality of a form of behaviour from which it can safely be concluded that a definite pattern is maintained, therefore does exist in a substantial majority of cases.

However at P 2412 line 26 to page 2413 line 1 DW6 insisted “ I do not believe that one can actually come to the conclusion that the real pattern is there by excluding certain transactions”.

He was hotly and closely pursued immediately thereafter as follows:

“What conclusion does one as an accountant draw from this, as an accountant what conclusion do you draw from it \_\_\_\_ ? The conclusion that I would generally draw from this is that Mr Bam generally paid 60% of the moneys which he received from Acres to Mr Sole” he tried to fob off the cross-examiner who could not be got rid of that easily and therefore insisted:

“Speaking as an accountancy layman, he was splitting the money with Sole, not so, or would that be going too far, would that be speculating \_\_\_\_ ? I think there is no doubt that Mr Bam was paying Mr Sole”. He assumed this answer would be enough. He was wrong for the final straw which was enough to break the camel’s back came instantly:

“He was splitting the money he got from Acres with Mr Sole, I mean why be coy about this \_\_\_\_ ? Well, if that is the way you want to put it, but the point is he did pay the money to Sole” he finally conceded though not without the usual rider as can be seen in quotes above.

I thus accept the submission properly formulated to the effect that even when it is pointed out to DW6 that all the moneys paid to Sole emanated from Acres and that, apart from the initial payment of CAD 180 000-00 and the odd payment that was reversed or was a composite of the 60/40% pattern, that the evidence clearly establishes such a pattern he still doesn't acknowledge what is after all perfectly obvious.

The court recalls the vigorous cross-examination to which PW7 was subjected regarding the fact that while he maintained that the split was in the proportion of 40/60% pattern in fact in one instance that Z M Bam received not 40% but 44 % with the result that Learned Counsel for the defence having scented blood in this regard sought to lay a basis for a demonstration that the cardinal principles in Blom's case were not satisfied and thereby implying that Acres should in due course be freed from criminal liability.

Consideration of evidence at pages 741 line 21 to 26 and 742 lines 1 to 22 will help illustrate the point. The text reads as follows:

“Then in the light of that, if you accept those assumptions and you look at paragraph 4.27 of your report at page 23 where you say those three payments of *10 500 each constituted the 40%*

*retained* by Bam \_\_\_\_ ? Sorry, just the paragraph number again please.

4.27 on page 23. Then the inference *which you draw in that paragraph is not the only inference*, is that right \_\_\_\_ ? It can never be the only inference, I mean anything is possible, that I assume, My Lord. It is just, it represents and it does *not represent precisely 40%, it is in fact 44 % of the amount*.

In other words *another inference which is also compatible* with the bigger scheme of things is that the 10 500's did not constituted 40% ... It constituted payments under the Representative Agreement \_\_\_\_ ? It is possible.

Let us just pause a moment at paragraph 4.17 because I have some difficulty in understanding what you are saying. I take it you say that this amount represents the amount that was previously retained by Z M Bam, 40% after transferring 60% of the amount paid by Acres to Sole, I take it you are referring to the three instalments of 10 500 which appear at the top of page \_\_\_\_ ? The 40% actually refers to the payment that were made in terms of the table on 4.25, the numbers that are there indicated where 60% was paid over to Sole. I am saying that this amount represents the amount, represents that 40% which in actual or the actual amount there would have been 9900 and something, if I remember correctly. As I say this 10 500 is not exactly 40% of that amount, it is about 44% of the amount but it does represent that amount because it is about 44% of the amount, it is about 44% of the amount but it does represent that amount because it is *very close* to the amount that would have been retained by Bam after he paid over to Sole on the original payment.” The cross-examination centred on the imprecision revolving around the

40/60% went on vigorously on 742, till culminating on page 744 with the following challenges:

“But then I don’t understand you. You have just told his Lordship 40% of 23478-27 is 9337. Now why \_\_\_ ? But as I have also explained I said I did not, it is not exactly 40%, I said it represents that amount. It is 44% and that I agreed to.

So is it now 40% or is it 44% \_\_\_\_ ? I said right from the start the actual amount is 44 % but it represents the amount that has been retained .

Is your report wrong \_\_\_\_\_ ? No

Is your report correct \_\_\_\_\_? Yes

Is it 40% \_\_\_\_\_ ? it represents 40%.

What is the difference between it represents 40% (sic) or it 40% \_\_\_\_\_ ? Represents, it looks like and if it is exactly the same it is exactly the same

The 10 500 looks like 9038 \_\_\_\_ ? It is a lot closer to 10 000, to 9 300 than it is to 23478".

When the above raging storm had come to a lull about thirty pages later and presumably the passage of time had a blunting effect on the learned counsel’s mistrust of approximations which detract from the precision he had shown himself to be a stickler for, addressing himself to PW7 to make calculations by aid of adding machine that is known for accuracy, at page 773 lines 1 - 11 he said:

“24 126 - 62 \_\_\_\_ ? That amounts to 221 170-14

Repeat it again \_\_\_\_ ? 221 170-14

That is the figure on page 306 \_\_\_\_\_ ? Well, it seems to me there is a CAD 5-35

**difference there.**

There is a CAD 5 - 00 difference, I think that is because we could not read the one figure properly, but that is close enough \_\_\_ ? If you are trying to prove a formula, I do not think close enough, is close enough, it must be exact". Finally PW7 effectively had his own back. Can you blame him after all what is sauce for the goose is sauce for the gander.

Accordingly smarting under the keenness of this barbed sting learned Counsel gave his final salvo to the hotly debated question of percentages with a gracious promise!

"Well, then we will do it 100%".

### **BACK TO DW6**

Picking up the threads of evidence relating to DW6 the court observed that as far as he was concerned there could have been many reasons why Z M Bam would have wanted to pay Sole. (Page 2421 lines 16 - 23). When his attention is drawn to the total evidential picture and he is asked to venture an opinion as to why Bam would be paying Acres' money over to Sole, DW6 simply refuses to draw the conclusion which to anyone else would seem perfectly obvious.

It fills this court with despondency to observe that nothing in this entire case seems capable of deflecting DW6 from his firm standpoint that everything between Acres and Z M Bam was perfectly acceptable and normal. Even the fact that a person from Lesotho was being paid by a Canadian Company in Switzerland appears to be no skin off his nose. Lines 15 to 22 at page 2428 show that DW6 was now weaving and ducking ensuring that he does not face up to the essence of

the question. A pointed question was asked whether as far as he is concerned it is par for the course in Lesotho that a person living there is paid in Switzerland seeing that he suggests it is not something one sees too much of in South Africa. He dodged answering this by saying that was not what he said. However the question was well put to expose the implied meaning that this sort of behaviour is accepted practice in the accounting world.

The question had been earlier put to him. Misleadingly he appeared to have given a positive response to it. The question was: “The fact that a contractor or a consultant in this case at the time of concluding the contract or just before or just after, whatever, is paying to a middleman or paying Mr Bam who in turn pays to Sole CAD320 000, did that raise any question marks \_\_\_\_\_ ? Yes, of course it did” he sensibly answered.

But asked what question mark it raised with him something entirely foreign to what common sense would command in the circumstances was said; namely “It raised my alertness to the fact that these allegations were here and my review of the documentation and everything had to do to satisfy myself of what was happening here, I had to be particularly diligent”

Surely common sense would command that something is wrong here. It cannot be proper or right for if it happens anywhere in a law abiding society preventive measures are to be taken and culprits brought to book.

It raised no question mark the that Chief Executive of the water Project receives CAD 300 000-00 in Switzerland from someone who in turn received it from one of the contractors on the

water project.

However he made a major concession when it was put to him that “In other words there is no duty on Z M Bam in terms of the representative agreement to transfer money to Mr Sole, so one has got to look at the reasons for the transfer of the money to Mr Sole outside the representative agreement, not so \_\_\_\_ ? Yes, that is correct.” Even so it appears that DW6 accepts the above proposition only in so far as it supports his theory that it was in Z M Bam’s long term interests to keep Sole happy to ensure that Z M Bam remains with Acres. But the crux of the matter is why keep Sole happy using Acres’ money?

I am in no illusion that DW6's bias in favour of Acres really comes to the fore when he is invited to speculate on the reasons why Z M Bam would be using Acre’s money to pay Sole in Switzerland. The passage in his evidence at pages 2429 line 16 to 2433 line 18 manifestly makes nonsense of any suggestion that he is an objective witness. But even more so when looking at the ludicrous examples he gives in order to try and explain why Z M Bam would have wanted to pay Sole. The ludicrousness of these explanations reinforces the legitimacy of the conclusion that there can be no other explanation for these payments than simply that they were indeed bribes. The important thing is that if there has been any real explanation DW6 would have ventured it.

When during the course of cross-examination it appeared that DW6 was criticizing PW7 on the basis of bank records that he had not actually seen, it transpired that he based his finding on little more than PW7's report. He did not look at the representation by Acres to the World Bank contained in Vol. 3 - 6 before the court. Page 2458 lines 10 - 13 brings this point to the fore as

follows: “Did Acres not give you these documents that they presented to the World Bank, did they not make them available to you \_\_\_\_ ? I never asked for these.

Did you know that they existed \_\_\_\_\_ ? No, I did not”

The fact that DW6 omitted to look for documents which would have enabled him to establish the authenticity of the representative agreement leaves him in a difficult position indeed. Without DW6 looking at supporting documents like invoices to see what Z M Bam or ACPM did for Acres for which they claim 7826 his claim that the representative agreement was valid in the teeth of compelling evidence to the contrary amounts to mere speculation or figment of his imagination.

DW6 was not aware of the state of negotiations at the time the representative agreement was entered into, or that Acres had already mobilised and were already working on contract 65 at the time, (Page 2461 lines 24 - 26). He was also not told about evidence before the court that the services specified in the representative agreement were not needed by Acres. Page 2462 lines 9 - 11: “Those are the services that ACPM were to perform. Were you told that there was evidence before this court that those services were not really needed by Acres \_\_\_\_ ? I have no knowledge of that”

One more strange thing about DW6's evidence is that at page 2462 line 24 he says “.... I have said already I am not in a position .... to test the validity or otherwise of this agreement” yet he is on record at page 2395 lines 17 to 18 as having said ACPM was appointed by Acres in terms of a representative agreement. The important point here is he was given an opportunity to say

whether that was a fact that he assumed and he countered by ruling out that he assumed by saying “ Well, I do not know if it is an assumption”. A man who denies an assumption in the circumstances can only be understood to assert his positive knowledge that something is a fact.

The court further learnt that DW6 was not told that Z M Bam was in Botswana at the relevant time. See Page 2462 lines 15 - 17. All these factors constituted a damning indictment on his “declaration of independence” in terms of which he proclaims that his report “includes all matters relevant to the issues on which [his] expert evidence is given “ see appendix 1 to “00”.

DW6 even refuses to acknowledge that there was at least something odd about the fact that the payments to Z M Bam dropped to CAD 10 500-00 where this amount equated approximately to Z M Bam’s share, at a time when Sole had lost his Court challenge for his dismissal. Be it recalled these particular payments were then not shared with Sole. Not only does he fail to find this but he is quite content with simply assuming that this must have been for the reasons given by DW5 (Gibbs). But consideration of the following passage will reveal the absurdity of DW6's singing Taliessen the fullest throat of song to DW5's melody. Driven to exasperation in the **Deathless Country** by thoughtless mimicry Tennyson at page 141 lines 298 to 301 puts it neatly by saying:

“But ye, that follow but the leader’s bell.....

Taliessen is our fullest throat of song,

And one hath sung and all the dumb will sing”.

See pages 2434 line11 to 2436 line 3 particularly from 3435 line 13 onwards where he text is as

follows: “and Mr Gibbs, and this was canvassed with him that Sole only lost his legal battle against his dismissal in January of 1997, you heard that \_\_\_\_\_ ? I heard that yesterday, yes.

All right. You go on to say that

‘I have satisfied ..... myself with reference to the financial history of the project payments to Acres by the LHDA that the real reasons for the reduction were related to the project performance as I have set out’.

Do I understand that to mean because Acres was .... getting paid less by the LHDA and for that reason was reducing its payments \_\_\_\_ ? Yes that is correct.

And that is the ..... the document memorandum that we have from Mr Gibbs to Mr Witherell, that is the document \_\_\_\_ - ? That is correct”

Now comes the hazardous pitfall into which those who indulge in incautious mimicry find themselves entrapped:

“You see is this not a bit remarkable where you seem to accept that explanation from Mr Gibbs before it was even testified to in Court? That is the evidence that came later, it came this week \_\_\_\_ ? Yes actually I came to that conclusion some time ago before I had even had the opportunity to discuss it with the Acres representatives”. Surely this explanation cannot escape the appropriate criticism that it is a last minute fabrication based as in this context it seems to be, on afterthoughts.

Even without DW5's says- so DW6 assumes in favour of Acres that this was done in order

to bring the payments within the 3.6% provided for. This despite the fact, as pointed out to him, through calculations made by PW7 (Roux) in Exhibit “NN”, that the timing of this reduction was at best arbitrary. See pages 2436 line 4 to 2438 line 14, also 2438 line 21 - 2438 line 7.

Nor does even his evidence about the payments to Z M Bam coinciding with the contractual terms in the RA dovetail with the facts. His evidence that the payments “generally” accorded with the terms of the agreement simply fails to stand up to scrutiny when compared to the actual contractual terms. Despite this DW6 simply refuses to acknowledge the obvious, namely that it simply cannot be said that the payments “generally” conformed with the agreement. Who does not know that improbity thrives in infinite generality?

But as could be anticipated, where non-observance of the agreement becomes quite glaring DW6 quite conveniently assumes that the contract must have been amended, or it did not mean what it said. In other words it is not what it purports to be! Amazing and interestingly bearing some resemblance to David’s scam. David was a mischievous neighbour’s son. He used to wake up in the dead of the night and without the owner’s consent or permission milk his cow. The owner was at his wits’ end to try to think why the sudden drop of the milk yield from his otherwise prolific milker. One bright moonlight night when his wife ventured towards the stall she recognised David by his clothes and height as he jumped out of the stall having apparently been disturbed by the creaking of the farm house door when the farmer’s wife came out. She shouted his name “David”. The encroacher shouted back, I am not David I am George. The wife thus gained an added advantage of recognising David by his voice when he denounced his name. The

absurdity of it all is how George, if it were him escaping, could squander away the gratuitous alibi provided by the farmer's wife by correcting her and thereby getting identified by his own stupid act when his sole aim was to throw the scent away thus avoiding detection, arrest and eventual conviction. Once more it is amazing that DW6 should insist that the contract is not what it is. See Page 2450 lines 14 to 15 where DW6 makes so bold as to say "I question why the agreement was written like that". Alongside this stunning revelation comes a further factor to complete the mystery. When it was pointed out to him as follows: "all I am suggesting to you is that the point at which the payments were stopped is a pretty arbitrary one" he responded "I am not sure why it was at that particular point that a decision was made". Surely if this purported to be a contract once something like stopping of payments outside the terms thereof happens, it should be recognised for what it is, namely, arbitrary instead of dodging this obvious issue and seeking in the process reasons to account for occurrence of the event at a particular time. He further compounds the mysterious tale he is relating by also suggesting at page 2452 lines 22 to 24 that payments were made in error. The simple answer to all this is that the terms of the contract were not adhered to. So either they were not binding or the contract itself was but a contract in name only; meaning it was non-existent.

The court was struck by DW6's lack of impartiality as manifested by his failure to discern what relationship there was between Z M Bam and Sole other than that it was improper. However to his credit he was at least prepared to admit that if the underlying reason for these payments was not as reflected in the agreement then the fact that the payments complied with the terms of the agreement would be totally irrelevant. This comes out clearly at page 2441 lines 16 - 20 where the text sets out as follows:

“If the real *Causa*, if the real underlying cause for the payments is not for services in Lesotho, but was in this instance for instance for a bribe, then you would take care normally to ensure that the payments that are then made at least accord with the written document, although the underlying *Causa* is something else \_\_\_\_ ? Yes, I would, I accept it.”

I accept the submission properly formulated that DW6's inability to factually point out anything, apart-as I noticed - from one or two minor errors, in PW7's report that was not factually correct further serves to enhance the quality of PW7's findings and thus fittingly commends them to this court for acceptance in respect of which the court obliges quite readily.

The court thus naturally demurs at DW6's partiality. The fact that he expressed views quite literally with blinkers on does not say much for his objectivity and his expertise. What is more Acres' bona fides are to a large measure seriously compromised by all this to the extent that Acres were a party to DW6 entering the witness box with the benefit of a completely one-sided picture of what really happened in this case.

At page 2431 because he had been sitting in court hearing other witnesses giving evidence because of him being an expert served as a two-edged sword so he had to answer even questions which could have been avoided were it not for the fact that the requirement to test his credibility invited them.

At page 2434 he admits to working on limited documentation.

Pages 2435 to 2435 reflect the specious stand DW6 took in relation to the fact that Z M Bam received 44% instead of 40%. He even buttressed his stand by saying 4% difference is a large margin taking into account that governments may fall because of 1% difference. A clever but not convincing reaction seeing that this witness confines himself to a solitary fibre sticking out in a cloth instead of focussing attention on the pattern constituted by a multiplicity of other fibres which go to form the entire cloth in turn.

At page 2436 the test put to DW6's theory puts him in dim light regarding reduction.

His impartiality is further put to a severe test through which it comes out severely bruised because no convincing answer could be proffered why he insinuated that the conclusion favouring the defence is no speculation while the one favouring the Crown is mere speculation.

Page 2451 reflects unsatisfactory reliance on Acres' advice by a witness who holds himself out as an expert witness.

Page 2453 reflects DW6 scrupling about 4 out of 20 as not safe for the remaining 16 occasions to qualify as forming a pattern. Yet earlier at page 2412 this was accepted without such query: "Now, in accounting terms does that not establish some form of pattern to you \_\_\_\_ ? On the basis of the transactions which you have selected yes, but all the ....." See Page 2412 lines 22 to 24.

At page 2417 while accepting the existence of a pattern DW6 qualifies his answer by putting in the question of time delay as making all the difference. See lines 20 - 27. In my view the fact remains unaffected that once there is nothing intervening then nothing of consequence can be attributed to time delay.

Section 1.2 of DW6's report forms the core of his investigation. See pages 2365.

At page 2367 he says that he is not a lawyer and that he has not expressed an opinion on the legality of ACPM/Acres contract. But his references in regarding PW7's forensic audit even taken along with evidence that he evaluated, as *no proof beyond reasonable doubt* smack of legalese that firmly belongs to the legal fraternity. See page 2386.

At Page 2367 he says his investigation was to see if there was proof that Acres paid Sole.

At Page 2377 appears payment of CAD 180 000 reference to this has been made earlier as to its fate.

Again at Page 2377 the court sees DW6 making heavy weather of treating Z M Bam as ACPM despite the obvious fact that there is no difference between the two.

Soon enough at Page 2380 the two are used interchangeably by DW6. Page 2380 betrays the facility with which this is done. At Page 2381 he agrees ACPM paid Sole. But now at 2383 there is clear evidence of Z M Bam pulling through payment from ACPM to Sole.

At Page 2385 DW6 is categorical that there is no basis for inferring that there is any link between moneys paid by Acres to ACPM and those paid by Z M Bam to Sole.

At page 2388 a storm in a tea cup is raised by DW6 regarding the closeness of time, but in my view as long as the money was paid before being received, that would fit the bill. Also in fact where the transaction is shown to be a credit advanced to the payee.

At Page 2392 the court bears witness to the fact that a witness DW6 already has a solution to a matter the court has been presiding over for months on end to resolve.

At pages 2401-2405 DW6 concedes that the only depositor into Z M and M M Bam's account was Acres. See page 2404 - 2405.

At page 2405 he concedes the fact of the split but disagrees with the actual percentage. He contents himself with acknowledging only that certain amount went to Z M Bam while the other went to Sole.

But now at 2409 DW6 is faced with an undeniable proof that Z M Bam specifically ordered that 60% be transferred to Sole. Surely this is significant.

At page 2411 the number of occasions i.e. 21 or 22 of them would justify that a pattern has been formed of the method of payment maintaining 40/60% split surely.

PW7 has put his cards on the table. He does not conceal the oddity. He volunteered the information that Z M Bam is paid 40% in one instance before he gets Acres payment (see Page 2412).

Page 2412 without a hitch 16 out of 20 conforms to the rule of patterns, it is dead in line with pattern.

At Page 2414 the court after studying proceedings revealed in this light forms the opinion that it is unfair that PW7's evidence should be scrutinised after he has left the witness box by reliance on the evidence of DW6 a man who had withheld his report till May when he had benefit of PW7's evidence and report way back in early February.

Page 2418 shows a major shift from a stand hitherto maintained by DW6.

At page 24 20 is shown concession of what must have all along been known thus reinforcing the view all along there must have been a concerted effort to mislead. The text goes:

“We have already shown that it is not from other consultants and contractors, it is only from Acres, do you accept that \_\_\_\_ ? I accept that the moneys that were paid to Mr Sole have come from a bank account which has *solely received* funds from Acres”. (Emphasis supplied)

This is indeed a momentous if truly an inevitable concession for it detracts from a stand initially adhered to with a great show of conviction.

At pages 2424 to 2425 DW6 is now shown here hoist with his own petard. It is convincingly demonstrated that the only connection between all contractors/consultants paying moneys which ultimately reach Sole is that Sole is the LHDA's Chief Executive. Given this setting how can DW6 be heard to say there is no evidence of Acres paying with intent to bribe?

A little scrutiny of the speculation that DW6 proffered will enable one to the same conclusion, given that Z M Bam is using Acres' money to pay Sole to keep him happy yet the representative agreement does not say he should. See pages 2429 to 2430.

This coupled with the damning evidence of non authenticity of the representative agreement (2457) coupled further and finally with the fact that invoices fail to show what Z M Bam or ACPM did for Acres yet DW6 blithely ignored the invoices and did not call for them (2457) yet he makes so bold as to deny the link established by the Crown (2464).

Before stepping off my remarks dealing with DW6, I thought I should mention that at the beginning of this trial when Mr Alkema sought for a postponement which I granted despite opposition, I was moved by his plea that he was a layman as far as matters relating to accounting were concerned therefore he required proper briefing from his clients in Canada. I should confess here that he and I were in the much unenviable rogue's gallery as far as that point is concerned.

Thus on my part relying on the expertise of my assessors asked them to prepare a synopsis of their evaluation of DW6's evidence against the background of any relevant evidence. They obliged and I include intact hereunder their unanimous and handy product:

**CROWN VS ACRES INTERNATIONAL LIMITED**

1. Acres International limited was awarded a consultancy contract No. 65 TAC -2 Engineering by Lesotho Highlands Development Authority in February 1991 by a sole-sourcing procedure.

2. Acres personnel were well placed within LHDA and occupied the most senior positions during the implementation of the contract including Mr Witherell who was appointed Deputy Chief Executive while he was a designated representative of Acres at he same time. A clear case of a conflict of interest.

3. Mr Z M Bam was purported to have been appointed by Acres as their representative agent for the implementation of contract 65 during which time he was employed on full time basis by the Botswana Housing Corporation and resided in Botswana.

4. Payments allegedly made for services rendered by Mr Bam in accordance with the Representative Agreement were initially made to Mrs M M Bam, his wife, through a Swiss bank account in January 1991. This payment was later transferred to Mr Bam's account also in Switzerland.

5. Several payments were subsequently made by Acres to Mr Z M Bam in Canadian Dollars in Switzerland between 1991 and 1998 in contravention of Lesotho Exchange Control Regulations.

6. Part of these monies were eventually transferred to Mr M E Sole's bank accounts in Geneva on a 60/40% split between Mr Sole and Mr Bam respectively. This apparent pattern and link has been admitted by Mr Burnett, a chartered accountant who appeared as a defence witness.

7. The point of departure between Burnett and Jean Roux's investigation was on the split of the monies where Burnette argued that Bam's share was 44.33% as opposed to Roux's 40%. This difference, if any, is immaterial.

8. It is our contention therefore, that Bam's Swiss bank accounts were used as receptacle by Acres to pay Sole.

9. Acres made these payments secretly and contravened the Lesotho Income Tax laws in the process as no taxes were deducted and duly paid to the Commissioner of Income Tax because the funds were sourced from a Lesotho project.

The other exercise the assessors were to do was abandoned as amounting to an unnecessary duplication as it appeared to have been on all fours with contents of PW7's report pages 24 and 25 paragraph 4.29.

**re: DW4 JOHHANE'S MEYER**

Proceeding now to deal with DW4's evidence.

At all times material to contract 65 DW4 was in Lesotho. He arrived in this country in 1988 and left in December 1996. The learned Counsel for the Crown makes a point of saying that despite the importance attributable naturally to the fact that he was always in Lesotho at the crucial time during the inception and initial life of contract 65 DW4's evidence took the defence case nowhere. For the same reasons that the Crown advances for this conclusion I would come to a different conclusion namely that DW4 actually undermined the defence case. Taking it nowhere does not go far enough.

I accept that, with the exception of a few disclaimers in cross-examination as reflected in pp 2173 line 17 - 2174 line 13 he said nothing about Z M Bam and the representative agreement. DW4 had been a member in the Lesotho Delegation of the JPTC having been seconded from his German Company Lahmeyer International to that position in the JPTC.

Clearly he too was blissfully unaware that Z M Bam was associated with Acres, strange as this may truly sound. One hollow feature in his evidence is that it did not touch upon the real issue in this case, namely what the true *causa* was for concluding the representative agreement on the 23<sup>rd</sup> November 1990.

Apart from the above his evidence essentially related to the various steps leading up to the establishment of contract 65. At P.2111 lines 16 - 18 can be seen the following:

“From what you said you were a member of the JPTC at the time when contract 65 was established \_\_\_\_\_ ? I was a member of the JPTC, yes”.

He owned up that he was aware of allegations by the prosecution that contract 65 was established in an irregular manner. To this extent DW4 successfully helped neutralise the answer given by PW1, admission of which matter as I said earlier had caused him visible discomfort.

Not only so but DW4 said he was aware even of the fact that the alleged irregularities complained of were founded on allegations that the LHDA were not observing the requirements of the Treaty. Indeed with “an adversary” like this what need would there be for PW1 to have a loyal “supporter”.

It was Acres’ effort to make an attempt through DW4 to show that everything in the process leading up to the establishment of contract 65 was regular, procedural and above board. Yet as has been alluded earlier the striking feature of his evidence was that although he agreed with everything that was put to him in chief, he nonetheless agreed also with everything put to him in cross-examination. “If you were not present during his evidence in chief but only came during the cross-examination phase you would not be wrong in forming the impression that the cross-examiner was making him repeat the version he must have given in chief the way he was agreeing with everything”. This was the apt description of DW6 by one of the Gentlemen assessors during tea break. I accept the submission that consequently everything he said in chief was neutralised by what he said in cross-examination.

One other purpose for which it seems DW4's evidence was led appears to be to counter the evidence of PW10 and PW15. Be it recalled that PW15's evidence was in essence to the effect that the important milestone steps leading up to the establishment of contract 65 were reached without JPTC's prior written approval. Further that to the extent that the JPTC did approve, it did so retrospectively in other words the JPTC was playing "catch-up". The signal virtue of PW15's evidence is that it was almost all vouched for and indeed corroborated in material respects by Exhibit "Z" which is the minutes of the various JPTC meetings. Now when cross-examined DW4 was taken through those self-same minutes which formed the substratum of PW15's unshakeable evidence. Then as indicated earlier Dw4 agreed with various important and indeed relevant portions put to him in cross-examination with reference to Exhibit "Z".

DW4 told the court in his evidence in chief that a move had to be made towards selection of consultants and that this was impelled by a sense of urgency; see page 2127 lines 19 - 21, after the decision had been made to sole-source. See 21 25 line 17.

At page 2134 lines 4 to 17 DW4 makes the point that it was unlikely the JPTC had insisted that the Request for proposals documents be approved formally by it before they could be issued. He is certain that the LHDA would not have shared the opinion of the JPTC on the issue due to tension prevailing between the two bodies at the time. However under cross-examination at pages 2186 line 26 to 2187 line 27 he pointedly denies that the JPTC's insistence on approval of the RFP before their issuance was a form of meddling into the affairs of the LHDA. To the suggestion that initially the LHDA indeed sought the JPTC's approval as testified to previously by PW15

Letlafa Molapo, DW4 does not only accept this suggestion he goes even further to volunteer explanations the upshot of which is to support PW15's testimony up to the hilt as follows:

“..... at the beginning the comments made during such meetings were taken as approval and there was a good working relationship and it was clear that if Mr “X” who was a representative of the JPTC would have that comment, the whole story would have a good chance of being approved. I *agree* that there might be *approvals regarding other contracts* or contract documents *before we dealt with* contract 65.” (Emphasis supplied)

He readily accepted the suggestion that it would have been shortsighted of the LHDA not to obtain the approval of the JPTC along the various steps of contract negotiations leading up to the signing of the contract.

With respect to the negotiation of the MOU at pages 2140 line 11 to 2143 line 20 DW4's evidence is to the effect that the JPTC was always involved in LHDA's negotiations of the MOU, he denied that up to there ever having been any feeling of discomfort within the JPTC in relation to the manner the negotiations were conducted. He indicated that the MOU was afterwards sent to the JPTC and remained in their hands. He intimated that the letter of intent would have been mentioned in the course of the negotiations and mobilisation would follow on the basis of this letter of intent thus Acres International limited acted on the basis of these processes. At page 2143 lines 10 - 12 the text is as follows:

“My question to you is was the JPTC aware of these facts \_\_\_\_ ? They were in possession of the MOU.

Yes \_\_\_ ? Yes”

But at pages 2185 line 17 to 2186 line 25 the above picture is controverted as follows:

“ ..... the JPTC as such does not have a say in the actual negotiations \_\_\_ ? That is if the JPTC attends, it attends as observer \_\_\_ ? Yes, that is true” DW4 went along with the suggestion that if Mr Classens a member of the JPTC was present at the negotiations meeting he was not the one negotiating. His actual words: “No, he is not the one who is actively negotiating.”

He volunteered an explanation how these meetings ran. Suffice it to say he clarified the point that the JPTC members were invited to these meetings and they contributed by way of comments depending on which negotiators would readily have an inkling into the possibility whether their proposals would be able to get past the JPTC thus allowing the negotiators an opportunity to as well change their proposals now than risk it meeting with a rebuff by the JPTC.

DW6 was agreeable to the suggestion that even if Mr Clanssens signified that he had no problem with a suggestion or decision while sitting at these meetings that in itself did not signify agreement.

With regard to the issue of the letter of intent DW4's evidence at pages 2143 line 21 to page 2144 line 20 shows that he was in agreement with the fact that the letter of intent was issued following discussions between the LHDA and the chief delegates of the two delegations to the commission as the question in line 4 at page 2144 suggests namely “ My question to you, Dr Meyer, is was the JPTC aware of the letter of intent \_\_\_ ? At that stage, 1 October, yes.”

Even though the immediate response which was in chief shows one thing favourable to the defence the next response which was also in chief showed something different which is devastating to the same defence. This appears at page 2146 lines 20 - 25 where the text goes:

“ I am talking about this particular period of time in July, August and September 1990. Can you say, as you sit here today, can you state under oath and categorically that no approval was given by the JPTC, even assuming that approval was necessary by the JPTC in respect of the letter of intent under Contract 65 \_\_\_? Do you refer to the formal approval” the witness wanted to be sure he understood the question.

Yes \_\_\_ ? Ja, I can say there was no formal approval given”.

This is a big concession that is in line with the Crown’s version throughout. One thing Learned Counsel for the defence’s body language showed that he could not have expected this answer. But categorical it was and as I said the witness testified to it who had been alerted to the fact that this that he was about to respond to was under oath. So there can be no assumption that he was confused or did not understand the question. He focussed his mind to telling the truth when he responded to it. To that extent he can be credited with being truthful; especially when he said this in is evidence in chief rendering it unnecessary to have him cross-examined on the point at a later stage.

Under cross-examination at pages 2200 line 21 to 2201 line 26, my understanding of what appears to be the issue here, taken in context of other evidence is that although at the time the 20% fee was regarded as too high it is at this very time that Sole steams ahead in disregard of the

JPTC's concerns and does not seek their approval with regard to the letter of intent.

Asked if it was not remarkable that Sole should have done that his simple answer was he expected him to do so.

Hence the court's intervention as a follow up to this highly pregnant answer: "What would you attribute his failure to do that [to] [failure to seek JPTC's approval] \_\_\_\_\_ ? Excuse me, My Lord!

You say you would expect him to do that, to seek the approval, now what would you attribute his failure to seeking approval to? Would it be the same thing that you told me about, namely inexperience and power (sic) trouble [struggle], this time \_\_\_\_\_ ? I would rather in this case talk about a matter of principle (power struggle)".

Another concession on a crucial question is to be found at page 2189 lines 13 - 21. This concession demolished the castle being tried to be built around the question of urgency precipitating failure to seek approval of the JPTC on these matters. The text goes in part : "If he [Sole] wanted the JPTC approval, he could easily have sought it, not so \_\_\_\_\_ ? It was physically, for sure, *not a problem* .... [ Mr Molapo said that] if a matter had to be dealt with urgently, that could be arranged. An urgent JPTC [meeting] could be convened, the people could be brought down from Pretoria or the Lesotho people could be taken to Pretoria \_\_\_\_\_ ? It could have, ..... ja....."

The delayed comparison of what went on at pp 2200/21 - 2201/26 appears with what is

reflected at pages 2228 line 1 to 2229 line 2.

The text goes “you will see that on 6 November the JPTC notes:

‘That the letter of intent, the letter which TAC engineering -2 have mobilised effective 1 August 1990 has not been approved by the JPTC nor has it been verbally agreed to by the Chief delegates.’

Do you see that \_\_\_\_ ? Yes

And do you accept that, that is correct \_\_\_\_ ? Yes”

The effect of this concession by a man who was in the JPTC at the time is an unmistakable charge on Sole that he was intentionally not only misleading but deliberately lying when he wrote his letter suggesting the two chief delegates to the Commission had approved. To this extent no further comment is needed to illustrate that the inception of Contract 65 was founded on a massive fraud through the machinations of a very corrupt and dishonest Chief Executive of the LHDA who must have been influenced either by promise of a bribe or actual acceptance of bribery whichever way is actually the case being irrelevant as the decision by the honourable Cullinan AJ with which I am in respectful agreement has shown in **CRI/T/111/99 Rex vs Sole** (unreported) above.

The court puts a special premium on DW4's concern that there was not even a verbal agreement to the letter of intent. See Pages 2228 line 1 to 2229 line 2.

Page 2229 lines 19 to 26 intensifies the improbability of the Chief Executive implying that there had been approval by two Chief delegates of the JPTC while there was none. In fact they disavowed that brazen lie.

At page 154 of Volume 8 a letter is written by M A Pettenburger of the South African section of the JPTC addressed to Van Robbroeck and dated 26 October 1990 referring to a letter of intent by the LHDA dated 28<sup>th</sup> July 1990.

Referring to item (e) of the draft letter Petternburger says:

“Item (e) of the draft letter would seem to reflect a rather *clumsy attempt to imply JPTC approval* of the letter of Intent. Could you confirm whether or not any such understanding was reached at any of your confidential discussions with Mr Sole. If so, we must retrospectively formalise JPTC approval”.

What is clear is that in one draft there was no question of JPTC approval hence the crunch which came following the next question:

“..... there was no reference to JPTC approval, so can we accept that there was no question of JPTC approval either to the letter of intent and the subsequent mobilisation \_\_\_\_ ? We can *definitely assume* that there *was no verbal agreement* in the answer given by the two Chief delegates” DW4 effectively disowned Sole’s shenanigan. Suffice it to say then that Sole’s attempt to make believe that the chief delegates had given their approval is an act of astounding

and unparalleled grotesquerie all existing in a class of its own.

With regard to the authority to mobilise reference to DW4's evidence in chief appearing at pages 2144 line 21 - 2156 line 18 will suffice to clarify the position when placed side by side with his evidence under cross-examination appearing at pages 2202 line 7 to 2205 line 6.

In this regard he was referred to the evidence of PW10 Ugo Hiddema to the effect that the latter had said there was no formal approval by the JPTC relating to the issuing of the letter of intent and mobilisation of Acres. His response was to stone wall into the previous position he had adopted namely "I repeat what I said before. The JPTC was of the opinion that that letter of intent required the approval of the JPTC before issuing it. I repeat again that LHDA did not share that opinion" see page 2148 lines 10 - 17.

Thus it would not be wrong to resolve this particular point in favour of the version specified and adhered to by PW10 at pages 2202 line 7 to 2205 line 6. In this regard it is to be realised that mobilisation of Acres' construction manager was without JPTC approval.

"Right? [The mobilisation] of the construction manager had taken place without approval \_\_\_\_ ? Without JPTC's knowledge" readily DW4 volunteered a correction; in the process intensifying the absurdity of the entire departure from the proper procedure which should instead have been followed.

DW4 acknowledged that there was not even a reference to mobilization having been

authorised by the LHDA itself let alone by the JPTC.

To illustrate the point it will be noticed at page 2201 lines 20 onwards that the following is revealed that ..... reference is to the mobilisation of the construction manager only “but no reference even of the mobilisation as such which was authorised on 14 August [is made], is that correct \_\_\_\_\_ ? Authorised by the LHDA?” DW4 again provides pertinent correction by adding an important balance to the question asked.

“Authorised by LHDA, yes \_\_\_\_\_ ? Ja, there is no reference, that is true, yes” he emphasises by adding a series of positives.

“So as at 4 September one must accept, must one not, that the JPTC was totally in the dark [regarding] the mobilisation *authorised by Mr Sole* on 14 August, otherwise, surely there would have been a note of it here? I am not talking about whispers in the corridors, it was totally in the dark about it as JPTC \_\_\_\_\_ ? If you refer to *official information* then you are right yes,” agreed DW4 adding more appropriate reference terms than were mentioned by the learned counsel as the emphasis supplied by italics is intended to demonstrate. See page 2203 lines 1 to 6.

Further down that page DW4 acknowledges that the above action by the LHDA without JPTC’s approval (prior approval) is in contravention of the Treaty.

He is tested in line 24 downwards

“Did you share that view? I see that you were present at that meeting, if we can go to page 208, you were present as one of the GOL delegates. Did you share the view at the time that the

absence of prior approval constituted a contravention of the Treaty \_\_\_\_ ? It was definitely JPTC's opinion that prior approval was required" he attempts to blunt the directness of the question intended for him by spreading its blow to the generality of the JPTC despite that it was clear from the repetitive reference to the fact that he was present the question was meant for his attitude in particular.

Learned Counsel affords no quarter and refuses to be fobbed off by use of generalities: "and that was your view as well \_\_\_\_ ? Yes" came the brief proper reply.

Learned counsel for the Crown then effected the *coup de grace* to the defence case on the above issues raised by reference to article 9.11 of the Treaty and proceeded as follows:

"I suggest to you that anyway one reads the article in question ..... when there is cost to be incurred with regard to a contract, that requires JPTC approval. It would be facetious to read the Treaty in any other way \_\_\_\_ ? ..... I do not need to be convinced about that, because I was always convinced that it should require JPTC approval but obviously our counterparts were of other opinion, of different opinion and I feel sorry for that." I agree entirely with the content of the question put and also appreciate the response of the witness who in effect tries to discourage the Learned Counsel from preaching to the converted so to speak.

All that has been demonstrated above confirms the Crown's contention that DW4's evidence in chief has done Acres more harm than good. See pages 2144 page 21 to 2156 page 18. He frankly testified that mobilisation and the issue of the letter of intent authorising mobilisation

took place without JPTC's knowledge, let alone approval. In fact at the time as far as he was concerned, contract 65 had not even been "awarded". See page 2151 lines 20 0 21. The actual words appear in the text as follows:

"And when is a contract awarded in your view \_\_\_\_ ? In my view once the contract has been signed". Be it remembered contract 65 had not been signed at this stage.

With regard to payment of the advance comparison of DW4's evidence in chief with that under cross-examination is true to pattern. See pages 2159 line 22 to 2160 line 20 c/f pages 2213 line 5 to 2217 line 2 where without any qualms whatsoever he says: "**I can only agree with you**" that the payment of the advance was "**highly irregular**". See page 2216 line 15.

Regarding whether or not funding was in place for contract 65 it would be fruitful to observe that whereas at pages 2156 line 18 to 2163 line 1 he testified that the JPTC had the draft contract in their possession though he would not be sure they were informed of the World Bank documents, he was certain that the JPTC was in the know about the advance payment of CAD1 160 000 and M250 000 because these fees and percentages were well discussed at the JPTC. He also denied that it would have been irregular to have made an advance payment to Acres during September October 1990 etc before the contract was signed. But at page 2183 lines 7 to 18 DW6 concedes that if one does not find approval in the minutes of the JPTC brought before him then it meant none had been given. He also made it plain that such approval would normally be in writing and also confirmed at a later meeting of the JPTC. But preceding all this the approval has to have been requested in the first place.

Thus the state of funding was not in place because finally at page 2207 lines 12 - 13 DW4 concedes that as far as the JPTC going into the contract without certainty as to funding was all irregular. He further acknowledges that this irregularity in effect was placing not only the JPTC but the Lesotho Government in difficult position because GOL was the Guarantor with the CMA funds so should the contract fail to be signed in the end GOL would be left “holding the baby”. DW4 indirectly recognised that Sole was the author of all this tricky situation in which the JPTC and GOL at the end of the day would find themselves.

With regard to the actual signing of the contract 65 DW4 accepted that the contract was signed on 21 February 1990. All issues raised by the JPTC or its RSA part of the delegation had been resolved and the World Bank had approved the contract. See pages 2163 line 7 to 2168 line 5. One other thing DW4 didn't recall ever seeing Mr Hiddema at the technical management meetings. DW4 discounted any possibility of fraud having been employed to secure contract 65 adding that Sole was a very influential and powerful person but this notwithstanding the instruments of control in the project which were exceptionally good would surely militate against any corrupt use of all that power and influence. See pages 2168 to 2170. But at pages 2219 line 22 and 2221 line 11 DW4 concedes that the LHDA incurred a certain risk on behalf of Lesotho. Going further at page 2221 line 10 he faces up to the essence of the question being asked and says:

“[The JPTC] It had no choice because of the project requirements as well”.

He conceded that it is because of this sort of thing i.e. presenting the JPTC with *fait accompli* that protocol IV was established thus resulting in the tightening up of procedures. This

way DW4 acknowledged that contract 65 was signed without JPTC approval and that when it did approve the contract *ex post facto* “it had no choice”.

DW4's evidence is important in the sense that it essentially endorsed PW15's evidence. To the extent that it can be relied upon it corroborates the Crown's case. But it is important to test it against objective facts otherwise, because standing alone it sways like a green reed in a strong wind. It is significant that in his evidence in chief he said “There is no doubt that Mr Sole was a very powerful man with lots of possibility to influence whatever decision” see page 2169 lines 17 to 19. It should not be overlooked then that this proposition is indeed central to the Crown's case and something which Acres, with somewhat receding conviction, has tried to contradict.

Furthermore in relation to the statement at page 2222 lines 14 to 15 that the World Bank memorandum when describing Sole starts with the sentence:

“We would note that the Chief Executive Officer of the LHDA is an experienced engineer with an *independent mind of his own*” (italics supplied) DW4 reacts and says:

“It is a quite strong statement and it is directed quite well, I say, to the JPTC”.

### **ISSUES**

As stated earlier the main issue canvassed in the evidence was whether the representative agreement put up by the defence is genuine or not.

The Crown alleges that Sole favoured Acres. The other issue canvassed in evidence related then to whether or not this was so, more particularly in the context of establishing contract 65, and in addition whether when showing such favour he also acted regularly.

In the words of Mr Alkema SC the issue in this case concerns the legitimacy of the representative agreement signed by the parties on 23 November, 1990. If the payments by Acres to ACPM/Bam were made in terms of a legitimate representative agreement, then such payments are destructive of an inference of bribery and corruption.

But as already indicated in the body of this judgment overwhelming evidence to the contrary shows the representative agreement as not genuine at all. It was only necessary for me to formulate the premise on which the notion of the legitimacy of the representative agreement is founded in order to reject it.

The defence states in the alternative that if (as the prosecution allege) the representative agreement is simulated and there was no intention on the part of either Z Bam or Acres that effect should be given to such agreement, then it follows (and is conceded by the defence) that the only reasonable inference from the payments by Acres to Z M Bam is that those payments were intended as the payment of bribe monies for onward transmission to Sole. The Crown contends that no effect was given to the representative agreement and that the true intention of the parties was to channel moneys through accounts of Z M and M M Bam to Sole. It should be noted that the payments from Z M Bam to Sole are not disputed by Acres and are common cause between

the parties.

It is stimulating that Mr Alkema seems to have captured the essence of the proceeding before this court in his accurate observation and conclusion that the gravamen of the case is therefore quite clearly whether the representative agreement between Acres and ACPM/Bam dated 23<sup>rd</sup> November, 1990 is legitimate or whether it constitutes a simulated agreement. If the former, Acres is entitled to an acquittal; and if the latter, Acres should be convicted (sic) at least on count 1. But as I have intimated this court has overwhelmingly been persuaded and has itself made a definite finding based on solid evidence that the so-called representative agreement was just a smoke screen kept in the back ground only to be readily available as a form of an insurance should Acres or any of the parties involved find themselves faced with a prosecution for bribery. It is important to note that the crown has built its case on evidential blocks none of which has been seriously challenged as it is apparent the defence in this case is based on the validity of the alibi. The defence appears not to focus on the arguments raised in support of the Crown's view and in turn on the inferences flowing therefrom, but largely focuses on what they are presenting before this court.

It bears pointing at that Mr Alkema seems to have taken hold of the wrong end of the stick in his view and submission reflected in paragraph 6 appearing at page 168 of his heads of arguments to the effect that the statement appearing in paragraph 290 of the Crown's submission that 'MEYER "..... testified that mobilisation and the issue of the letter authorising mobilisation took place without JPTC knowledge ...."' is incorrect. In fact it is his own submission that is incorrect because reference to page 2202 shows that what the Crown claims Meyer said is

exactly what that witness said in line 18 in answer to a question based on an extract from JPTC debate in a minute saying “the mobilisation of Acres’ construction manager without JPTC approval had taken place” see lines 13 to 16 in Volume 22 of recorded evidence where the following appears followed by the point at issue:

“Feedback that was being awaited from the LHDA on the Commission’s comments in respect of the contract and now that mobilisation of Acres’ construction manager without JPTC approval had taken place “

Right ? Of the construction manager had taken place without approval \_\_\_\_? **Without JPTC’s knowledge.**

Yes, **without JPTC’s knowledge had taken place** \_\_\_\_ ? Ja.’ (Emphasis supplied)

I am prepared to condone this resounding mistake as I don’t think thereby Learned Counsel deliberately intended to mislead this court. Having formed a truly good impression of the way he has comported himself in this trial I would condone this error on the principle that Homer sometimes errs. (The best of us do also err.)

Having said this I would hasten to make reference to page 135 paragraph 5 of the Learned Counsel’s heads reading

“The defence counsel and attorney take offence at the submission made in paragraph 47 page 24. It is true that the defence team in the presence of HARE and BROWN consulted with

SOLE and that SOLE was in court, and these events were never hidden and were openly disclosed to the prosecution. The implication in this paragraph is that SOLE, in the course of these consultations, may have disclosed or admitted that he received bribe monies from BAM which originated from contractors and consultants, including ACRES. If this in fact is so, senior counsel, junior counsel and the instructing attorney would be guilty of gross professional and ethical misconduct which may warrant an application to strike their names from the roll of advocates and attorneys respectively. The defence based on the legitimacy of a representative agreement was vigorously, and perhaps even aggressively, canvassed and it was put to various witnesses, particularly ROUX, that the payments from ACRES to BAM were made in terms of a lawful representative agreement. This conduct of the defence would have been highly unprofessional and unethical if SOLE indicated that the monies received by him from BAM were bribe monies pursuant to offers of bribery by, inter alia, ACRES.”

True enough the crown made its submission complained of. I do not recall the defence arguing orally in response thereto. The submission bemoaning the Crown’s implied aspersions cast at the defence appears in the defence’s written submissions to which the defence did not talk. Thus I neither had benefit of the defence’s oral responses to the Crown’s submissions nor in turn the Crown’s replies. However with the material laid before me I have not formed the impression that the Crown went out of its way to make unsavoury attacks at the person of the learned defence counsel his junior and his instructing attorney. If he was hurt thereby he has all my sympathy but the signal behaviour of both Counsel to my recollection and my lasting impression was of exemplary type purely professional free of querulous and vitriolic attacks at each other. Thus making the task of the court that less arduous . Be it appreciated that in our vernacular the

business of litigation is likened to the skinning of a pole-cat by the judge his assessors and counsel on opposite sides of the spectrum. The stench issuing from the pole-cat can easily be ascribed to any of the persons I have described. But truly that would be wrong. By this I wish to be understood to say that even if Mr Alkema seriously maintains his character has been sallied or assailed, in the eyes of this Court he remains a leading member of the profession whose character has not been dented in any way and thus remains unblemished.

I hope he takes this in the spirit I have tried to project.

The court is alert to the effort by the defence to water down the rather striking feature of the enormity of the moneys that Z M Bam received from Acres and a good portion of which went to Sole's account. The court makes a finding that these moneys were indeed huge. Sole according to the evidence was the best paid person in Lesotho yet Z M Bam even exceeded him. In any case it is a matter of record fighting against which would be vain and imprudent that in **Rex vs Sole** a branch of this court made a definitive finding as follows at page 203:

“It is then significant that Lahmeyer and LMC in particular should, as expected, conduct its normal course of business, involving the payment of millions of Maloti, through local banks, yet also paid Mr Bam further **large amounts of money into Swiss bank** accounts, sixty per cent of which he channelled to the accused”. Emphasis mine. The forensic chart Exhibit K “4” patently bears out the statement by the leaned Judge above as well as the position as affects Acres in the instant case.

The facts of the instant case satisfy me that the trio involved who were operating under cover of darkness afforded by the inaccessibility of Swiss Account at the time, were, when the lights came out, discovered without a fig leaf to cover their glaring nudity.

### CIRCUMSTANTIAL EVIDENCE - ACCUSED'S SILENCE

Revisiting now the question of circumstantial evidence along with accused's silence and false testimony.

In drawing any inference it behoves the Court to look at all the evidence together and not piecemeal. See **S vs Ostilly & Ors 1977 (2) SA 104 (D) at 106 H - 107A** where **Kumbleben J** said" .... the court should not restrict its attention to those portions of .... evidence which tend to support the state case but is obliged to have regard to the whole of such evidence to ensure that statements favourable to the State are seen in their proper context and that exculpatory statements are not left out of account." I, like the learned Judge stated, agree that this is the correct approach.

It stands to reason therefore that the Court must decide whether the inference is the only reasonable one that can be drawn from the complete picture painted by all the established facts. This then means that to find fault with individual witnesses on a piecemeal basis without considering the effect of that criticism on the overall picture or impression is a wrong approach. Where such criticisms, even if valid, do nothing to displace the inference or give rise to no other reasonable inference then the criticisms are of no real value or relevance. Despite lip service to the contrary this is exactly what the defence urged upon the court in the application for discharge.

Indeed even the foundation laid for this eventuality was discernible from the cross-examination which would invite a witness whether his response excluded an elaborate number of possibilities suggested to him. I have already commented on an instance/s where this was spotted apart from where it was asked of PW1 whether there was anybody who was dissatisfied with the conclusion of TAC -2 as far as he was concerned. The court therefore recalls the fact that the Crown witnesses were individually criticised but in my humble opinion those criticisms did nothing to displace the impression created by the evidence as a whole.

I endorse the words of Davis AJA in **R vs De Villiers 1944 AD 493** at Page 508 that

“It is not each proved fact which must exclude all other inferences; the facts *as a whole must* do so.” (Italics supplied) see also **R vs Sole** at pages 191 to 192.

Both counsel made common cause in impressing upon the court the important words appearing in **Cooper & anor No vs Merchant Trade Finance Ltd 2000 (3) SA SCA at 1027F-G** which restates the dictum in **R vs Blom** above. Of importance is to bear in mind that a distinction must be drawn from the proven facts on the one hand and conjecture, speculation and making assumptions on the other. The former being in order while the latter is impermissible.

Formulating its request for the form of inferences the court is to draw the Crown submitted two main inferences to the following effect:

(1) That Acres knew very well that it was paying Z M Bam to use its money to bribe Sole.

(2) That Acres used Z M Bam to camouflage this fact by using Z M Bam to break the chain of evidence relating to the payments between Acres and Sole.

I have already indicated previously that the main thrust of the defence case that an inference to draw from the facts they advanced that Acres made payments to Sole pursuant to an offer to bribe is not consistent with the evidence of the representative agreement would depend on the validity of that representative agreement in the first place. Since a reading of this judgment leaves no doubt that in the eyes of this Court that representative agreement was but a worthless smokescreen, it stands to reason that nothing turns on the submission made by the defence in that regard. It is therefore rejected.

Likewise the submission that the evidence of the representative agreement and the payments made by Acres to ACPM/Bam thereunder, exclude the inference that payments were made in terms of an offer to bribe, is rejected on the score of absurdity in that no valid inference can be founded on an invalid representative agreement.

I accept the submission that the so-called representative agreement is analogous to a criminal carefully setting up his alibi before committing his crime so that he is able to fall back on it should the need arise. Thus the argument is equally rejected that says the “pattern” of Roux is based on selective figures and ignores the total amount paid by Acres to Z M Bam. The extension of this argument is also rejected to the extent that it seeks to persuade this Court that “In any event, and even if there is a ‘pattern’ in respect of some of the payments, it ignores, .... the

existence of an inference that the payments were made in accordance with the terms of a representative agreement.”

The defence seeks to make a merit of the fact that certain aspects of evidence referred to were not challenged. While this may be true it ignores the overall effect of evidence advanced by the Crown to sustain a conclusion sought. In this regard the word of caution by authorities comes in handy that the dependability of circumstantial evidence should be likened rather not to a chain the measure of whose strength is the weakest link thereof but rather to a rope to which reference is aptly made by Elyan J in **Marcus Leketanyane vs Regina 1956 HCTLR** at page 3 where the learned Judge quoting with approval of a passage in *Wills Circumstantial Evidence* 7<sup>th</sup> ED. P 435 said: “..... Such evidence is more aptly compared to a rope made up of strands twisted together. The rope has strength more sufficient to bear stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose”.

In any case the words of Curlewis JA in **R vs Hepworth 1928 AD 265** are very apt that “A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side....” For completion it seems necessary to cite the dictum in *de Villiers* 493 more fully as where at pages 508-509 appear the following words:

“In a case depending upon circumstantial evidence ..... the Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any

reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with innocence”.

I am in respectful agreement with the above dictum for it even enjoys the support of Darling J in **Rex vs Armstong, Herefordshire Assizes, April 1922** to the following effect;

“Circumstantial evidence going to prove the guilt of a person is this: one witness proves one thing and another proves another thing, and all these things prove to conviction beyond a reasonable doubt; but neither of them separately proves the guilt of the person. But taken together they do lead to one inevitable conclusion”.

In order to justify the inference of guilt, though, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. See **Rex vs Kasa** [1936] OPD 200 and **Rex vs Tshabangu** 1934 AD. 519

I find Lord Coleridge’s disquisition on circumstantial evidence both down - to-earth and stimulating in its simplicity contained in his summing-up in the trial of **Rex vs J A Dickman** 1910 (5) CAR 3200.

“It is perfectly true ..... that this is a case of circumstantial evidence alone. Now

circumstantial evidence varies infinitely in its strength and proportion to the character and variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. The network may be a mere gossamer thread, as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances, all pointing in the same direction, convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence, standing by itself, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be ..... overwhelming proof of guilt. Ask yourselves then, what is the cumulative effect then upon your minds of so many, so varied, so independent pieces of evidence, all pointing, it is said, in one direction, all tending, it is said, to inculpate the prisoner and the prisoner alone in the commission of this crime?"

Even at risk of over burdening this proceeding I deem it important to indicate adherence by various authorities to the principle outlined above.

For instance Davis A .J.A in **Rex vs de Villiers** 1944 AD 493 buttresses the view expressed above as follows in his own words:

“But I should not leave this point without dealing shortly with an argument pressed upon us by Mr Morris that, in a case depending upon circumstantial evidence, ‘ the court must take each

factor separately and, if each of them is possibly consistent with innocence, then it must discard each in turn'. This argument is entirely fallacious ..... It is not each proved fact that must exclude all other inferences; *the facts as a whole* must do so .... As stated by *Best*, Evidence, 5<sup>th</sup> Ed. s. 298, 'Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone .... It is of the utmost importance to bear in mind, that where a number of independent circumstances point to the same conclusion, the probability of the justness of the conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them ..... The court must not take each circumstance separately to give the accused the benefit of any reasonable doubt ....." as earlier indicated.

Conclusions reached above namely that Acres knew very well it was paying Z M Bam to bribe Sole and that Z M Bam was used to camouflage this fact are inter-related. One relates to *mens rea* while the other relates to the truthfulness of Acres' defence. As to *mens rea* this has always been a matter of inference. Very seldom is there direct evidence of *mens rea* as where an accused is heard saying "let me swing for the bastard". Thus it can more commonly be gathered from the circumstances. These being that in a case of assault the nature of the weapon used, the location of the blow delivered and the degree of force applied are matters of importance in trying to determine the existence of *mens rea*. See **S vs Mbelu 1966 (1) Prentice Hall H. 176 (N)**. As with the cited authority above, the same reasoning is applicable in the instant matter to ascertain Acres' *mens rea* from all the facts.

Of course Acres bears no **onus**. The Crown must prove its case against the accused

beyond a reasonable doubt. It appears on the Crown's evidence that the only inference is that Acres knew that it was paying Z M Bam in order for him to use its money to pay Sole. On the face of it Exhibit "K4" lends support to this inference especially when viewed against the background of the water project and Acres' involvement with the LHDA. Of further importance in this regard is that Exhibit "K4" does not stand on its own but is re-enforced by evidence collectively pointing to the guilty knowledge on Acres' part, as well as a strong motive to bribe.

The collective force of all this evidence, standing unanswered, more than satisfies the test in **Blom's** case cited above. On this evidence the only inference to be drawn is that Acres intended to bribe Sole and indeed did so through Z M Bam. The two propositions in the instant paragraph are lent strong support by the authorities of (i) SE. **van der Merwe et al** in their invaluable works styled **Evidence** at page 417 where it is stated:-

"The State will have established a *prima facie case*; an evidential burden (or duty to adduce evidence to combat a *prima facie case* made by his opponent ....) will have come into existence i.e it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State; but if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt ....."

The other is (ii) that of **R vs Mlambo** 1957 (4) SA 727 at 737 D-F to the effect that : " Proof of motive for committing a crime is always highly desirable, more especially where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not

present an insurmountable obstacle” because it is quite unrealistic to loll in the realm of conjecture when there is at hand material which furnishes “a perfectly sound, rational, common sense solution to the problem”. I am in agreement with this approach.

It follows from **Van der Merwe et al** that it is then for Acres to displace the inference drawn. I should emphasise that this does not mean Acres bears any onus. Instead the Crown evidence which calls for an answer which is not forthcoming from Acres *prima facie* becomes conclusive proof whereby the Crown is adjudged to have completely discharged the onus of proof. If as it has also happened in the instant case a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, amount to full proof.

In the celebrated passage of Lord Devlin in **Broadhurst vs Rex** 1964 AC 441 at 457 it is to be noted that:

“It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of a judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused’s conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What

strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness”.

As stated earlier the representative agreement is doubtful and unsatisfactory, so because the court does not believe the evidence of Hare and Brown that should conclude the matter against Acres.

See **Ex Parte the Minister of Justice. In re R vs Jacobson and Levy** 1931 AD 466 at 479 where Stratford JA said:-

“It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence ‘calls for an answer’ then, in such a case, he has produced *prima facie* proof, and in the absence of an answer from the other side it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof”

I accept the submission that in the instant case Acres’ answer has been shown to be more than just “doubtful or unsatisfactory”. It has indeed been shown to be a manifestly false answer.

In coming to the conclusion that Acres' version ought to be rejected as false beyond doubt this court has borne in mind the instructive words of **Van der Spuy in S vs Munyai 1986(4) S 712 at 715 G** where it is stated that:

“..... even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false”. Of course my investigation of the instant case qualifies it as so.

It is also fruitful to heed the terse lucidity of Lord Denning's phrase with regard to the criminal standard about which he said:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it's possible but not in the least probable; the case is proved beyond reasonable doubt, but nothing short of that will suffice”. **See Miller vs Minister of Pensions** [1947] 2 LL ER 372 at 373

I am particularly enamoured of the underlying purpose for the approach adopted by Lord Denning in the passage just quoted to be seen to be protecting the community and not allowing

culprits to get away with it by resort to a whole host of flights where their fancy may take them.

I am in no doubt therefore that for purposes of the onus in a criminal case, it has been shown that Acres' answer cannot reasonably be true. See **Ntsele vs S 1998 (3) ALL SA 517 (SCA)** letter B to C where reference is made to onus of proof and to the fact that where the State relies on circumstantial evidence, it is sufficient that the cumulative effect of the evidence before the Court indicates that the accused is guilty beyond a reasonable doubt.

#### **Accused's silence and false testimony**

Reference to **Broadhurst and Van der Merwe** above has at once a good deal of bearing on the topic relating to an accused's silence and his giving false testimony.

I need only indicate that because Z M Bam in his capacity as Acres' agent has been shown to have been using Acres' money to pay Sole. This piece of evidence has furnished the court with prima facie material calling for an explanation by Acres. The rule of thumb being that where the prosecution has presented a strong case based on circumstantial evidence which the Accused, if innocent, could reasonably be expected (not required) to answer or explain, his failure to do so will serve to strengthen any unfavourable inferences which can properly be drawn.

In **R vs. Dube** 1915 AD 557 at 563 Innes CJ said:

“The onus rested upon the Crown to establish her guilt. At the same time

the fact that she did not endeavour to explain the circumstances of suspicion which the prosecution had set up was an element which the trial Court was entitled to take into consideration”

In keeping with this authority is **R vs Bardhu** 1945 AD 813 at 822 - 3 where Davis AJA said:

“ ..... the accused has given an explanation which has been rejected - one which cannot even possibly be true. .... The court should not ..... find on his behalf some explanation which, if given, might perhaps have been true, but which he himself has not given”. I agree entirely with this statement.

**R vs Mlambo** above is also worth paying attention to at 738 B to D where Malan JA said:

“..... if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping a conviction altogether and his evidence is declared to be false and irreconcilable with he proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so”.

I must hasten to indicate that the importance of the phrase “in suitable cases” should be

read as a clear indication that **R vs Mlambo** is not an attempt to undermine the cardinal rules in **R vs Blom**. In any case regarding **Blom** as to the second rule of logic on which Mr Alkema reposed a lot of faith the authorities sound a word of caution as follows:

“The second rule of logic in **Blom** is a salutary rule, whose field of application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused.....”.

See **The South African Law of evidence** by Hoffmann *et al* 4<sup>th</sup> Ed. At page 590

The weight to be given to a failure to give evidence was discussed in **R vs Ismail** 1952 (1) SA 204 A at pages 206 F to H and 209 G to 210 C respectively.

At page 206 F - H Centlivres CJ said “ ..... the evidence led for the Crown was sufficient, taken in conjunction with the absence of evidence for the defence, to make it impossible for this Court to hold that the magistrate was wrong in arriving at the conclusion that beyond reasonable doubt the appellant possessed 80 bottles of wine for the purpose of sale. In the absence of any explanation by the appellant as to why he was in possession of the 80 bottles of wine plus 87 found in his store and having regard to the humble position he occupied in community, it is asking too much of human

credulity to draw from the facts proved in this case any inference other than that the appellant was in possession of the 80 bottles of wine for the purpose of sale”.

At page 210 C the learned Chief Justice whose expressed view has my full endorsement goes on to say:

“Each case has to be dealt with in relation to its own circumstances; considerations which may have to be taken into account in any particular case are the strength or weakness of the Crown case, the apparent certainty with which the accused could have answered that case, if he were innocent, and the probability or improbability of the accused’s failure to testify being explainable on some hypothesis unrelated to his guilt on the charge in question”.

Hence for instance the endorsement of the sentiments expressed above by Quenet JP in **R vs Joseph 1964 (4) SA 54** [S.R.,AD] at page 57 D to F where the learned Judge President said:

“The cases relating to the recent possession of stolen goods provide frequent examples. .... if the accused’s hat were found in a

house that had just been burgled it would theoretically be possible, even in the absence of defence evidence, to imagine circumstances explanatory of the hat's presence there consistently with the accused's innocence. The hat might have been lost by or stolen from the accused or he might have lent it to someone. It might be one of a number of hats belonging to the accused and might simply have disappeared. But unless he gave evidence laying the foundation for one or other of these explanations the possibility that one of them might be the true explanation would presumably be regarded as remote and not reasonable. In such cases the accused would fairly certainly have been alive to the explanation if true and so his failure to propound it would remove it from the range of reasonable possibility. Lapse of time may introduce the factor that the accused may have forgotten the facts which might provide an innocent explanation: whether that might reasonably explain his failure to propound the facts will depend on their nature and on the length of time involved. Unless at the time when an explanation is to be expected of him i.e. at the trial or earlier according to the circumstances, it is reasonably certain that the accused is aware of the facts and appreciated their importance there is no reason to reject the explanation merely because no evidentiary foundation therefor is laid by the accused".

I am thus fortified in my view that remote possibilities more often than not remain no more than just that, that is until such time as the accused makes them reasonable ones by introducing them as evidence.

In the instant situation the case of the Crown is much stronger in that the accused has given an explanation in the form of the representative agreement. But because the court has determined that it is false this would seem to be the end for the defence case. Likewise if the court believed Hare that would be the end of the case for the Crown. But that is not so.

I may add only for purposes of emphasis that where an accused gives false evidence, the Court is at large to infer that there is something he wishes to hide, adding then an element of suspicion to facts which may otherwise have been neutral. See **S vs Rama 1966 (2) SA 395 (A)** at 400 H to 401 B.

In **Mawaz Khan vs Reginam [1967] 1 ALL E.R at 81 H - 83 B** the Privy Council specifically held that a false explanation constitutes some evidence of guilt.

In keeping with the above view, which I wholly support, the effect of a false explanation and the value to be attached to it in South Africa is authoritatively set out in **S vs Mtsweni 1985 (1) SA 576 A** the headnote of which summarises the position neatly as follows:

“The weight to be attached thereto must relate to the circumstances of each case.

In considering false testimony by an accused, the following matters should, *inter alia*, be taken into account:

- (a) the nature, extent and materiality of lies and whether they necessarily point to a realisation of guilt;
- (b) the accused’s age, level of development and cultural and social background and standing in so far as they might provide an explanation for his lies;
- (c) possible reasons why people might turn to lying, e.g. because, in a given case, a lie might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth”.

In the instant case when the other circumstances surrounding the factor of these

payments is added the inference of corruption becomes conclusive.

The court is of a firm view that if Z M Bam could keep all the money he received from Acres for himself he would surely have done so. There is no suggestion based on any evidence that Z M Bam would have paid Sole out of generosity or some other obligation, contractual or otherwise. Acres certainly haven't offered any sensible explanation for the payments made by them to Z M Bam. I need once more emphasise that no onus lies on Acres at all to prove its innocence. But the extortion theory hinted at before the World Bank is nothing short of fanciful and speculative. So are the various theories advanced by DW1 Hare DW2 Brown and DW6 Burnett.

It is strange that the best Acres has been able to do in the face of all this fourfold cord of damning evidence is that it did not know that its money was going through to Sole.

The court is disinclined to follow the path advocated by Mr Alkema because broadly speaking it means that the court should treat piecemeal the circumstantial evidence which forms the basis of this case. That path also seems to ignore the importance of the authorities which highlight factors which characterise circumstantial evidence such as that it is like a rope with several strands and not like a chain upon whose single links depends its strength.

I accordingly reject the submissions the acceptance of which would lead to the acquittal of Acres.

**COURT'S FINDINGS ARE TABLED BELOW**

1. The court's findings are that the representative agreement is not what it purports to be but mere sham.
2. The court rejects the theory that Acres didn't know that Z M Bam was paying Sole with the money obtained from Acres.
3. Acres had an interest in ensuring that Sole was kept happy in order for Acres to derive benefit of favourable disposition by the LHDA towards it. For this it was prepared to pay Sole.
4. In order to pay Sole Z M Bam's accounts were used as a conduit. Again this was done with Acres' full knowledge.
5. All the moneys that Z M Bam paid in the ration of 60% to Sole while Z M Bam retained 40% or thereabouts were bribe moneys to ensure that Acres' interests in the LHDA were secured to the detriment of other competitors who were under false belief that Acres had won contract 65 by fair means over them.

- (1) Z M Bam could hardly have squeezed so much money out of Acres without persuading Acres that it was worth its while. That he was paid 25% of Acres' mark-up is a clear indication that he achieved this by letting Acres know that Sole was in on the deal.
  
- (2) Because of my acceptance of this on reasonable grounds now everything falls into place.

**Anomalies in the Acres' version, like**

- (1) wanting to use Bam as an agent even though he was in Botswana
- (2) paying so much money allegedly for political intelligence
- (3) why it is that most of the services in the representative agreement were not necessary
- (4) the fact that no one knew Z M Bam was Acres' agent
- (5) the fact that he was paid in Switzerland

**begin to make sense.**

- (3) Acres' reliance on the representative agreement pronounced a sham in (1) above establishes **mens rea** in the sense that
- (i) by relying on this document Acres, as in the case of alibi, put its eggs in one basket. Thus because of the crack suffered by the defence in an instance where their denial of criminal liability was proved to be false the whole proverbial edifice was destined to come tumbling down.
6. The court further finds that the reason why Acres would want to hide its true agreement or understanding with Z M Bam is that it has a guilty knowledge of what the real situation involved here is (much akin to a man who intending to murder his wife carefully plans his alibi in advance so that it is in place if and when he becomes a suspect).
7. The court further relies in making the above findings on the concession by the defence that the representative agreement does not reflect the true agreement. Pages 398 line 23 to 399 line 7.
8. the incontrovertible facts before this court are a negation of the validity of the representative agreement, thus leaving the credibility

of Acres in tatters in this case.

(there is no reason for the court to believe Acres about the need to provide “political intelligence” when, if this were true, Acres could and would easily have drawn the agreement in those terms.)

9. Because various amendments which were made to the agreement for over one and half years yet at no stage were services provided for in Schedule 1 ever amended, thus showing they were not required the court makes a finding that they could only have been intended as “window dressing” or just an “eye -wash”.
10. The 40/60% split of Acres money between Z M Bam and Sole and the very amounts conceded to be “huge” by the defence (“Page 35 line 18) connote the existence of a specific and compelling reason why Z M Bam made these payments to Sole. The reason was promotion of corruption. Payment of these moneys into and out of Swiss accounts held by Z M Bam and in turn to Sole betokens corrupt motive as these accounts were operated in breach of foreign exchange regulation and were in secret.
11. The court finds that it makes no difference that Acres thought payments they made into M M Bam and Z M Bam’s accounts were

in ACPM account for as long as it is established, as has indeed been the case, payments were made with the intention to bribe.

12. The court also finds that not all the moneys can be traced through to Sole. However it does not change the fact that all the moneys involved were used in order to facilitate bribery thus the fact that a portion thereof remained with Z M Bam for his part in the scheme does not affect the situation.

Because the Crown has discharged its onus in respect of both counts of which Acres stands charged the court accordingly finds Acres guilty on both these counts of bribery.

My Assessors Agree.

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M L LEHOHLA  
CHIEF JUSTICE

ON : 17-09-2002

FOR CROWN : Mr G H Penzhorn SC  
Mr H T Woker

FOR DEFENCE : Mr S Alkema SC  
Mr W Geyser

INSTRUCTED BY: Messrs M T Matsau & Co.



