JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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INDEX: SEQ 03/2020

1.

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OUR REF: SDM/GM/0014-20 Date: 14TH JANUARY 2020
Your Ref :

THE SECRETARY
COMMISSION OF ENQUIRY INTO STATE CAPTURE
JOHANNESBURG

RE: RULE 3.3 NOTICE – SIPHO DERRICK SHABALAL NTOMBENHLE BEATRICE SHABALALA

1. We act for Sipho Derrick Shabalala and Ntombenhle Beatrice Shabalala ("our clients").

2. We acknowledge receipt of the notices in terms of Rule 3.3 of the Judicial Commission of Inquiry into allegations of State Capture, which notices were served on our clients via email on 09 January 2020.

3. As alluded in the said notice you are aware that a criminal investigation into the allegations against our clients was conducted, which culminated into our clients being arrested and subsequently indicted in the Pietermaritzburg High Court under Case number CC14/12.

4. Our clients were arrested in 2010 and the matter has been pending in court ever since and the trial has yet to commence. Our clients have always been eager to have the charges against them adjudicated in court.

5. Our clients have been extremely prejudiced by the delay in bringing the matter to trial and have been severely prejudiced thereby. In an attempt to mitigate the prejudice against them and fast track the finalisation of the criminal matter, our clients brought an application in the Durban High Court to have their criminal trial separated from the rest of the accused. This would have the result of having the trial against them commence immediately without any further delay.

6. On 17 December 2019, the Durban High Court handed down the judgment granting the order to separate our clients' trial from the rest of the accused in that matter. We annex hereto a copy of the judgment.

7. With this background you will appreciate how much our clients are committed to dealing with their criminal trial without any further prejudice or delay.

8. The evidence which will be tendered by Mr White and Mr Du Plooy in the Commission of Inquiry goes to the heart of the charges against our clients, for which they have not yet had the opportunity to answer in the court of law.

9. The right to a fair trial is the cornerstone of our criminal justice. The adducing of evidence by Mr White and Mr Du Plooy at the Commission before our clients have had the opportunity to answer to the allegations in court, will seriously undermine and infringe on their constitutionally guaranteed right to a fair trial.

10. Our clients do not wish to have any allegation against them remain unchallenged. As such under ordinary circumstances they would definitely take up the option of giving evidence at the Commission and cross-examine any witness who implicates them. However you can appreciate how doing so at this stage will severely interfere with the fairness of their criminal trial.

11. Mr White and Mr Du Plooy are the main witnesses in the criminal trial against our clients. Cross examining them would entail an extensive and thorough exercise to ensure that our clients' versions are fully stated. This would require that our clients' entire trial strategy be ventilated at the Commission. By the time the criminal trial commences, Mr White and Mr Du Plooy will be *au fait* with our clients' trial strategy. This will amount to trial related prejudice not capable of being cured.

12. The Commission is widely publicised with a huge and varied audience. Other witnesses who will be testifying in the trial against our clients will have the opportunity to hear the evidence against our clients before those witnesses testify. This is not allowed in a court of law as the prejudice to the accused is abundantly clear.

13. The presiding officer who will hear our client's trial will have the opportunity of hearing the evidence before it is presented before him or her. Our client's right to be presumed innocent before the court will be severely infringed. Our clients are facing serious charges which attract heavy sentences if convicted.

14. We request therefore that the evidence of Mr White and Mr Du Plooy be held over at the Commission, at least until such time that they have testified in the criminal trial against our clients.

15. With the Durban High Court having granted our clients a separation order, thereby effectively ordering that their trial commence without delay, we expect that the trial will be heard during the first part of the year (2020).

16. The prejudice which will be suffered by our clients if the evidence of Mr White and Mr Du Plooy is adduced on 20 January 2020 far outweighs the prejudice which will befall the Commission in delaying the hearing of the evidence for a few months. Based on what we have gleaned from the media and watching the proceedings of the Commission, it is likely that the Commission will endure for at least another year still.

17. We trust that our request will meet your approval.

18. However, should you not be amenable to granting our request we find it prudent to advise you that our instructions are to bring an urgent application before the Gauteng Division of the High Court to interdict the adducing of any evidence before the Commission, against our clients at this stage. Such application will be brought on Friday, 17 January 2020.

19. We request that you revert to us by close of business on Wednesday, 15 January 2020 to enable us to brief Counsel and draft the papers. Should we not hear from you at the end of the said period, we will proceed and draft the papers for the urgent application.

Yours Faithfully

(Electronically sent and therefore unsigned)

MR SD MOLOI

S.D. MOLOI & ASSOCIATES INC.

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

17 January 2020

To: Mr S. D. Moloi
S D Moloi & Associates Inc
Email: moloi@sdmoloi.com

Dear Sir

RE: RULE 3.3 NOTICE // SIPHO DERRICK SHABALALA & NTOMBENHLE BEATRICE SHABALALA ("YOUR CLIENTS") // EVIDENCE OF MR TREVOR WHITE & COLONEL P. JOHANNES DU PLOOY

1. We refer to your correspondence dated 14 January 2020, in respect of your request that the evidence of Mr. White and Colonel Du Plooy not be led as scheduled.

2. If you wish to persist in your stance, you may bring an application before the commencement of the hearing of Mr. White's evidence on Monday, 20th January 2020, which is when Mr. White's evidence is scheduled to be led.

3. The application should be brought before the Chairperson of the Commission, Honourable Deputy Chief Justice Raymond Zondo, and he will determine the application.

4. In the event of a change of date, for the leading of Mr. White's evidence, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media. Please do not hesitate to contact the Secretariat of the Commission regarding this matter.

Yours faithfully

_____

Ms. Brigitte Shabalala
Acting Secretary
JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

3.

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 6120/2018D

In the matter between:

SIPHO DERRICK SHABALALA **FIRST APPLICANT**

BEATRICE NTOMBEHHLE SHABALALA **SECOND APPLICANT**

and

THE STATE **RESPONDENT**

ORDER

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(1) The appliation is granted.

(2) The criminal trial of the first and second appliants currently pending in this court under case number CC14/2012, is seperated from the trial of the other accused in terms of section 157(2) of the Criminal Procedure Act, No 51 of 1977.

(3) The respondent is ordered to pay the costs of this application on a party and party scale.

JUDGMENT

Date delivered: 17 December 2019

Ncube A J:

Introduction

[1] This is an application for a seperation of trials, in respect of a criminal trial which is pending in this Division, under case number CC14/2012. The two applicants, who are husband and wife ('the applicants') ask the court to have their trial seperated from that of their co-accused, in terms of section 157(2) of the Criminal Procedure Act[1] ('the CPA'). The trial, which has been on the roll for eight (8) years, has not commenced as yet. The application is only opposed by the State. Other accused persons do not oppose this application.

Background facts

[2] The applicants were arrested with other 21 accused persons and entities, on 20 October 2010. They were charged with various offences, ranging from racketeering, corruption, fruad and money laundering. The indictment lists 17 charges. Out of 17 charges, the first applicant faces a total of seven counts, which are racketeering, fraud, corruption, two counts of money laundering and two counts of failing to comply with the Public Finance Management Act. The second applicant faces only two charges which are money laundering and acquisition, possession or use of proceeds of unlawful activities in contravention of the Prevention of Organised Crime Act[2] ('POCA').

[3] In 2012, charges were withdrawn against some of the accused persons. Currently the applicants are indicted with six others and two entities. The trial has not taken off the ground as it has been constantly adjourned at the instance of accused one, two and three who have made several interlocutory applications without success.

[4] The applicants made their first appearance in High Court Pietermaritzburg on 20 January 2012 when a pre-trial conference was held and matter set down for trial from 16 to 20 July 2012. On 16 July 2012 another pre-trial conference was held and

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[1] Act 51 of 1977.
[2] Act 121 of 1998.

the matter was set down for trial during the session starting 01 October to 14 December 2013. When the matter came before court on 01 October 2012, charges were formally withdrawn against some of the accused, with only 11 accused remaining in the dock. Consequent upon the withdrawal of charges against some of the accused, the prosecution prepared a new indictment, which is the current one.

[5] The case never proceeded on the prescribed dates since accused one to three decided to challenge the constitutionality of certain provisions of POCA in the Costitutional Court. That application was to be heard by the Constitutional Court on 11 and 12 of December 2012. The criminal trial was then adjourned to 29 July 2013. On 29 July 2013 accused one and two were not present in court and by arrangement with the State, their warrants of arrest were authorised and stayed till 10 February 2014. In May 2013 accused one to three had applied for a permanent stay of prosecution.

[6] On 10 February 2014 the matter was adjourned to 20 January 2015, still awaiting the decision of the Constitutional Court regarding constitutional challenge by accused one to three. It was only on 20 March 2015 that the Constitutional Court handed down its judgment, dismissing the Constitutional challenge application. Later the matter was adjourned to 08 February 2016 in order to accomodate the application for a permanent stay of prosecution brought by accused one to three.

On 08 February 2016, the matter was adjourned to 06 February 2017 as the permanent stay of prosecution was still pending. On 06 February 2017, the matter was adjourned again. Accused one to three had launched an application to obtain certain documents from the State. The judgment in respect of that application, was delivered on 23 February 2018. By that time, the criminal case had been adjourned to 11 March 2019.

[7] Accused one to three applied for leave to appeal against the refusal of their application to obtain documents from the State. Application for leave was heard on 06 September 2018 and dismissed on 11 September 2018. On 10 October 2018, accused one to three petitioned the Supreme Court of Appeal ('SCA'). The SCA refused the leave to appeal on 18 February 2019. On 11 March 2019 accused one to three approached the Constitutional Court for leave to appeal. On 02 May 2019 the

Constitutional Court refused the leave to appeal. The date for hearing of the appliation for permanent stay of prosecution is now set for 05 and 06 March 2020.

[8] Mr Willem Van Der Colff ('Mr Van Der Cloff'), attorney for acussed one to three filed an affidavit in which he alludes to the fact that even though the date for hearing of the application for permanent stay of prosecution, has been fixed, that application may be referred to hearing of oral evidence. If the application is referred for hearing of oral evidence, that might cause even more delay in the hearing of the trial.

The Law

[9] Section 157(2) of the CPA provides:

'Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held seperately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.'

In the normal course of events, it is the judicial officer seized with the trial who hears the application for the seperation of trials. In *casu*, the trial has not commenced. There is no judge who is seized with the trial in this, case hence the need for these motion proceedings.

[10] Although the section makes provision for a seperation of trials on application by the State or the accused, in certain instances, the court may *mero mutu* order a seperation of trials in order to avoid prejudie to the accused[3]. The main consideration is prejudie. The test whether to grant the seperation of trials, is whether the applicant will suffer prejudice if a joint trial takes place[4]. The prejudice which the applicant will suffer if a seperation of trials is refused, is set off against the prejudice to the other

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[3] S v Ndwandwe 1970 (4) SA 502 (N).
[4] S v Nzuza and another 1952 (4) SA 376 (A).

party if a seperation is allowed. The court will have to decide if it will be in the best interest of justice that a seperation of trials be allowed[5].

Prejudice to the applicants

[11] Miss Shazi, counsel for the applicants, argued that both applicants are prejudiced by the non-trial of the criminal case. The first applicat was employed as a Chief Executive Officer ('the CEO') of Ithala Development Bank and as a result of his arrest, he was dismissed from work and he has been unemployed ever since. The applicants owed four businesses, which were all taken over by the Asset Forfeiture Unit ('the AFU') of the National Prosecuting Authority. In the hands of the AFU all the businesses except the farm, were placed under liquidation and were disposed of.

[12] The second applicant states in her founding affidavit, that she and the first applicant have had to endure a severe financial burden in paying legal fees. Since they are not employed, they had to sell some of their remaining assets in order to pay legal fees. Ms Shazi argued further that as the second applicant is facing only two counts out of 17 counts, she will be expected to remain in the dock listening to witnesses testifying in respect of other 15 counts which have nothing to do with her. She will have to pay her legal representative to stay in attendance, listening to evidence which has no bearing on the second applicant. The State concedes in its answering affidavit, that the witnesses who will testify regarding 15 counts which the second applicant is not facing, are not the same as those who will testify regarding the two counts which she is facing. Despite this, Ms Mansingh counsel for the State, argued that prejudice which applicants are enduring, is part and parcel of being an accused in a criminal trial. This line of reasonig ignores the presumption of innocence in a criminal trial.

Discussion

[13] For the period of eight (8) years, the applicants have been waiting patiently for the trial to resume. The numerous adjournments which were granted, were not as a

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[5] See S v Somciza 1990 (1) SA 361 (A) at 367 E-F, S v Plaatjies en 'n Ander 1997 (2) SACR 280 (O).

result of any fault on the part of the applicants. It is not sufficient to say the applicants did not object to the adjournments as Ms Mansingh seems to suggest, it is equally not enough to say the prejudice the applicant endure is part and parcel of being an accused in a criminal trial. The applicants have a constitutional right to a speedy trial[6].

[14] The Constitutional Court has said that the right to a speedy trial is at the forefront of the requirement for a fair criminal trial[7]. Dealing with delay-related prejudice in Anderson v Attorney – General, Eastern Cape[8], Kriegel J referred to a whole range of disadvantages that can befall an accused person in a criminal case. These include restrictive bail conditions, loss of reputation, social ostracism, loss of employment or income and loss of credibility with the general public.

[15] If trials are seperated the only prejudice to the State is that the prosecution will be required to lead same evidence twice. This prejudice is to be weighed agaist the prejudice suffered by the applicants. Applicants have lost businesses. They have sold their assets in order to pay legal fees. They have lost employment. First applicant lost his position as a CEO of Ithala Development Bank. In his founding affidavit, first applicant states that there is no one who wants to employ him whilst the criminal case is still pending. The prejudice which applicants will suffer if trials are not seperated weighs heavily against that which the State will suffer if the trials are seperated.

[16] Generally speaking, it is undesirable to have a multiplicity of proceedings. However, each case is to be decided on its own merits. A period of eight (8) years awaiting trial is an over-lengthy delay. It is more so when the adjournments have nothing to do with the applicants. Even if accused one to three succeed in their application for a stay of prosecution, the trial will proceed against the applicants. If the stay of prosecution is refused, accused one to three may decide to appeal up to the Constitutional Court, as they have done in the past. The State has indicated that it is ready to proceed with the trial once accused one to three have settled all their interlocutory applications. The applicants cannot wait until the other accused have exhausted all their applications.

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[6] Section 35(3)(d) of the Constitution, 1996.
[7] Wild v Hoffert 1998 (3) SA 695 (CC).
[8] 1998 (2) SA 38 (CC)

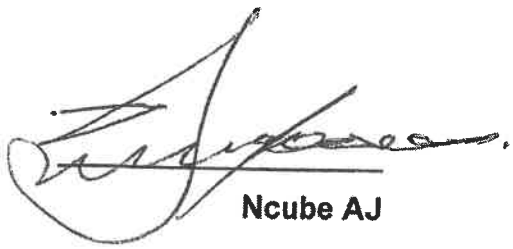
Order

[17] In the result, I make the following order:

(1) The appliation is granted.

(2) The criminal trial of the first and second appliants currently pending in this court under case number CC14/2012, is seperated from the trial of the other accused in terms of section 157(2) of the Criminal Procedure Act, No 51 of 1977.

(3) The respondent is ordered to pay the costs of this application on a party and party scale.



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Appearances:

For the Applicants:	Adv K Shazi
Instructed by:	Moloi & Associates Attorneys, Durban.
For The Respondents:	Adv R Mansingh, Sandton
Instructed by:	State Attorney Durban.
Date of hearing the matter:	18 October 2019.
Date of judgment:	17 December 2019

4.

In the application of

SIPHO DERRICK SHABALALA AND NTOMBENHLE BEATRICE SHABALALA

before

CHAIRPERSON, COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

WRITTEN SUBMISSIONS: LEGAL TEAM

SUMMARY

1. It is firmly established in our law that where an accused person is implicated in parallel civil and criminal proceedings, a stay will only be granted where there is an element of state compulsion impacting on the accused's right to remain silent.

2. The applicants are not under any *compulsion* to provide self-incriminating evidence before the Commission and they enjoy a right to remain silent (for the present at least). Nor are they obliged to cross-examine (and forward put a version).

3. Instead they face a *choice.* They may challenge the witnesses' evidence by testifying and cross-examining, or they may remain silent (for the present at least).

4. The right against self-incrimination does not protect the applicants in either case. Such interest as they have alleged is not legally protected.

5. The alleged interests must moreover be weighed against the statutory duty of the Commission to investigate and hear evidence of criminal activity. Nothing that the applicants have alleged derogates from this duty.

6. If the Commission were obliged to delay evidence of criminal activity until the conclusion of a related criminal trial, the Commission would be rendered superfluous.

7. Seen in this light, the contentions of the applicants are nonsensical and their application for a stay of evidence must be dismissed.

A. INTRODUCTION

8. The Legal Team intends to lead evidence from Mr White and Colonel du Plooy.

9. This evidence implicates the applicants in activity that is the subject of a criminal trial that has been pending against Mr and Mrs Shabalala since 2010.[1]

10. Mr White and Colonel du Plooy are key witnesses in this criminal trial, but they have not testified in court as the trial is yet to commence.[2]

11. After receiving a rule 3.3 notice, the applicants requested that this evidence be held over at the Commission until these two witnesses have testified in the criminal trial.[3]

12. The applicants argue that Mr White and Colonel du Plooy's testimony before the Commission will prejudice them and undermine their fair trial rights as accused in pending criminal proceedings.[4]

13. On the one hand, the applicants claim that they do not wish to leave any allegation against them unchallenged.[5] They accordingly contend that they would, under ordinary circumstances, take up the option of giving evidence at the Commission and cross-examining any witness who implicates them.[6]

14. On the other hand, the applicants contend that cross-examining Mr White and Colonel du Plooy would prejudice them by prematurely exposing their trial strategy.[7]

15. The applicants further allege that the fairness of their criminal trial will be undermined by the public ventilation of incriminating evidence against them.[8]

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[1] Letter from the applicants' attorneys to the Commission dated 14 January 2020 at para 4.
[2] Id at para 8.
[3] Id at para 14.
[4] Id at paras 9 and 11.
[5] Id at para 10.
[6] Id.
[7] Id at para 11.
[8] Id at para 12.

In particular, they contend that their right to be presumed innocent will be infringed if the presiding officer and witnesses in their criminal case hear adverse evidence against them before the commencement of their trial.[9]

16. The Legal Team opposes this application, both on its merits and on principle.

B. THE EFFECT OF PENDING CRIMINAL PROCEEDINGS ON THE COMMISSION'S INVESTIGATION

(a) Choice or compulsion to testify: the scope of the right to remain silent

17. The applicants' objection to the testimony of Mr White and Colonel du Plooy before the Commission turns on the potential for this evidence to incriminate them.

18. They contend that any allegations made against them would, if left unchallenged, prejudice the fairness of their pending criminal trial.

19. It is now firmly established in our law that where an accused person is implicated in parallel civil and criminal proceedings, a stay will only be granted when there is an element of state compulsion impacting on the accused's right to remain silent.[10]

20. This general principle was articulated in the leading decision of *Davis v Tip N.O.*[11] and has been consistently applied in our High Courts.[12]

21. The facts of *Davis* are instructive for purposes of the present application:

    21.1 The applicant in *Davis* was a senior official in the Johannesburg City Council who sought to postpone a disciplinary inquiry into allegations of

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[9] Id at para 13.
[10] This formulation is drawn from the authoritative restatement of the general principle in *Law Society of the Cape of Good Hope v Randell* [2013] ZASCA 36; 2013 (3) SA 437 (SCA) (*Randell*) at para 23.
[11] *Davis v Tip N.O.* 1996 (1) SA 1152 (W).
[12] See, for example, *Fourie v Amatola Water Board* (2001) 22 ILJ C94 (LC); *Gilfillan t/a Grahamstown Veterinary Clinic v Bowker* 2012 (4) SA 465 (E); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & De Wet N.N.O.* 1997 (2) SA 636 (W) (*Seapoint*); and *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

fraud and bribery against him on the basis that these allegations were the subject of pending criminal charges against him.[13]

21.2 In the disciplinary inquiry, the applicant had the right to give evidence and cross-examine other witnesses, but was not compelled to do so.[14]

21.3 He nevertheless alleged that his right to remain silent would be infringed if the inquiry were to proceed before the criminal investigation had been completed.[15]

22. In dismissing the applicant's challenge, Nugent J held that the right to remain silent was not implicated by the prior commencement of a disciplinary inquiry:

> "Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information."[16]

23. This general principle articulated in *Davis* has been affirmed by a unanimous Supreme Court of Appeal on two occasions: first, in *Randell*[17] and, even more recently and on point, in *Singh*.[18]

24. The principle is also consistent with the Constitutional Court's decisions in *Bernstein v Bester*[19] and *Ferreira v Levin*:[20]

24.1 In *Bernstein*, the Court upheld the constitutionality of robust examination mechanisms under the Companies Act.

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[13] *Davis* above n 11 at 1154E-G.
[14] Id at 1154I-J.
[15] Id at 1155D-E.
[16] Id at 1157E-H. See further *National Director of Public Prosecutions v Prophet* 2003 (6) SA 154 (C)(*Prophet*) at para 9 and *Seapoint* above n 12 at 648.
[17] *Randell* above n 10 at para 23.
[18] *Singh v Companies and Intellectual Property Commission* [2019] ZASCA 69; 2019 (5) SA 432 (SCA).
[19] *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).
[20] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

24.2 This was subject to the narrow exclusion the Court had laid down in *Ferreira* that an examinee's compelled self-incriminating answers cannot be used in subsequent criminal proceedings against them.

25. In the present circumstances, Mr and Mrs Shabalala have not been compelled to provide self-incriminating evidence before the Commission.

26. The Commissions Act[21] and Commission Regulations[22] protect, at least to a degree, a witness who is compelled to appear before the Commission:

26.1 Section 3(4) of the Commissions Act stipulates that the law relating to privilege applies to a witness before a commission.[23]

26.2 Regulation 8(1) confirms that section 3(4) applies to the present proceedings.[24]

26.3 Regulation 8(2) renders inadmissible in any subsequent criminal proceedings the record of evidence given by a witness before the Commission and any fact or information that comes to light pursuant to that evidence.[25]

27. The *choice* that Mr and Mrs Shabalala have to testify before the Commission in order to rebut incriminating evidence against them should not be confused with a legal *compulsion* to testify.[26]

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[21] 8 of 1947.

[22] Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, GN 105 *GG* 41436 (9 February 2018).

[23] Section 3(4) provides as follows:

> "Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, *and in connection with the giving of any evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply*." (emphasis added)

[24] Regulation 8(1) of the Commission Regulations provides as follows:

> "No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947 (Act No.8 of 1947)."

[25] Regulation 8(2) of the Commission Regulations provides as follows:

> "No evidence regarding questions and answers contemplated in sub-regulation (1), and no evidence regarding any fact or information that comes to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No.8 of 1947), or regulation 12."

[26] *Prophet* above n 16 at para 9.

28. In *Randell*, the Supreme Court of Appeal warned against a conflation of compulsion with choice in the context of parallel proceedings:

> "[A] distinction must be maintained between the situation where an individual has the choice whether to testify (even though the alternatives over which he has a choice are equally unattractive) and where he is compelled to because a failure to do so attracts a penalty. According to the decision in *Davis* this is necessary to ensure that the 'salutary principle', enshrined in the right to silence is not to be extended beyond its true province and thereby risks falling into disrepute."[27]

29. Mr and Mrs Shabalala's application for a stay of evidence attempts exactly such an extension. They seek to assert their right to remain silent to protect them from incriminating evidence brought by *other* witnesses before the Commission.

30. This is impermissible. The applicants' right to remain silent cannot be used to silence other witnesses who may offer incriminating evidence before the Commission.

31. The applicants may *choose* to remain silent in order to avoid incriminating themselves before the Commission, but this right does not immunise them from the consequences of their choice, namely to allow incriminating evidence to go unchallenged.

32. As Nugent J observed in *Davis*:

> "[T]he preservation of the applicant's rights lies entirely in [their] hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices [they] may be called upon to make."[28]

33. The right to remain silent cannot shield the applicants from this choice or its consequences:

> "Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion."[29]

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[27] *Randell* above n 10 at para 31, affirming *Davis* above n 11 at 1158H-J.
[28] *Davis* id at 1157G-I.
[29] *Davis* id at 1159A-C. See also *Seapoint* above n 12 at 647F-I and 649G-I; *Prophet* above n 16 at para 11; and *Equisec (Pty) Ltd v Rodriguez* 1999 (3) SA 113 (WLD) at 115A-B.

(b) The choice to apply for leave to cross-examine witnesses

34. The applicants also allege prejudice in relation to a further choice that they face, namely the choice to cross-examine Mr White and Colonel du Plooy:

34.1 The applicants contend that they will suffer prejudice if they opt *not* to cross-examine these witnesses before the Commission because it would leave their allegations unchallenged.[30]

34.2 Yet the applicants further contend that they will also suffer prejudice if they *do* cross-examine these witnesses because it would prematurely expose their trial strategy in their pending criminal case.[31]

35. Before responding to the merits of this argument, it is necessary to clarify at the outset that no implicated person or witness has a *right* to cross-examine in the Commission.

36. Rather, it is the Chair who has a discretion to grant of refuse leave to cross-examine:

36.1 Regulation 8(3) and Rule 3.7 stipulate that the Chair will exercise his discretion to grant leave if he deems cross-examination to be necessary and in the best interests of the Commission's work.[32]

36.2 This approach has been consistently followed in the determination of applications for leave to cross-examine that have been brought before the Chair so far in the Commission.[33]

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[30] Letter above n 1 at para 11.
[31] Id at para 11.
[32] Regulation 8(3) provides as follows:
> "Any witness appearing before the Commission may be cross-examined by a person only if the Chairperson permits such cross-examination should he deem it necessary and in the best interest of the function of the Commission."

Rule 3.7 provides as follows:
> "In accordance with Regulation 8(3), there is no right to cross-examine a witness before the Commission but the Chairperson may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so."

[33] See, for example, the Chairperson's decision on the application for leave to cross-examine brought by Mr Ajay Kumar Gupta, Mr Rajesh Gupta and Mr Duduzane Zuma (13 September 2018).

37. While leave to cross-examine will not easily be refused where a witness has made serious allegations against an implicated person before the Commission, the important point is that cross-examination is not an entitlement to be taken for granted.

38. Putting this preliminary issue aside, however, the applicants' allegation of prejudice has no merit.

39. The alleged prejudice of premature exposure of an accused's trial strategy has been rejected by our courts as a ground for a stay of proceedings.

40. In *Prophet*, the High Court affirmed that litigants "cannot be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters pertaining to the civil proceedings".[34]

41. More recent and apposite authority for this position is found in the Supreme Court of Appeal's 2019 decision in *Singh*:[35]

    41.1 In *Singh*, the appellants challenged a decision by the Companies and Intellectual Property Commission to investigate a complaint against them and to authorise summons compelling Singh to testify before the Commission.[36]

    41.2 The appellants contended that if the Commission's investigation was allowed to continue, it would provide "a preview of the evidence to be presented at the upcoming trial'.[37]

    41.3 They accordingly argued that Singh's co-operation with the Commission's investigation would prejudice their pending civil litigation.[38]

42. As the Supreme Court of Appeal unanimously observed, "[t]his submission flies in the face of formidable authority".[39]

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[34] *Prophet* above n 16 at para 10. See also *Mitchell v Hodes N.NO.* 2003 (3) SA 176 (C) at 209B-C.
[35] *Singh* above n 18.
[36] Id at para 4.
[37] Id at para 19.
[38] Id at para 21.
[39] Id at para 22.

43. Commending the approach taken in *Davis* and the cases that followed it,[40] the Supreme Court of Appeal held that "the appellants have shown no prejudice of a kind which these judgments had in mind".[41]

44. As with the applicants' decision to remain silent or to testify before this Commission, the decision to cross-examine remains a *choice*, notwithstanding the consequences that may attach to it.

45. The trade-offs involved in electing to cross-examine are part and parcel of the strategic choices that must inevitably be made by a person implicated in parallel proceedings:

> "Simply put, when a party is required to appear in different fora, each of which has jurisdiction in respect of the subject-matter, the manner in which that party deals with the process in each forum is a matter of choice, which holds particular consequences attendant on the choice so made."[42]

46. In the present proceedings, Mr and Mrs Shabalala have the choice to cross-examine Mr White and Colonel du Plooy.

47. They also have some agency in timing the exercise of this election, as they could cross-examine these witnesses now or at a later stage depending on how their criminal trial progresses in relation to the Commission's work.

C. THE MANDATE OF THE COMMISSION

48. No allegation of prejudice or unfairness made in Mr and Mrs Shabalala's application derogates (or may derogate) from the statutory duty of the Commission to investigate criminal activity in accordance with its mandate.

49. Moreover, an assessment of prejudice as a ground for staying evidence must not only consider prejudice to the accused, but also the need to protect the public interest.[43]

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[40] Id at para 22-23.
[41] Id at para 24.
[42] Id at para 24.
[43] *Randell* above n 10 at para 33.

50. In *Singh*, the Supreme Court of Appeal held that the Companies and Intellectual Property Commission must be empowered to perform its investigative function as its fulfilment of this mandate is manifestly in the public interest.[44]

51. The work of this Commission will be undermined if Mr and Mrs Shabalala's application for a stay of evidence is granted.

52. Most immediately, the hearing of Mr White and Colonel du Plooy's evidence will be rendered contingent on the progress of Mr and Mrs Shabalala's criminal trial:

    52.1 Their criminal trial has been pending since 2010 and its progress lies outside of their control.

    52.2 A stay of evidence will therefore effectively delay this evidence indefinitely.

    52.3 Given the finite lifetime of the Commission, an indefinite postponement would likely mean that the Commission will not hear this evidence at all.

53. Moreover, granting a stay of evidence in these circumstances creates a precedent that would severely hamper the work of the Commission going forward:

    53.1 The Commission has a duty to investigate allegations of state capture, fraud and corruption in the public sector which, by definition, covers criminal activity of a particular kind.

    53.2 In this sense, every implicated person is a potential suspect.

    53.3 The Legal Team must be able to lead evidence that may implicate or incriminate persons if it is to effectively fulfil its statutory duty.

    53.4 Yet the productive work of the Commission would be brought to a halt if every implicated person could stay incriminating evidence that is the subject of pending or future criminal charges against them.

54. These consequences of a stay of evidence go to the heart of the Commission's mandate and integrity.

[44] *Singh* above n 18 at paras 26-27 under the section entitled "The significance of the Commission's mandate".

55. Not only would the critical evidence of Mr White and Colonel du Plooy be indefinitely delayed, but similar applications brought on the heels on this precedent would chronically constrain the Commission's ability to lead evidence of criminal activity.

56. In light of the Commission's statutory duty, and the overwhelming public interest in the Commission's effective discharge of its mandate, the application for a stay of evidence must be refused.

D. CONCLUSION

57. The statutory mandate of the Commission must be followed. This duty outweighs any alleged prejudice (which is denied) as contended for by the applicants.

58. In short, the Commission must do its work. Any impact on fair trial rights may be appropriately assessed at the criminal trial.[45]

59. The mandate and proper sequence of the Commission's work is clear. It must investigate allegations of criminal activity and make recommendations, including recommendations of prosecutions.

60. To assert that its work must be delayed pending criminal trials would render the Commission superfluous.

[45] *Prophet* above n 16 at para 10 and *Mitchell* above n 34 at 212A-B.

DAVIS v TIP NO AND OTHERS 1996 (1) SA 1152 (W)

Citation	1996 (1) SA 1152 (W)
Case No	27358/94
Court	Witwatersrand Local Division
Judge	Nugent J
Heard	May 4, 1995; May 5, 1995
Judgment	June 13, 1995
Counsel	B E Leech for the applicant. No appearance for the first respondent. C E Watt-Pringle (with him D B Spitz) for the second respondent.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Constitutional law - Human rights - Protection of - Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Protection of fundamental rights not solely domain of Courts - Disciplinary tribunal therefore competent to inquire into alleged C violation of fundamental rights.

Constitutional law - Human rights - Right of accused to remain silent in terms of s 25(3)*(c)* in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993-Section 25(3)*(c)* not enlarging upon common-law right to remain silent in the face of a criminal charge, but guaranteeing its future existence. D

Constitutional law - Human rights - Right of accused to remain silent in terms of s 25(3)*(c)* in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Civil proceedings invariably create potential for information damaging to accused in subsequent criminal proceedings being E disclosed by the accused - Exposure of accused to inevitable choice of testifying or remaining silent in civil proceedings not conflicting with right to remain silent - Courts will intervene in civil proceedings to protect right to remain silent only where there is potential for compulsion by State to divulge information.

F Constitutional law - Human rights - Right of accused to remain silent in terms of s 25(3)*(c)* in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Right exists to ensure that there is no potential for coercion of accused person to incriminate him/herself - Right not shielding accused from making legitimate choice to testify - Compulsion to G testify distinguished from choice to testify by whether alternative that presents itself constitutes a penalty which serves to punish person for choosing particular route as inducement to him or her not to do so - Choice facing applicant between giving potentially incriminating evidence to a disciplinary inquiry and losing his employment legitimate and not amounting to compulsion to testify. H

Headnote : Kopnota

The applicant was employed by the second respondent, the Greater Johannesburg Transitional Metropolitan Council (formerly the Johannesburg City Council) as the executive director of the Directorate of Public Safety. His employment was governed by the Council's standard conditions I of service, which included a chapter dealing with misconduct by an employee. The Council convened an inquiry in terms of the chapter into allegations of *inter alia* bribery, corruption and theft which had been made against the applicant. The first respondent was appointed to conduct the inquiry. The inquiry was due to commence on 5 September 1994, but was postponed to 3 October 1994.

The applicant's conditions of service provided that an employee could be charged with misconduct, an inquiry conducted into those charges and a penalty imposed despite the fact that criminal proceedings which might J have been instituted against the

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A employee in respect of the same charges had not been finalised. On 14 September 1994 the applicant was arrested on charges of fraud and theft and later released on bail, subject to the condition that he make no attempt to interfere with certain witnesses. It was common cause that certain of the charges investigated by the police arose from the same circumstances underlying certain of the allegations in issue in the B inquiry conducted by the first respondent. When the inquiry resumed on 3 October 1994 the applicant applied for it to be postponed until after the conclusion of the criminal proceedings, alleging that if the inquiry proceeded his right to remain silent at his trial could be compromised. He also alleged that his conditions of bail precluded him from consulting with witnesses and that this would prejudice him at the inquiry. The first respondent dismissed the application for postponement, but allowed the applicant an opportunity to seek relief in the Supreme Court before proceeding with the inquiry. The applicant accordingly brought an C application seeking the setting aside of the first respondent's refusal to grant the postponement. It was argued that the applicant's right to remain silent during his criminal trial guaranteed by s 25(3)*(c)* of the Constitution of the Republic of South Africa Act 200 of 1993 would be violated if the inquiry proceeded, since he might of necessity be called on to answer evidence given against him if he wished to avoid a finding of misconduct. The applicant's evidence could then be used against him in the criminal proceedings. Accordingly, it was argued, the first D respondent was bound to postpone the inquiry until after the criminal proceedings were concluded.

Held, that it was competent for the first respondent to enquire into an alleged violation of constitutional rights. The Constitution was not solely the domain of the Courts. The fundamental rights chapter (chap 3) was the touchstone for testing the validity of conduct that was subject to its terms. It was the light which guided those who were bound to act in E accordance with its terms, and not one against which their eyes were to be shielded. The role of the Courts was merely to ensure that there was no deviation from the path. Accordingly, the only question the Court was required to decide was whether the first respondent's conclusion that the applicant's constitutional rights would not be infringed by the continuation of the proceedings was correct. (At 1156C/D-E/F.)

Held, further, that s 25(3) did not enlarge upon the common-law right to remain silent in the face of a criminal charge, but guaranteed its future existence. (At 1156H.)

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Held, further, that, while civil proceedings invariably created the potential for information damaging to the accused being disclosed by the accused, not least so because it would often serve his or her interests in the civil proceedings to do so, the exposure of an accused person to

those inevitable choices had never been considered to conflict with the right to remain silent during the criminal proceedings: where the Courts had intervened to protect the right to remain silent, there had always been a further element, namely the potential for compulsion by the State to divulge information. In the present case the preservation of the applicant's rights lay entirely in his own hands, and there was no such element of compulsion. (At 1157E/F-F/G and 1157H.)

Held, further, that the right to remain silent derived from an abhorrence of coercion as a means to secure convictions by self-incrimination and existed to ensure that there was no potential for such coercion to occur: it achieved this by protecting an accused person from being placed under compulsion to incriminate himself or herself and not by shielding him or her from making a legitimate choice to testify. What distinguished compulsion to testify from the choice to testify was whether the alternative that presented itself constituted a penalty which served to punish a person for choosing a particular route as an inducement to him or her not to do so. While the distinction between choice and compulsion might at times be a fine one, it was essential that it should be maintained if a salutary principle was not to be extended beyond its true province, thereby risking its falling into disrepute. (At 1158G-H and 1158H/I-J.)

Held, further, that, even if in the present case the applicant might be required to choose between incriminating himself or losing his employment, his loss of employment would be a consequence of the choice he had made and not a penalty for having done so: it would be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. Hard as the choice might be, it would

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be a legitimate one which the applicant could be called upon to make and would not amount to compulsion: the right to silence did not shield him from making that choice. (At 1159A-B/C.) Application dismissed.

The following decided cases were cited in the judgment of the Court:

Du Toit v Van Rensburg 1967 (4) SA 433 (C)
Gratus & Gratus (Prop) Ltd v Jackelow 1930 WLD 226
Irvin & Johnson Ltd v Basson 1977 (3) SA 1067 (T)
Kamfer v Millman and Stein NNO and Another 1993 (1) SA 122 (C)
Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy) (1993) 18 CRR (2d) D-6 (Digest) (117 NSR (2d) 218)
Williams v Deputy Superintendent of Insurance (1993) 18 CRR (2d) 315 (Nova Scotia SC)
S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401).

Case Information

Application for an order setting aside or correcting the ruling of the first respondent in a disciplinary inquiry against the applicant. The facts appear from the reasons for judgment.

B E Leech for the applicant.

No appearance for the first respondent.

C E Watt-Pringle (with him *D B Spitz*) for the second respondent.

Cur adv vult.

Postea (June 13).

Judgment

NUGENT J: The first respondent is an advocate practising at the Johannesburg Bar. He was appointed by the Town Clerk of the Johannesburg City Council to enquire into allegations of, *inter alia*, bribery, corruption and theft which have been made against the applicant, who is employed by the council. This is an application to review a ruling made by the first respondent at the commencement of the inquiry.

Since the ruling was made the Johannesburg City Council has been incorporated into the Greater Johannesburg Transitional Metropolitan Council, which has succeeded to all its rights, duties and obligations. For convenience I will refer to the parties and the officials by their former designations.

The position occupied by the applicant is high in the council's hierarchy. He is the executive director of the Directorate of Public Safety, and reports directly to the Town Clerk, who is the most senior official in the council's service. The applicant's employment is governed by the council's standard conditions of service, which include a chapter dealing with misconduct.

The inquiry has been convened in terms of that chapter, and the first respondent's duty is to establish whether the applicant has been guilty of misconduct as defined therein. If the applicant is found guilty of misconduct, one or more penalties may be imposed, including dismissal. The applicant may not be dismissed unless he is found guilty of misconduct, and he may not be suspended in the meantime unless this is done on full pay. While the applicant is entitled to give evidence at the inquiry, he cannot be compelled to do so. He may cross-examine witnesses who give evidence against him, and may call his own witnesses.

The conditions of service also contain the following provision:

> 'An employee may be charged, an inquiry may be conducted, and a penalty in terms of this chapter may be imposed, despite the fact that criminal proceedings which may have been instituted against the employee, have not been finalised.'

The inquiry which is in issue in these proceedings was due to commence on 5 September 1994. On that day it was postponed to 3 October 1994 to allow for various documents and further particulars to be furnished by the applicant.

On 14 September 1994 the applicant was arrested by the police on charges of fraud and theft. He was released on bail. One of the bail conditions was that he should not 'interfere directly or indirectly' with certain specified witnesses.

It is common cause that certain of the charges being investigated by the police arise from the same circumstances which underlie certain of the allegations which are in issue in the inquiry being conducted by the first respondent. The police investigation may also result in further criminal charges being brought against the applicant.

When the inquiry resumed on 3 October 1994 the applicant applied for it to be postponed until after the criminal proceedings had been concluded. He alleged that, if the inquiry proceeded, his right to remain silent at his trial could be compromised. He also alleged that his conditions of bail precluded him from consulting with witnesses and that this could prejudice him at the inquiry.

The first respondent dismissed the application to postpone the inquiry until after the criminal proceedings had been concluded, but nevertheless allowed the applicant an opportunity to seek relief in this Court before proceeding with the inquiry.

The present application is for an order setting aside or correcting the first respondent's ruling. The applicant also sought an order compelling the council to furnish him with certain documentation, but that relief was not pursued.

In his affidavit the applicant alleged that the first respondent had a discretion to postpone the inquiry, which he had failed to exercise

properly. It was alleged that the decision made by the first respondent was

> '. . . so grossly unreasonable as to warrant the inference that he failed to apply his mind to the relevant issues in accordance with the provisions of the conditions of service and the tenets of natural justice'.

That was the only ground relied upon in the founding affidavit for the relief which was sought, and it has no merit. It is clear from the reasons furnished by the first respondent that he properly considered the matter, taking into account all the relevant factors in doing so. Counsel for the applicant could point to nothing in the first respondent's reasons to indicate the contrary. If the respondent did have a discretion in the matter, he exercised it properly, and any attack upon his ruling on those grounds must fail.

However, the argument before me took a different course, relying instead on the terms of chap 3 of the Republic of South Africa Constitution Act 200 of 1993 ('the Constitution').

It was submitted that the applicant's right to remain silent during his criminal trial, which is guaranteed by s 25(3) of the Constitution, will be

violated if the inquiry proceeds. Accordingly, so it was submitted, the first respondent had no discretion in the matter, but was bound to postpone the inquiry until the criminal proceedings have been concluded. It was submitted that this Court should exercise the jurisdiction conferred on it by s 101(3) of the Constitution to prevent the violation occurring.

Although it was not pertinently raised in the founding affidavit, the issue referred to above was fully argued before me.

I have assumed that the council in its dealings with its employees is indeed bound to observe the provisions of chap 3 of the Constitution. If that is so, then the first respondent was bound to postpone the inquiry if to continue would have violated the rights guaranteed by chap 3. The only question then is whether it has been shown that the applicant's rights will be violated if the inquiry proceeds.

The applicant's counsel submitted that this was a question which the first respondent had been precluded from enquiring into as the Constitution is the sole domain of the Courts. I do not think that is correct. The Constitution's charter of rights is the touchstone for testing the validity of conduct which is subject to its terms. It must necessarily in those circumstances be the light which guides those who are bound to act in accordance with its terms, and not one against which their eyes are to be shielded. The role of the Courts is merely to ensure that there is no deviation from the path. It is apparent from the reasons which he furnished that the first respondent appreciated this. The question this Court is called upon to decide is whether he was correct in concluding that the applicant's rights would not be infringed.

The applicant relies upon s 25(3) of the Constitution, which guarantees to every person the right to a fair trial, including the right

> 'to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial'.

The right to remain silent in the face of a criminal charge is not foreign to our common law. In *S v Zuma and Others* 1995 (2) SA 642 (CC) at 659H (1995 (1) SACR 568 at 588*a/b*; 1995 (4) BCLR 401 at 419C), Kentridge AJ described this right of our common law as one of a number of rights which

> '. . . are the necessary reinforcement of Viscount Sankey's "golden thread" - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt'.

I do not see that s 25(3) enlarges upon that common-law right. Rather, it guarantees its future existence.

The present case concerns a threat to the applicant's right to remain silent during his trial which is said to arise indirectly. In his affidavit the applicant stated that he intended to plead not guilty to the criminal charges. It was submitted that if the inquiry proceeds he may of necessity be called upon to answer evidence given against him if he wishes to avoid a finding of misconduct, which could in turn be used by the State in the criminal proceedings.

It is well established that a Court will intervene to protect the right to remain silent in criminal proceedings even if the threat thereto is only an

indirect one. In *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T), which concerned insolvency proceedings, Trengove J said the following at 1072H-1073B:

> 'The principle, as I understand it, is that, if it is shown that proceedings in an insolvency, and the examination of an insolvent, are likely to prejudice the insolvent in his defence in related criminal proceedings, the Court has a discretion to stay all proceedings against him until the criminal proceedings have been concluded (*Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 437, and *Gratus & Gratus (Pty) Ltd v Jackelow* 1930 WLD 226 at 230). This practice arises out of the general rule in civil proceedings that, until criminal proceedings have been disposed of, where a defendant or a respondent, as the case may be, might be prejudiced in criminal proceedings if the civil proceedings were heard first, the civil proceedings would then be postponed or suspended. Basically the question is whether the respondent will suffer prejudice if the proceedings for the sequestration of his estate are continued.'

(See too *Kamfer v Millman and Stein NNO and Another* 1993 (1) SA 122 (C).)

Although the principle has been articulated in the language of a discretion, this may be misleading. I do not understand the decided cases to have held that a Court may direct the civil proceedings to continue even where it has been found that they may prejudice an accused person. On the contrary, it is clear that once the potential for prejudice has been established the Courts have always intervened to avoid it occurring. In that sense then it has no discretion.

Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented. (Compare *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 437A/B; *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 231; *Kamfer's* case at 127H.)

In the present case the preservation of the applicant's rights lies entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices he may be called upon to make.

The applicant's counsel submitted that, if the applicant were to remain silent during the inquiry in the face of damning evidence against him, he could be found guilty of misconduct and dismissed. He submitted that this is no choice at all, and is tantamount to compulsion to disclose his hand. He referred me in this regard to a decision of the Nova Scotia Court of Appeal in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*) (1993) 18 CRR (2d) D-6 (Digest) (117 NSR (2d) 218), which was followed by the Nova Scotia Supreme Court in *Williams v Deputy Superintendent of Insurance* (1993) 18 CRR (2d) 315.

Phillips' case concerned a mining accident inquiry under the Public Inquiries Act, which was to take place while criminal charges were pending

against certain of the mine personnel. *Williams'* case concerned an inquiry under the Insurance Act to determine whether the applicant was a suitable B person to hold an insurance agent's licence. At the time he was facing charges under the Securities Act. In both cases it was held that the respective parties' right to remain silent, which was guaranteed by s 7 of the Canadian Charter, would be infringed if the inquiries were to proceed.

C The legislation in terms of which the inquiries had been convened in both those cases empowered the authorities to compel the persons concerned to give evidence. However, it seems that it was not on those grounds alone that the Court in each case ordered the inquiries to be suspended. In *Williams'* case McAdam J said the following:

> 'Justice Hallet (in *Phillips'* case) confirms that the right to silence may D even be compromised where the person agrees to testify:
>
> "the four respondents' right to silence will have been compromised even if they agree to testify, which they may be forced to do, as they may not want to leave unanswered allegations that are made at the public inquiry. They are in the coercive power of the State; the Crown will be able to gather evidence without the usual safeguards provided by the criminal law."
>
> E Similarly, the applicant faced with the evidence before the advisory board may, notwithstanding that he has not been *subpoenaed* to give evidence, be forced to waive the right to silence in order to respond to the evidence in the possession of the superintendent. He will therefore be in the coercive power of the State and the Crown will be able to gather evidence without the usual safeguards provided by the criminal law.'

F The applicant's counsel invited me to adopt a similar approach in the present case, but, in my view, the invitation ought to be declined. I have already indicated that the decisions in this country, concerning the same principle, have not gone as far. While that is not decisive, I can see no good reason to extend the principle to the facts of the present case. The right to remain silent G derives from an abhorrence of coercion as a means to secure convictions by self-incrimination (see *S v Zuma (supra* at 658D (SA) (at 586*e* (SACR) and 417H-I (BCLR))), and it exists to ensure that there is no potential for this to occur. It achieves this by protecting an accused person from being placed under compulsion to incriminate himself; not by shielding him H from making legitimate choices.

The applicant's submission suggests that, if the alternatives which are to be chosen from are equally unattractive, then choice is tantamount to compulsion, and that the right to silence entitles an accused person not to be faced with that choice. I do not agree. What distinguishes I compulsion from choice is whether the alternative which presents itself constitutes a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so. While the distinction between choice and compulsion may at times be a fine one, in my view it is essential that it should be maintained if a salutary principle is not to be extended beyond its true province and thereby risk J falling into disrepute.

NUGENT J

A In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. Hard B as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice.

Accordingly, the first respondent was entitled to refuse to postpone the C inquiry, and the application is dismissed with costs, including the costs of two counsel.

Applicant's Attorney: *Tyron M Azar*. First Respondent's Attorney: *Michael Gaganakis*. Second Respondent's Attorneys: *Edward Nathan & Friedland Inc*.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v PROPHET 2003 (6) SA 154 (C)

Citation	2003 (6) SA 154 (C)
Case No	5926/2001
Court	Cape Provincial Division
Judge	N C Erasmus J
Heard	February 24, 2003
Judgment	May 22, 2003
Counsel	J J Gauntlett SC (with him A M Breitenbach and N Nel) for the applicant. P F Mihalik for the respondent.
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Criminal procedure - Search and seizure - Civil forfeiture order of property in terms of chap 6 of Prevention of Organised H Crime Act 121 of 1998 - Generally - Purpose of - Applications not to be treated in predetermined, mechanistic manner - Rationality, fairness and justifiability of each case to be judged on own merits and treated accordingly - Balance to be struck between public interest in effective crime fighting and interests of private property owners I affected by forfeiture provisions.

Criminal procedure - Search and seizure - Civil forfeiture order of property in terms of chap 6 of Prevention of Organised Crime Act 121 of 1998 - Application for order of civil forfeiture in terms of s 48(1) read with s 50(1)*(a)* of Act - Section 50(1)*(a)* providing that order competent if J

found that property concerned 'an instrumentality' in commission of offence listed in Schedule 1 - Section 1 A defining 'instrumentality' as property being 'concerned in' commission of offence - On facts, property in question clearly 'concerned in' commission of various drug-related offences - Property having formed integral part of commission of such offences - Property constituting 'instrumentality' - Forfeiture order granted. B

Criminal procedure - Search and seizure - Civil forfeiture order of property in terms of chap 6 of Prevention of Organised Crime Act 121 of 1998 - Application for order of civil forfeiture in terms of s 48(1) read with s 50(1)*(a)* of Act - Application for stay of proceedings pending determination of related criminal proceedings - Stay of civil proceedings pending determination of related criminal proceedings C granted only where accused under legal compulsion to give evidence in civil proceedings - Legal compulsion distinguishable from pressure to testify in order to rebut incriminating evidence - On facts, accused, though under no compulsion to testify, having made his choice by filing comprehensive answering affidavit - Court accordingly declining to order stay of proceedings. D

Headnote : Kopnota

Although civil forfeiture is a controversial mechanism it has been accepted in many countries as a legitimate tool to combat serious crime. Forfeiture both prevents further illicit use of the property and imposes an economic penalty, thereby rendering illegal behaviour unprofitable. It is, however, essential that civil forfeiture not be E treated 'in a predetermined, mechanistic manner' and that the 'rationality, fairness and justifiability' of each case be 'judged on its own merits and treated accordingly'. It is critical in this regard that a balance is struck between 'the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws'. (Van der Walt 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property F Clause' (2000) 16 *SAJHR* 1 at 45.) (Paragraphs [28] - [29] at 167D - H.)

Having already obtained a preservation of property order under s 38(2) of the Prevention of Organised Crime Act 121 of 1998, the applicant proceeded to apply under s 48(1) of the Act for the civil forfeiture of the property to the State. The application was opposed by the respondent, the owner. The applicant contended that house in G question was being used in the commission of various drug-related offences, namely the attempted manufacture of a Schedule 2 drug under the Drugs and Drug Trafficking Act 140 of 1992 and the possession of and dealing in prohibited substances (contraventions of s 3, s 4 and s 5 of that Act). Section 50(1) of the Act provides that the Court is obliged to grant a s 48(1) application if it finds on a balance of H probabilities that the property 'is an instrumentality in the commission of an offence referred to in Schedule 1 or is the proceeds of unlawful activities'. A *curator bonis* had also been appointed to assume control of the property. The respondent denied that any offences were being committed on the property and applied for a stay of the proceedings pending the outcome of the related criminal proceedings instituted against him in the magistrate's court. I

Held, that the application for a stay of the proceedings had to fail because (1) there had been no formal application for a stay; (2) an application for a stay of civil proceedings pending the determination of related criminal proceedings could only be granted where the accused was under a legal compulsion to give evidence in the civil proceedings, which had to be distinguished from J

pressure to testify in civil proceedings in order to rebut incriminating evidence; A and (3) the respondent had already elected to file a comprehensive answering affidavit dealing with the facts asserted by the applicant, and at no stage did the respondent suggest in his affidavit that, in order to deal with the applicant's supplementary affidavits, he would be compelled to incriminate himself before the State had produced evidence in the criminal trial. (Paragraphs [8] and [9] at 159F/G - I.) B

Held, further, that the respondent could in any event not be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal proceedings to escape responding to matters pertaining to civil proceedings. It was not a matter of compulsion but of a choice to be made by the respondent, something he had clearly done by filing a comprehensive answering affidavit. (Paragraphs [10] and [11] at 160D - 161C.) C

Held, further, as to the issue of instrumentality, that it was clear that more was required than the mere commission of the offence on the property. Thus it was held in *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (C) at 39*f - j* that 'a property would only qualify as an instrumentality where it has been used as a means or instrument in the commission of the offence, or where it is otherwise involved in the D commission of the offence'. (Paragraphs [20] and [21] at 164C - E/F.)

Held, further, that, since civil forfeiture in South Africa was based largely on statutory provisions in the USA and New South Wales, Australia, the American and Australian approaches provided some guidance in the process of determining the type of relationship that needed to exist

between the property to be forfeited and the crime in E question. The essential element that has emerged there was the idea of a *nexus* connecting the property to the unlawful use and, consequently, tainting it. The determining question was whether the confiscated property had a close enough relationship to the offence to render it an 'instrumentality'. (Paragraphs [22] and [26] at 164F - G and 166B - D.) F
Held, further, that the critical question was whether the property in question could be categorised as an 'instrumentality' of the offence, and that the facts indicated, on a balance of probabilities, that this had indeed been the case. It was clear in light of the evidence and on a balance of probabilities that the property was 'concerned in' the commission of the offences. The property could not be divorced from the acts in question: it was an integral part, or instrumentality, thereof. (Paragraph [27] at G 166D - 167D.)
Held, accordingly, that the forfeiture order applied for had to be granted as intended in s 50 of the Act. (Paragraph [31] at 168C.)
The Court accordingly ordered the *curator bonis* to dispose of the property and, after settling the amount due to the bondholder from the proceeds of such sale, to pay the balance of the proceeds into the Criminal Recovery Account, if there was such a balance. (Paragraph [32] at 168C/D - G.) H

Cases Considered

Annotations

Reported cases

Davis v Tip NO and Others 1996 (1) SA 1152 (W): referred to

Director of Public Prosecutions (NSW) v King [2000] NSWSC 394: considered I

Equisec (Pty) Ltd v Rodriguez and Another 1999 (3) SA 113 (W): followed

Mitchell and Another v Hodes NO and Others 2003 (3) SA 176 (C) (2003 (1) SACR 524): applied

Mohamed NO and Others v National Director of Public Prosecutions and Another 2003 (1) SACR 286 (W): dictum in para [57] applied J

National Director of Public Prosecutions v Carolus and Others 1999 (2) SACR 27 (C): considered A

National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (4) SA 843 (CC) (2002 (2) SACR 196; 2002 (9) BCLR 970): applied

National Director of Public Prosecutions v Patterson and Another 2001 (2) SACR 665 (C) ([2001] 4 B All SA 525): applied B

National Director of Public Prosecutions v Seevnarayan 2003 (2) SA 178 (C) (2003 (1) SACR 260): referred to

Nedcor Bank Ltd v Behardien 2000 (1) SA 307 (C): applied

Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO 1997 (2) SA 636 (W): applied

United States v Austin 509 US 628 (1994): considered C

United States v Chandler 36 F 3d 358 (4th Cir, 1994): discussed

United States v Ursery 518 US 267 (1996): considered

Various Items of Personal Property v United States 282 US 577 (1931): considered.

Statutes Considered

Statutes

The Drugs and Drug Trafficking Act 140 of 1992, ss 3, 4, 5, Schedule 2: see *Juta's Statutes of South Africa* D *2002* vol 1 at 1-451, 1-452, 1-458 - 1-461.

The Prevention of Organised Crime Act 121 of 1998, chap 6, ss 1, 38(2), 48(1), 50(1): see *Juta's Statutes of South Africa 2002* vol 1 at 1-571, 1-582 - 1-587, 1-582, 1-584, 1-585. E

Case Information

Application for an order of civil forfeiture in terms of the Prevention of Organised Crime Act 121 of 1998. The facts appear from the reasons for judgment.

J J Gauntlett SC (with him *A M Breitenbach* and *N Nel*) for the applicant. F

P F Mihalik for the respondent.

Cur adv vult.

Postea (May 22).

Judgment

N C Erasmus J: G

[1] This is an application brought by the National Director of Public Prosecutions (NDPP) for civil forfeiture under s 48(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA, hereinafter called 'the Act') which came into operation on 21 January 1999. A preservation order in terms of s 38(2) of the Act was granted by Desai H J on 28 June 2001 preserving the property situated at 54 Balfour Street, Woodstock (the property). In addition, a *curator bonis* was appointed to assume control of the aforementioned property.

[2] If a preservation order is in force, the NDPP may in terms of s 48 apply to the High Court for an order for the forfeiture of I 'all or any of the property' concerned. In terms of s 50(1) the High Court 'shall' grant the forfeiture order applied for by the NDPP if it 'finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities'. J

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The statute A

[3] The Act as a whole is a response to a perceived growth in organised and related criminal activities.[1] It was enacted in response to a belief that 'South African common law and statutory law had failed to deal effectively'[2] with such criminal activities. In this regard the Act is in line with international trends, as it encompasses not only criminal forfeiture but also the relatively new B concept, to South Africa at least, of civil forfeiture. The intent behind the inclusion of civil forfeiture appears to be twofold. To provide the means to forfeit the proceeds of crime and in the process remove the incentive for crime and to seize assets that are used to facilitate unlawful activities and thus remove these instrumentalities from criminal control. C

[4] The present application involves chap 6 of the Act, which bears the heading 'Civil recovery of property' and thus provides for civil forfeiture, as opposed to criminal forfeiture, which is regulated by chap 5. As the proceedings under chap 6 are deemed to be civil proceedings they are governed by the rules of evidence and procedure D applicable to proceedings of that kind. Clearly the purpose of chap 6 is to target the asset bases of criminal enterprises, independent of criminal proceedings. In the words of Ackermann J:

'Chapter 6 (comprising ss 37 - 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but it is not conviction based: it may be invoked even where there is no E prosecution.'[3]

In fact, the Act explicitly separates the criminal process from the civil forfeiture process. Therefore chap 6 is focused not on

'wrongdoers, but on the property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owner or possessors of the property is, therefore, F not primarily relevant to the proceedings.'[4]

[5] Section 37 of the Act entrenches the distinction between civil proceedings and criminal proceedings[5] . Section 50(4) of the Act expressly states that the validity of an order made in terms of s 50(1), forfeiting to the State property that is subject to G a preservation of

property order made in terms of s 39(2), is not affected by the outcome of any related criminal A proceedings.[6] This section sanctions the granting of an order for the forfeiture to the State of property that is an 'instrumentality of an offence referred to in Schedule 1 to the Act' before any criminal proceedings in respect of that offence are instituted or, if instituted, determined. B

[6] To delay the determination of civil forfeiture proceedings until the finalisation of related criminal cases would have a dramatic impact on the purpose of an asset forfeiture programme. After all the

'present Act (and particularly chaps 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligations and C domestic interest, to ensure that criminals do not benefit from their crimes'.[7]

Moreover, such a delay would have an adverse effect on the various parties who have an interest in the proceedings:

- those individuals who have an interest in the property and seek to have it excluded from the proposed forfeiture order, by taking D advantage of the 'innocent owner' defence;
- also the accused, who has an opportunity to show that the property is probably not an instrumentality or the proceeds of unlawful activities;
- and the State, which is burdened with the cost of curatorship. E

The 'application for a stay of proceedings'

[7] The application by the respondent for a stay of the civil proceedings, pending the outcome of the criminal proceedings against him in the Cape Town magistrate's court was raised in a supplementary affidavit delivered out of time. There are three F pertinent points that can be made in this regard.

[8] First, there was no formal application for a stay and as such it is not a competent application. Mr *Mihalik* admits in his supplementary heads of argument that there is no 'formal' application for a stay but asks the Court to exercise a discretion in G the matter.

[9] Secondly, the fact of the matter is that the respondent had already elected to file a comprehensive answering affidavit in which he deals with the facts asserted by the applicant. Furthermore, at no stage in his affidavit in which the stay is sought does the respondent suggest that, in order to deal with the applicant's H supplementary affidavits, he will be compelled to incriminate himself before the State has produced evidence in the criminal trial. In any event, an application for the stay of civil proceedings pending the determination of related criminal proceedings I

will only be granted in those cases where the accused is under a legal compulsion to give A evidence in the civil proceedings. A legal compulsion must be distinguished from pressure to testify in civil proceedings in order to rebut incriminating evidence.[8] Even in cases where the accused is legally compelled to incriminate himself in civil proceedings before the State has produced its evidence in the related criminal proceedings, which is not the case in the present matter, the B Courts have not generally suspended the civil proceedings. Instead the criminal court could order that the relevant element of compulsion not be implemented.[9] Should the accused believe he has suffered an infringement of his right against self-incrimination, he can rely on s 35(5) of the Constitution in the criminal trial. It will be up to the trial court to ensure compliance with fair criminal C standards, this may involve finding that any derivative evidence[10] is excluded because it was found as a result of compelled testimony.[11]

[10] The third point is that the respondent cannot be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters D pertaining to the civil proceedings.[12] Thus, as was pointed out by Navsa J in the *Seapoint* case it is a matter not of compulsion but of choice, 'hard as the choice may be, it is a legitimate one'[13] which the respondent in this matter is called upon to make. In *Nedcor Bank v Behardien* 2000 (1) SA 307 (C) Cleaver J approved of the E view expressed by Nugent J in the *Davis v Tip* case that

'civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to F

conflict with his right to remain silent during the criminal proceedings . . . the preservation of the applicant's rights lies A entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices he may be called upon to make.'[14]

[11] In principle then in every such case where civil and criminal proceedings are instituted by the same activity the respondent is called upon to make a tough choice. He must weigh up the consequences and resolve the 'dilemma' in which he finds B himself.[15] The respondent in this matter clearly made his choice by filing a comprehensive answering affidavit. Accordingly no good grounds have been made out for suspending the civil proceedings.

The applicant's case C

[12] The applicant in this matter seeks a forfeiture order against the respondent owner of a property, which the applicant contends has been used in several drug-related offences. The applicant alleges that the respondent 'was using the property in an attempt to manufacture a Schedule 2 drug under the Drugs and Drug Trafficking Act 140 of 1992, as well as for the possession of and dealing in D prohibited substances'. The applicant argues that the property was 'instrumental in the commission of the following offences':

- Contravention of s 3 of the Drugs and Drug Trafficking Act. Section 3 provides: E

  '3. Manufacture and supply of scheduled substances

  No person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug.'

  The applicant argues that the section was contravened in that F respondent manufactured 1-phenyl-2-propanone, a scheduled substance (defined in Schedule 1 of the Drugs Act as one of the 'substances useful for the manufacture of drugs') with the intention to use it in the manufacture of a drug, namely methamphetamine.

- Contravention of s 4*(b)* of Act 140 of 1992, read with s 1(1) (xxvii), in that respondent was found in possession of G phenyl acetic acid (defined in Schedule 1 of the Drugs Act as one of the 'substances useful for the manufacture of drugs'), 1-phenyl-2-propanone and methylamine. Section 4*(b)* prohibits the possession of any 'undesirable dependence-producing substance'. Section 1(1)(xxvii)

defines this as 'any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2' of the Drugs and Drug Trafficking Act.

- Contravention of s 5*(b)*, read with s 1(1)(iii), 1(1)(xiii) and 1(1)(xxvii) of the said Act, in that respondent dealt in an undesirable dependence-producing substance. 'Deal in' is defined in s 1(1)(iii) as including 'performing any act . . . with the shipment, importation . . . manufacture, supply . . . of the

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N C ERASMUS J

drug'. Section 1(1)(xiii) defines 'drug' as 'any dependence producing substance or any undesirable dependence producing substance'. As methamphetamine is listed in Part III of Schedule 2, by virtue of s 1(1)(xxvii) phenyl acetic acid and 1-phenyl-2-propanone are within the definition of 'undesirable dependence-producing substance'. Accordingly both the importation of phenyl acetic acid and the manufacture of 1-phenyl-2-propanone puts respondent firmly within the definition of having dealt in an 'undesirable dependence producing drug'.

[13] The applicant's case was founded on the affidavits of Captain Smit, a narcotics investigating officer, and Caspar Venter, a forensic analyst with the South African Police Service with 11 years' experience and at least a basic knowledge of 'clandestine laboratories'. Smit is the designated officer in the Western Cape area for the chemical monitoring program of the South African Narcotics Bureau. This program monitors the import and export of 24 chemical substances, identified as useful in the manufacturing of illicit drugs. Smit received information about the importation of phenyl acetic acid, without the necessary 'end user declaration'. Phenyl acetic acid is a substance listed in Part II of Schedule 2 of Act 40 of 1992 and can be used in the manufacture of methamphetamine. Smit and his colleagues observed the chemicals being handed over to the respondent at 20:30 on 30 January 2001 and then they followed him to the property in Woodstock.

[14] The following day, 31 January 2001, the respondent was followed to Litechem Pharmacy where he purchased distilled water and caustic soda. According to Venter's affidavit distilled caustic soda is needed in the final stages of manufacturing methamphetamine. Smit then obtained a search warrant to search the property. He and his colleagues requested access to the property but were unsuccessful and they forced open the front and back doors. Upon entering the property Smit heard the sound of breaking glass at the back of the house. He discovered in a toilet bowl broken glass and a yellow brownish fluid. This was analysed by Venter who identified it as 1-phenyl-2-propanone, which is an ingredient that can be used in the manufacture of methamphetamine. The police discovered a small room adjacent to the kitchen fitted with an extractor fan, and containing other equipment such as a magnetic stirrer, hot plate and vacuum sealer, which it is alleged was being used as 'a clandestine laboratory' to manufacture methamphetamine. They also found a hand-written 'recipe' detailing the process for purifying 1-phenyl-2-propanone. Venter found a flask containing a small quantity of what he later established was chilled methylamine in the kitchen, which apparently is combined with 1-phenyl-2-propanone to produce methamphetamine. They also found other items that could be defined as laboratory apparatus, as well as literature relating to chemical processes and chemicals in the 'mini laboratory' and also in the room connected to the 'laboratory', which Smit refers to as the 'old kitchen'.

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The respondent's case

[15] Respondent's version of events is that he is an 'amateur chemist' and possesses a particular personal interest in conducting chemical experiments. He claims to have inherited this interest in chemistry, along with all the laboratory equipment, literature and chemicals found at the property from his brother.

[16] He admits to ordering and collecting the phenylacetic acid and methylamine and taking it to the property, but denies knowing that it was purchased under an assumed name. He contends that he dropped the glass container in the toilet from the shock of the police forcibly entering the property. He denies that the substance in the toilet was 1-phenyl-2-propanone but states that, if it was, it was too small an amount to make him an illegal drug manufacturer. He contends that the presence of this particular combination of chemicals *per se* on his property did not mean that he was manufacturing methamphetamine. He stated that the room adjacent to the 'old kitchen' was the place where he conducted his 'informal chemical experiments'. He denies knowledge of the hand-written recipe and denies that it was found on the table in the 'old kitchen'. He also rejects Venter's statement that he found a flask containing methylamine in the kitchen fridge.

The expert evidence

[17] A point *in limine* raised by Mr *Mihalik* argues that Venter's evidence as a forensic expert cannot be received by the Court because Venter failed to qualify himself in relation to the techniques and measuring instrument he used in his analyses. However, these proceedings are explicitly civil; indeed the respondent concedes that the application is in nature a civil one. Consequently the criminal burden of proof does not apply. What does apply is the general approach by courts in civil proceedings to expert opinion evidence. This allows for more flexible criteria in determining whether the expert possesses the necessary skill, training and/or experience.[16]

[18] Venter attests to his position and qualifications and describes the techniques he applied and affirms their internationally accepted status. He states that he applied ''n proses wat bedrewenheid in skeikunde vereis' ('a process requiring skill in chemistry') and describes the two techniques he used. No contrary facts or expert testimony is put up against which that of Venter is to be measured. There is no reason to doubt the veracity of Venter's conclusions or the accuracy or reliability of his analyses or that of the measuring equipment used in the analytical process.

[19] Against this factual background it must be determined whether on

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a balance of probabilities the property concerned falls within the definition of an instrumentality of an offence.

An instrumentality of an offence

[20] A number of recent judgments have examined the term 'instrumentality of an offence'.[17] The dictionary meaning of instrumentality is 'a thing employed for a purpose or end; a means'.[18] The term is defined in the Act as

> 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere'.

In the *Carolus* case Blignaut J focused on what he perceived was a lack of clarity in the use of the words 'which is concerned in'. In the view of the learned Judge a restrictive interpretation was called for, and that

> 'a property would only qualify as an instrumentality where it has been used as a *means* or *an instrument* in the *commission* of the offence, or where it is otherwise involved in the commission of the offence'.[19]

[21] In the unreported case of 2000/12886 *National Director of Public Prosecutions: Re Application for Forfeiture of Property in terms of ss 48 and 53 of Act 121 of 1998*, Stegmann J remarked at para [12] that

> 'evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been ''concerned in the commission'' of the offence'.

It is not sufficient for the offence merely to have been committed on the property.[20] *The Oxford English Dictionary* defines the word 'concerned' as 'involved, interested' suggesting the need for a direct connection to the offence.

[22] Civil forfeiture in South Africa is based largely on statutory provisions in the USA and New South Wales in Australia. The Australian

approach in New South Wales provides for forfeiture orders for 'tainted property', used in, or in connection with the commission of a serious offence. This has been interpreted by the Courts as meaning that G

> 'there must be a relationship between the commission of the offence and the property in question. That relationship need not be substantial or direct, but the need for a connection poses questions of proximity and degree . . . and this is essentially a question of fact.'[21]

It becomes more difficult where the property is merely the place where the offence was committed. Merely being the *locus in* H *quo* and nothing

more would not be sufficient. Ultimately, O'Keefe J in the *King* case held that when it came to tainted A property 'some activity connected with the relevant crime must have involved the utilisation or employment of the property with the aim or purpose of committing or furthering the commission of the crime in question'.

[23] In the United States 'forfeitures are designed primarily to confiscate property used in violation of the law, and to require B disgorgement of the fruits of illegal conduct' (*United States v Ursery* 518 US 267 (1996)). The US in particular has had extensive experience with civil forfeiture. American case law may therefore be usefully studied comparatively. *In rem* forfeiture in the US has traditionally been based on the theory that the property is guilty C of an offence. Consequently 'it is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate'. (*Various Items of Personal Property v United States* 282 US 577 (1931) at 581.) This approach, however, could not justify the civil forfeiture of the instrumentalities or the proceeds of crime. D

[24] Generally the US Courts have adopted either the 'instrumentality test'[22] or the proportionality test or one that combines both of these. In terms of the instrumentality test the forfeited property must have a sufficiently close relationship to the illegal activity. In order to determine this the following factors must be E examined:[23]

(1) the *nexus* between the offence and the property and the extent of the property's role in the offence

(2) the role and culpability of the owner

(3) the possibility of separating offending property that can readily be separated from the remainder. F

[25] However, the potentially harsh results of the instrumentality test when applied alone have made some Courts hesitant to accept it as the sole test and some have favoured the adoption of a proportionality test. There has been much debate in the US Courts about the need to subject civil forfeiture to the requirements of the eighth G amendment of the US Constitution dealing with excessive fines. Hence the decision to incorporate some aspect of proportionality in determining whether forfeiture

of the property imposes upon the owner a penalty grossly disproportionate to his or her offence. A

[26] It is clear that such tests have to be seen in the context of the differing statutory requirements and standards of proof that exist in the US. Unquestionably the law in this area is still fairly unsettled, with some American Courts favouring one test over the other and others settling on a 'hybrid approach'. However, the American and B Australian approaches do provide some guidance in the process of determining the type of relationship that needs to exist between the property to be forfeited and the crime in question. The essential element that emerges is the idea of a '*nexus*' connecting the property to the unlawful use and consequently 'tainting' it. The C determining question is whether the confiscated property has a close enough relationship to the offence to render it an 'instrumentality'. The critical question to be addressed here is whether on the facts presented to this court the property situated at 54 Balfour Street, Woodstock can be categorised as an instrumentality? D

[27] The facts of this matter dispose the court to believe that on a balance of probabilities the property in question was in fact an instrumentality of the offence.

- The respondent admits to ordering the phenylacetic acid and methylamine. This was done using a false name and through another E party. It can be inferred from this action that this was an attempt to conceal the connection between the respondent and the chemicals. These chemicals were then transported to the property.
- There was evidence through the forensic tests conducted by Venter that 1-phenyl-2-propanone had been manufactured on the premises and F that methylamine was stored in the fridge. Clearly an attempt had been made to dispose of the glass container containing the 1-phenyl-2-propanone in the toilet and respondent failed to provide an adequate explanation for this event or for the existence of that particular chemical or to suggest an alternative substance that it could be. G
- At no stage was the respondent prepared to confide to the Court details of the innocuous chemical experiments that he claims to have been conducting. His claim that he was experimenting with 'formulas that did not make sense' simply because it was 'stimulating, exciting and therapeutic' is unconvincing. Furthermore, it is highly improbable that someone would go to the trouble of H ordering specific chemicals, such as phenylacetic acid and methylamine without having a clear idea of what they were going to be used for.
- It is clear that the following chemicals which were found on the property, phenylacetic acid, methylamine, 1-phenyl-2-propanone, piperidine, acetone and benzene are in fact precursor chemicals used in I the production of methamphetamine. Phenylacetic acid, piperidine and 1-phenyl-2-propanone are scheduled substances in terms of the Drugs Act (substances useful for the manufacture of drugs). On a balance of probabilities there is evidence that the property was being used to manufacture a scheduled substance in J

terms of s 3 of the Drugs Act, namely 1-phenyl-2-propanone, with the intention that this would be used A in the unlawful manufacture of an 'undesirable dependence producing substance' namely methamphetamine.

- At no stage was an adequate explanation or convincing evidence provided for the presence of the specific combination of chemicals found at the property or for the equipment set up in the 'mini B laboratory' and the 'old' kitchen.
- It is clear that in light of the evidence and on a balance of probabilities the property was 'concerned in' the commission of the offences. It was a place to store the chemicals, rooms on the property were being used to process, refrigerate and 'synthesise' these C chemicals, into what on a balance of probabilities was methamphetamine. The property cannot be divorced from these acts, it was an integral part, an instrumentality.

Concluding remarks D

[28] There is no doubt that civil forfeiture is a controversial mechanism but it has been accepted by many nations as a legitimate law-enforcement tool to combat serious crime. Forfeiture both prevents further illicit use of the property and imposes an economic penalty, thereby rendering illegal behaviour unprofitable. It has been argued that South Africa has managed to avoid some of the worst of the US forfeiture laws by providing for an 'innocent owner' defence and E recourse to appeal.[24] The Constitutional Court has referred to the 'important public interest objectives of the Act'. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted by the international community that criminals should be stripped of the F proceeds of their crimes,[25] the purpose being to remove the incentive for crime. This approach has similarly been adopted by our Legislature.[26]

[29] It is clearly essential that at no stage should the effects of civil forfeiture be treated in a 'predetermined, mechanistic manner - the

rationality, fairness and justifiability of G each case should be judged on its own merits and treated accordingly'.[27] It is critical in this regard that a balance is struck 'between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws'.[28]

[30] There is, however, a growing concern about the way major and H

minor drug-related crime continues to threaten and affect the everyday lives of ordinary members of the community. The type of A synthetic drug involved in this case gives particular cause for concern because it appears to be relatively easy to manufacture and thus is ideal for production in 'clandestine laboratories' in residential areas. All efforts must be made to deter illegal activities that contribute to neighbourhood deterioration. Ultimately, civil forfeiture seeks B

> 'to neutralise property that has been involved in the commission of offences. This provides sufficient reason for the deprivation of property, which is the purpose of a forfeiture order'.[29]

[31] The applicant's application for a forfeiture order of the property should be granted. C

[32] In terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 (the Act) it is ordered that:

1. The property being erf 14241m situated at 54 Balfour Street, Woodstock, Cape Town (the property) and which is presently D subject to the preservation of property order granted by this honourable Court on 28 June 2001, is forfeited to the State.

2. It is further directed that the property shall vest in the State upon the grant of the forfeiture order and that Ivan Malcolm Ross of Bill Rawson Countrywide who was appointed *curator bonis* in terms of s 42 of the Act does the following: E

   2.1 dispose of the immovable property situated at 54 Balfour Street, Woodstock, Cape Town, by sale or other means and deposits the proceeds thereof into the Criminal Recovery Account subject to the following conditions:
   (a) the amount which is owed to the bondholder, First F National Bank, shall be paid to them in full, or
   (b) if the proceeds of the sale is less than the amount owed to the bondholder, then the bondholder will be paid the full proceeds of the sale.

[33] Respondent to pay the costs, which costs to include the costs of two counsel where such were employed. G

Applicant's Attorney: *State Attorney*. Respondent's Attorneys: *Snitchers*.

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1 M J Cowling 'Fighting Organised Crime: Comment on the Prevention of Organised Crime Bill 1998' (1998) 11 *SACJ* 350.
2 See preamble to Prevention of Organised Crime Act 121 of 1998.
3 *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) (2002 (2) SACR 196; 2002 (9) BCLR 970) para [16] at 851C - D (SA).
4 *National Director of Public Prosecutions v Mohamed (supra* para [17] at 851F - G).
5 '37. Proceedings are civil, not criminal
(1) For the purpose of this chapter all proceedings under this chapter are civil proceedings, and are not criminal proceedings.
(2) The rules of evidence applicable in civil proceedings apply to proceedings under this chapter.
(3) No rules of evidence applicable only in criminal proceedings shall apply to proceedings under this chapter.
(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings under this chapter.'
6 Section 50(4) provides: '(T)he validity of an order under ss (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.'
7 *National Director of Public Prosecutions v Mohamed NO and Others (supra* para [16] at 851B - C).
8 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 311H - 315A.
9 *Davis v Tip NO and Others* 1996 (1) SA 1152 (W) at 1157E - H. See also *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W) at 648 where the Court observed that 'a court weighs all the facts and circumstances to determine whether prejudice might attach to the accused person if the civil proceedings were to continue. Once potential for prejudice is established, the court will stay proceedings or find a formula for preventing prejudice, such as, in appropriate cases, ruling that information obtained should not be subsequently disclosed, or barring the use of compelling or coercive measures.'
10 *Mitchell and Another v Hodes NO and Others* 2003 (3) SA 176 (C) (2003 (1) SACR 524) at 208F (SA) and 556*d* (SACR). Ultimately 'it will be the duty of the trial judge to ensure a fair trial, if necessary by the exercise of his or her discretion to exclude, in appropriate circumstances, some or all of such derivative evidence'.
11 *Mitchell (supra* at 211 (SA) and 559 (SACR)).
12 *Mitchell (supra* at 209A - C (SA) and 556*e* - *g* (SACR)) where the Court held that the civil proceedings were of such significance (an interrogation in terms of s 417 of the Companies Act 61 of 1973) that to grant the relief sought by the applicants would 'effectively stultify' the purpose which the statutory mechanism of the winding up enquiry is intended to achieve. The learned Judges went on to argue that s 417 enquiries have 'extremely important public policy objectives' and thus the applicants in the matter could not rely on the potential loss of an ill defined tactical advantage at their criminal trial.
13 *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W) at 647F - I and 649G - I.
14 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 313G - 314H.
15 *Equisec (Pty) Ltd v Rodriguez and Another* 1999 (3) SA 113 (W) at 115A - B.
16 Joubert (ed) *The Law of South Africa* vol 9 (first re-issue) 1996 para 507, 'it is not generally a *sine qua non* that an expert must have had theoretical training or practical experience: his qualifications must be measured against the evidence he has to give in order to determine whether they are sufficient to enable him to give relevant evidence'.
17 *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (C) at 39*f* - *j*; *National Director of Public Prosecutions v Patterson and Another* 2001 (2) SACR 665 (C) ([2001] 4 B All SA 525) at 668 (SACR) and 529 (B All SA); *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C) (2003 (1) SACR 260) paras [31] - [39] at 188 - 90 (SA) and 270 - 2 (SACR).
18 See *The New Shorter Oxford English Dictionary* 2nd ed (1994) at 1385.
19 *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (C) at 39*g* - *h*.
20 *National Director of Public Prosecutions v Patterson and Another (supra)*.
21 *Director of Public Prosecutions (NSW) v King* [2000] NSWSC 394 at para 14.
22 As advocated by Justice Scalia in his concurring opinion in *United States v Austin* 509 US 628 (1994). Providing that a close enough relationship can be said to exist then neither the value of the property nor the culpability of the owner are of any significance.
23 The Court in the case of *United States v Chandler* 36 F 3d 358 (4th Cir, 1994) accepted this property-offence *nexus* and expanded on it. In measuring the strength and extent of the *nexus* between the property and the offence, the Court held that it may also take into account the following:
(1) whether the use of the property in the offence was deliberate and planned
(2) whether the property was important to the success of the illegal activity
(3) the time during which the property was illegally used
(4) whether its illegal use was an isolated event or had been repeated
(5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence.
24 Jean Redpath 'Forfeiting Rights? Assessing South Africa's Asset Forfeiture Laws' (2000) 19 *African Security Review* No 5/6.
25 See the United Nations Convention Against Illegal Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1988 in Vienna; United Nations Convention Against Transnational Organised Crime, Palermo, December 2000.
26 *National Director of Public Prosecutions v Mohamed* NO 2002 (4) SA 843 (CC) (2002 (2) SACR 196; 2002 (9) BCLR 970) para [15] at 851A - B (SA).
27 A J Van der Walt 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause' (2000) 16 *SAJHR* 1 at 45
28 *Ibid*.
29 *Mohamed NO and Others v National Director of Public Prosecutions* 2003 (1) SACR 286 (W) para [57] at 306*d* - *e*.

A

LAW SOCIETY OF THE CAPE OF GOOD HOPE v RANDELL 2013 (3) SA 437 (SCA) A

Citation	2013 (3) SA 437 (SCA)
Case No	341/2012 [2013] ZASCA 36
Court	Supreme Court Of Appeal
Judge	Mthiyane DP, Majiedt JA, Van der Merwe AJA, Swain AJA and Mbha AJA
Heard	February 21, 2013
Judgment	March 28, 2013
Counsel	*S Rosenberg SC* for the appellant. *M Osborne* for the respondent.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Practice — Stay of proceedings — Grounds — Criminal proceedings pending on same facts — Stay permissible where individual faces compulsion to speak and where he will likely be prejudiced in criminal proceedings. C

Headnote : Kopnota

In issue in this case was whether to stay a civil proceeding — a striking-off application — pending the conclusion of a related criminal matter. The facts were that attorney R was involved in a property transaction. Consequent on it the state charged him with fraud and theft and then a law society applied for his striking from the roll. R counter-applied for a stay of the society's D application pending completion of the criminal proceedings. He argued that answering the society's case might prejudice him in the criminal proceedings. The court granted the application, reasoning that the law allowed a stay where there was a likelihood of prejudice, and even where there was no compulsion to speak. The society appealed to the Supreme Court of Appeal. It considered the law and overturned the decision, holding E that a likelihood of prejudice and a compulsion to speak were requirements for a stay. (Paragraphs [3], [9] – [12], [18], [23], [27] – [28] and [30] – [32] at 438G, 439B – 440E, 441I – 442B, 443E – G, 444D – I and 445B – I.)

Cases Considered

Annotations

Case law F

Southern Africa

Clipsal Australia (Pty) Ltd and Others v GAP Distributors and Others 2010 (2) SA 289 (SCA): referred to

Davis v Tip NO and Others 1996 (1) SA 1152 (W): considered and approved G

Du Toit v Van Rensburg 1967 (4) SA 433 (C): considered

Equisec (Pty) Ltd v Rodrigues and Another 1999 (3) SA 113 (W): referred to

Fourie v Amatola Water Board (2001) 22 *ILJ* 694 (LC): referred to

Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker 2012 (4) SA 465 (ECG): referred to

Gratus & Gratus (Prop) Ltd v Jackelow 1930 WLD 226: considered H

Irvin & Johnson Ltd v Basson 1977 (3) SA 1067 (T): referred to

Kamfer v Millman and Stein NNO and Another 1993 (1) SA 122 (C): referred to

Nedcor Bank Ltd v Behardien 2000 (1) SA 307 (C): referred to

Randell v Cape Law Society 2012 (3) SA 207 (ECG): reversed on appeal I

Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO 1997 (2) SA 636 (W) (1996 (8) BCLR 1071): referred to.

England

Jefferson Ltd v Bhetcha [1979] 2 All ER 1108 (CA): referred to

R v BBC; Ex parte Lavelle [1983] 1 All ER 241 (QB): referred to

V v C [2001] EWCA Civ 1509: referred to. J

Case Information

A *S Rosenberg SC* for the appellant.

M Osborne for the respondent.

An appeal from the Eastern Cape High Court, Grahamstown (Smith J).

B **Order**

The appeal is upheld with costs on an attorney and client scale, and the order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs on an attorney and client scale.'

Judgment

C **Mthiyane DP (Majiedt JA, Van der Merwe AJA, Swain AJA and Mbha AJA concurring):**

[1] The respondent, Michael Wharton Randell, is a duly admitted attorney of the high court, practising as such in Port Elizabeth. He is D currently facing charges of fraud and theft involving a sum of R2,4 million which he, together with two other persons, is alleged to have misappropriated while they were trustees of the Greenwood Property Trust (the Trust), the sole beneficiary of which was the Greenwood Primary School, Port Elizabeth (the school). The criminal proceedings E against the respondent are still pending.

[2] Prior to the disposal of the criminal proceedings, the appellant, the Law Society of the Cape of Good Hope, launched an application in the Eastern Cape High Court for the removal of the respondent's name from the roll of attorneys. The application is based on the same facts which are the subject of the criminal proceedings pending against the respondent F in the Commercial Crimes Court in Port Elizabeth. Without filing an answering affidavit in opposition to the application to strike him off, the respondent launched a counter-application for a stay of the striking-off application, pending the disposal of the criminal proceedings.

[3] The question arising in this appeal is whether the court below was G entitled to grant a stay of the civil proceedings, even though there was no compulsion on the respondent to file an answering affidavit in opposition to the striking-off application. There is a further aspect to be considered and it is the question whether the respondent proved that he would suffer prejudice if he made a sworn statement in opposition to the striking-off H application. The appeal is with leave of the court below.

[4] A brief history of the matter is necessary to put the legal and factual issues in this case in proper context. The respondent was one of the three trustees of the trust which was established in 1999. The sole beneficiary I of the trust was, as I have said, the school.

[5] In 1999 the trust purchased land and buildings adjacent to the school (the property) for a consideration of R500 000. The trust in turn leased the property to the school and the rental was used to cover instalments on the mortgage-bond finance provided by the Standard Bank.

[6] During the period March 2005 to August 2005 the trustees amended J the trust deed and established themselves as trust beneficiaries.

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[7] On 21 April 2006 the trust sold the property to a developer for A R3,5 million, the developer also agreeing to fund the erection of a facility on the school's grounds to the value of R1,5 million.

[8] On 27 June 2006 the trustees met and resolved that R2,4 million of the purchase price was to be distributed to the respondent and the other trustees. B

[9] Mr SC Kapp, a chartered accountant and partner of Mozars Moores Rowland, the auditors of the school and the accountants of the trust, queried this transaction, and when he did not receive what he considered to be a satisfactory explanation he concluded that the trustees had C misappropriated the sum of R2,4 million. A further unsatisfactory feature in his view was the amendment of the trust deed by the respondent and his co-trustees, the appointment of themselves as the additional beneficiaries, the amount of the purchase consideration and the distribution of R2,4 million amongst themselves, all of which took place without the knowledge of the school's governing body. Mr Kapp decided to report the matter to the police and the respondent was as a D consequence duly charged with fraud and theft.

[10] In the light of the above facts the appellant concluded that the respondent had made himself guilty of dishonourable, dishonest and disgraceful conduct which was of such a nature that he was not a fit and E proper person to continue practising as an attorney. In terms of its obligation under s 22(1)*(d)* of the Attorneys Act 53 of 1979, the appellant launched an application for the removal of the respondent's name from the roll of attorneys.

[11] It is these proceedings that the respondent sought to have F postponed pending the finalisation of the criminal proceedings against him. He submitted that, by making a sworn statement in advance of the criminal proceedings, he might be prejudiced and his right in terms of s 35(1)*(c)* of the Constitution, not to be compelled to make any confession or admission that could be used in evidence against him, might be violated. He also claimed that he was entitled to remain silent G pending the finalisation of the criminal trial, and that his right to do so under s 35(1)*(a)* of the Constitution would be compromised.

[12] The respondent's contentions found favour with Smith J. In granting a stay of the application the learned judge cited the general H principle articulated by Corbett J in *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 435H, which is to the following effect:

'(W)here civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person it is the usual practice to stay the civil proceedings until the criminal proceedings have been disposed of.' I

In the judge's view, '(t)he principle at the root of this practice is that the accused might be prejudiced in the criminal proceedings if the civil proceedings were heard first'. He disagreed with the approach adopted in *Davis v Tip NO and Others* 1996 (1) SA 1152 (W). After alluding to the principle at the root of the practice of staying civil proceedings until J

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A the criminal proceedings had been disposed of in certain circumstances, the judge said the court has only to be satisfied that there is a danger that the accused person might be prejudiced in the conduct of his defence. He stated at para 23 that the 'qualification that there must be an element of state compulsion before a court can stay civil proceedings B under these circumstances, was superimposed for the first time in the *Davis* case'. I do not agree. In my view the golden thread that runs through the previous cases that were considered in *Davis (Du Toit*; *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T); *Kamfer v Millman and Stein NNO and Another* 1993 (1) SA 122 (C), to mention just a few) is that they all involved sequestration proceedings, in which the examinee C respondent was required to subject himself or herself to interrogation or to answer questions put to him or her by the provisional trustee. Clearly in each one of those cases there was an element of compulsion because s 65 of the Insolvency Act prior to its amendment provided that the person concerned was not entitled to refuse to answer questions. The D examinee's position was only ameliorated by the intervention of the court in the exercise of its discretion, which in most cases involved directing that the examinee should not be interrogated (*Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 231). This is how the general principle was applied long before *Davis*. The element of compulsion is E not something that was introduced or superimposed by the decision in *Davis*.

[13] The approach adopted by the court below is, with respect, erroneous in two important respects. The first involves its broad formulation of the general principle applied in determining whether a stay should be F granted where civil and criminal proceedings arising out of the same circumstances are pending against a person and there is a likelihood of prejudice to the person concerned if he or she made a statement prior to the disposal of the criminal proceedings. On the approach adopted by the court below, the power to grant a stay under these circumstances would be unlimited. One would envisage a situation where a stay will be G refused because, as Nugent J correctly pointed out in *Davis*, civil proceedings invariably create the potential for information damaging to the accused person being disclosed by the accused person himself, not least so because it will often serve his or her interests in the civil proceedings to do so.

H [14] The second important respect in which the court erred is with regard to the application of the principle to the facts. In my view the respondent failed to show that he would be prejudiced if the application to strike him off the roll were proceeded with. I will deal more fully with this aspect later in the judgment.

[15] I turn now to the general principle, as it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first. (*Du Toit* at 435H – 436B; *Irvin & Johnson* at 1072H – 1073B; *Kamfer* at 125E – 126D; *Davis* at 1157B – E.)

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[16] A series of previous decisions in this connection have dealt with applications for a stay in the context of sequestration proceedings pending the determination of the criminal proceedings. In those cases the examinee respondent was obliged to submit to compulsory interrogation in terms of s 65 of the Insolvency Act and to answer questions put to him or her by the provisional trustee. The general approach of the courts in this regard was not to stay the sequestration proceedings, but rather to ameliorate the potential prejudice by directing that, pending the disposal of the criminal proceedings, there should be no interrogation of the insolvent (see *Gratus* at 231). In *Gratus* the applicant had applied for sequestration of the estate of the respondent whom it had formerly employed as a clerk whilst criminal proceedings on a charge of theft were still pending against him. The charge related to the money the respondent had allegedly stolen from the applicant. The respondent applied for a stay of the sequestration proceedings pending the finalisation of the criminal proceedings. He contended that any statement he made in the sequestration proceedings would seriously prejudice him in his defence at the criminal trial. The court refused to grant a stay of the sequestration proceedings, but, to avoid possible prejudice to the respondent, it ordered that he not be examined under the Insolvency Act or interrogated by the provisional trustee. One would then immediately realise that the court intervened to ameliorate any state compulsion that existed arising from the obligation on the part of the examinee respondent to answer questions put to him in the interrogation which was sought to be pursued under the Insolvency Act. This occurred long before the decision in *Davis*.

[17] Under s 65(2) of the Insolvency Act, compulsion flowed from the fact that the examinees could not decline to answer any question upon the ground that the answer would tend to incriminate them, or upon the ground that they were to be tried on a criminal charge and might be prejudiced at such trial by their answers. Their opposition was ameliorated by the subsequent amendment. Section 65(2A) now provides for some protection to persons under interrogation. The new section requires that part of the proceedings in which they are required to answer such questions should be held in camera, and further that their answers to such questions should not be published. Prior to the amendment the information elicited at these proceedings had generally been admissible in subsequent criminal proceedings. It is for this reason that a practice developed whereby civil proceedings were stayed until criminal proceedings arising from the same facts had been disposed of. (*Du Toit* at 435H.)

[18] In the present matter the respondent is under no compulsion to respond to the allegations in the striking-off application. In this appeal we are requested to consider the question of how the court should deal with the situation where a party who faces criminal proceedings is called upon to answer allegations in related civil or disciplinary proceedings, without being compelled to do so. The party concerned may be faced with the choice of abandoning a defence to the civil or disciplinary proceedings or waiving his right to remain silent. This is the position in which the respondent finds himself. In *Davis* the court had to consider

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a situation which is not dissimilar to what we are dealing with in the present matter. In that case there was no legal compulsion on the respondent to testify. The court held that the preservation of his rights lay entirely in his hands. The court had to consider an application to review a ruling by a chairperson of a disciplinary enquiry, refusing an application by an employee of the Johannesburg City Council for a stay of the disciplinary proceedings pending the final determination of the criminal charges of fraud and theft. The court upheld the chairperson's refusal to stay the disciplinary proceedings pending the determination of the criminal proceedings, and dismissed the application for review.

[19] As I have said, Nugent J pointed out that civil proceedings invariably create the potential for information damaging to an accused person to be disclosed by the accused person himself, not least because it will serve his or her interest in the civil proceedings. He emphasised that where the courts have intervened, there has been a further element, which has been a potential for state compulsion to divulge information. He pointed out that even in those cases the courts have not generally suspended civil proceedings, but have in appropriate cases ordered that the element of compulsion should not be implemented. I have already referred to how the court in *Gratus* refused to grant a stay of the sequestration proceedings, but ameliorated the prejudice by directing that the respondent not be examined under the Insolvency Act or interrogated by the provisional trustee. (*Gratus* at 231.)

[20] The approach of Nugent J in *Davis* has been followed in a number of subsequent cases, eg *Fourie v Amatola Water Board* (2001) 22 *ILJ* 694 (LC); *Gilfillan t/a Grahamstown Veterinary Clinic and Another v Bowker* 2012 (4) SA 465 (ECG); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W) (1996 (8) BCLR 1071); *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C). In *Seapoint* Navsa J followed and applied the principle in *Davis* and stressed that in principle a party should be left to his or her choice as to how he or she conducts the civil proceedings. The learned judge pointed out that allegations in pending criminal investigations or proceedings, without indicators that state compulsion or coercive means are to be employed in the civil proceedings, are not sufficient to prove prejudice of a kind that will justify a stay (at 649H – I).

[21] In *Equisec (Pty) Ltd v Rodrigues and Another* 1999 (3) SA 113 (W) Nugent J again had the opportunity to express himself on the subject. He was called upon to consider an application for a stay of sequestration proceedings until such time as the related criminal proceedings had reached finality. Alluding to the dilemma in which a party requesting a stay found himself, he remarked (at 115A – C):

> 'Where a person is accused of having committed an act which exposes him to both a civil remedy and a criminal prosecution, he may often find himself in a dilemma. While on the one hand he may prefer for the moment to say nothing at all about the matter so as not to compromise the conduct of his defence in the forthcoming prosecution, on the other hand, to do so may prevent him from fending off the more immediate civil remedy which is being sought against him.

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> When he finds himself in that dilemma he might appeal to a court to resolve it for him, which is what has occurred in the case which is now before us.'

[22] The judge elaborated further as follows:

> 'There are two circumstances in which the first respondent will face the prospect of disclosing information which may be relevant to whether he has committed the offence with which he is now charged.
>
> Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *Davis v Tip NO and Others* 1996 (1) SA 1152 (W). . . . I see no reason to depart from the conclusion which was reached in those cases. In my view, the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his right to remain silent (cf Templeman LJ in *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 381, especially at 423D – G) does not constitute prejudice against which he should expect to be protected by a Court and I would not exercise my discretion in favour of the first respondent on those grounds alone.' [At 116A – E.]

[23] In my view the approach in *Davis* is sound and does no more than reiterate the approach of the previous decisions, namely that a stay will only be granted where there is an element of state compulsion impacting on the accused person's right to silence. It is true that the judges in those cases do not specifically refer to compulsion, but this is a matter of deduction made from the way the general principle was applied in matters which primarily involved sequestration proceedings. The development and formulation of the principle occurred in the context of sequestration proceedings. There is no authority to support the proposition that the principle is of application in ordinary civil proceedings not involving an element of compelled response on the part of the party who seeks a stay of civil proceedings. Our courts have only granted a stay where there is an element of state compulsion.

[24] This also appears to be the approach in certain foreign jurisdictions. In *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) at 1112 – 1113 the Court of Appeal in England dismissed an application by an accused person for the stay of civil proceedings for the recovery of money pending the finalisation of the related criminal proceedings. In dismissing the application the court emphasised that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject-matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence is, or is likely to be, in the criminal proceedings.

[25] *Jefferson* was followed in *R v BBC; Ex parte Lavelle* [1983] 1 All ER 241 (QB) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that

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while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger, and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.

[26] In *V v C* [2001] EWCA Civ 1509 the court of appeal, in deciding whether a stay of proceedings should have been granted because the privilege against self-incrimination constrained the defendant from putting forward a defence, pointed out that there was no absolute right for a defendant in civil proceedings not to have judgment entered against him or her simply because the privilege against self-incrimination was raised. The court refused the appeal on the basis that there was no need for the stay. It held that the defendant was entitled to enjoy the privilege against self-incrimination, but if he were to exercise it he would have to suffer the consequences in the civil proceedings.

[27] Turning to the facts of this case the judge in the court below proceeded from the assumption that prior to *Davis* the applicable legal principle was that where civil and criminal proceedings arising out of the same circumstances were pending, the civil proceedings had to be stayed and that the question of compellability was a later requirement introduced for the first time. He asserted that the element of compulsion was not required in *Du Toit* and that Corbett J considered the legal principle to be of application if there were a likelihood that the accused person would be prejudiced.

[28] The interpretation and the application of the principle in *Du Toit* as articulated and applied by the judge a quo are, with respect, not entirely accurate. The question of compellability has always been regarded as a relevant factor in a court's approach to the determination of whether a real likelihood of prejudice has been established. In *Du Toit*, and so too in *Gratus* and other cases mentioned earlier, there was an element of compulsion. It is for that reason that Corbett J in *Du Toit* made an order that 'the examination or interrogation of the respondent in terms of the Insolvency Act shall not take place pending the finalising of the application for sequestration'. The object of crafting the order in those terms was to ameliorate the impact of the compulsion contained in s 65(2) (prior to its amendment), in terms of which the examinee respondent was 'not entitled at such interrogation to refuse to answer any questions upon the ground that he is to be tried on a criminal charge and maybe prejudiced at such trial by his or her answers'. A similar example of intervention is also to be found in *Gratus* where, in order to avoid possible prejudice to the respondent, the court ordered that he not be examined under the Insolvency Act or interrogated by a provisional trustee. Absent any compulsion under the relevant provisions of the Insolvency Act, the courts in *Du Toit*, *Gratus* and the other cases I have referred to above would have been slow to grant a stay of the civil proceedings.

[29] If the approach adopted in the court below is taken to its logical conclusion, in every case where civil and criminal proceedings are

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pending and there is a likelihood of prejudice, the court will be vested with unlimited jurisdiction to stay the civil proceedings until the criminal proceedings have been finalised, even where there is no compulsion on the part of the person concerned to disclose his or her defence — where the person concerned is faced with a 'hard choice'.

[30] It seems to me that the nature of the discretion to be exercised by courts in cases such as this is very limited in scope and ambit. In *Davis* the discretion was described by Nugent J as follows (at 1157D – E):

> 'Although the principle has been articulated in the language of a discretion, this may be misleading. I do not understand the decided cases to have held that a Court may direct the civil proceedings to continue even where it has been found that they may prejudice an accused person. On the contrary, it is clear that once the potential for prejudice has been established the Courts have always intervened to avoid it occurring. In that sense then it has no discretion.'

The judge pointed out further that the potential for prejudice is limited to cases where there is a further element present, namely 'the potential for State compulsion to divulge information'. (At 1157F – G.)

[31] I agree with the approach in *Davis*. I also think that to extend the court's intervention to cases where an applicant for a stay of the civil proceedings has a 'hard choice' to make, would bring the right to remain silent into disrepute. The ratio for the discretion being narrowly circumscribed is that a distinction must be maintained between the situation where an individual has the choice whether to testify (even though the alternatives over which he has a choice are equally unattractive) and where he is compelled to because a failure to do so attracts a penalty. (At 1158H – J.) According to the decision in *Davis* this is necessary to ensure that the 'salutary principle', enshrined in the right to silence, is not to be extended beyond its true province and thereby risk falling into disrepute (at 1158I – J).

[32] The respondent in this case falls outside the category of parties who are subject to compulsion to testify or to disclose their defence. He has a 'hard choice' to make as to whether he should respond to the allegations in the striking-off application or face the consequences of not responding. In my view, the learned judge's broad formulation of the general principle applicable to applications for a stay was erroneous. The only prejudice the court below referred to was that 'making a sworn statement in opposition to the main application might serve to prejudice the respondent in the conduct of his defence in the criminal matter'. The respondent, however, denies any wrongdoing and, if he were to respond, would in any event probably file an exculpatory statement. Any claim to violation of the respondent's right to silence appears to be illusory. On the papers the respondent has already disclosed essentials of his defence when he filed a plea in a related civil matter. Significantly, he has not sought to stay those proceedings. I do not see how he could claim that filing an answering affidavit in the striking-off application would prejudice him.

[33] The matter is of huge public importance. The respondent is an officer of the court whose position requires scrupulous integrity and

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Mthiyane DP (Majiedt JA, Van der Merwe AJA, Swain AJA and Mbha AJA concurring)

honour. He is facing grave allegations of dishonesty and impropriety. In assessing prejudice generally the judge a quo regrettably appears to have focused solely on the respondent's practice. He pointed out that there was no evidence of wrongdoing in the respondent's trust account. This appears to avoid the issue because probity and fitness to remain in office of an attorney do not depend solely on whether the attorney's trust account is intact. These are factors which the judge a quo should also have taken into consideration in the overall consideration of the question of prejudice. It was not only prejudice to the respondent that he had to consider, but also the protection of the public interest. In failing to consider the above factors the judge erred.

[34] Before concluding, I would like to refer to a further point made by the respondent's counsel during argument. Counsel submitted that the application for a stay of the striking-off proceedings was interlocutory and therefore not appealable. The argument is without merit. The order by Smith J to stay the application to strike off was final in effect, in that it disposed of all the issues relevant to the said application. In any event, the contention advanced on the respondent's behalf is in conflict with the decision of this court in *Clipsal Australia (Pty) Ltd and Others v GAP Distributors and Others* 2010 (2) SA 289 (SCA), in which an application to stay contempt proceedings was held to be appealable.

E [35] In the result the appeal is upheld with costs on an attorney and client scale, and the order of the court a quo is set aside and replaced with the following: 'The application is dismissed with costs on an attorney and client scale.'

Appellant's Attorneys: *Bisset Boehmke McBlain*, Cape Town; *Webbers*, F Bloemfontein.

Respondent's Attorneys: *Nettletons*, Grahamstown; *Claude Reid Inc*, Bloemfontein.

SINGH AND OTHERS v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION AND OTHERS 2019 (5) SA 432 (SCA)

Citation	2019 (5) SA 432 (SCA) E
Case No	822/2018 [2019] ZASCA 69
Court	Supreme Court of Appeal
Judge	Navsa ADP, Mbha JA, Schippers JA, Mokgohloa AJA and Davis AJA F
Heard	May 30, 2019
Judgment	May 30, 2019
Counsel	*DE Loggerenberg SC* for the appellants. G *ALS Msimang* for the first and second respondents. *HF Oosthuizen SC* for the third respondent.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Company — Complaints — Power of Companies and Intellectual Property Commission (CIPC) to investigate — Whether complaint time-barred — Effect of H pending litigation on CIPC investigation, where subject-matter of complaint also material issue in such litigation — Companies Act 71 of 2008, ss 219(1)*(a)* and 219(2).

Headnote : Kopnota

In two complaints filed with the Companies and Intellectual Property Commission (the Commission), the third respondent, Mr Smith, alleged that the I first appellant, Mr Singh (or persons associated with him), had fraudulently filed documents with the Commission reflecting Mr Smith as having resigned as a director of two companies (the second and third appellants); and that the records of the Commission incorrectly did not reflect him as a director of these companies. The High Court dismissed an application to have the Commission's decision — to investigate the complaint and to J authorise summons in terms of which Mr Singh was requested to appear

and provide information to the Commission in his capacity as a director of A the said companies — set aside on review.

Here, an appeal to the Supreme Court of Appeal against the High Court's order, the appellants argued that the Commission lacked jurisdiction to investigate the complaints, inter alia, because it was time-barred from doing so by s 219(1)(a) of the Companies Act 71 of 2008 * (Mr Smith having lodged it more than three years after 'the cause of complaint' arose); and that the B investigation was otherwise barred by s 219(2) † because Mr Smith's alleged resignation was also a material issue in pending litigation (relating to a contractual dispute).

The SCA *held* as follows:

As to whether the complaint was time-barred

When s 219(1)*(a)* employed the words 'the act or omission', the purpose thereof C was to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they were corrected. Thus, if the records of the company reflected incorrect information, there was an obligation on officers of the company to ensure that the inaccuracy was cured. It followed that the failure to ensure that the records were maintained accurately, constituted either 'an act or an omission' falling within the scope of s 219(1)*(a)*; and if D there was a complaint that the records of the company were inaccurate, that constituted a complaint that there had been an act or an omission, which in terms of s 219(1)*(a)* constituted the cause of the complaint. The failure to cure the inaccuracy or to draw it to the attention of the Commission constituted a discrete act which was not frozen in time. (See [18].)

As to the effect of pending legislation on complaints E

The wording of s 219(2) made it clear that a complaint could not be prosecuted if there were other proceedings relating to substantially the same conduct that gave rise to the complaint where such other proceedings were based on a section of the Act. In this case the proceedings before the High Court were contractual in nature and thus were not based on any provision of the Act. F Hence s 219(2) of the Act was inapplicable. Whatever the situation may be with regard to a private action launched in the High Court concerning contractual disputes, the present dispute, which dealt with the accuracy of company records, fell within the jurisdiction of the Commission, namely to investigate a complaint. This function went to the heart of its mandate, namely to ensure the proper administration of the Act and compliance with the principles of good corporate governance. In the result, the appeal would G be dismissed. (See [21], [26] and [36].)

Cases cited

*Barnett and Others v Minister of Land Affairs and Others*2007 (6) SA 313 (SCA) (2007 (11) BCLR 1214; [2007] ZASCA 95): referred to

Competition Commission of SA v Telkom SA Ltd and Others [2010] 2 All SA 431 (SCA) ([2009] ZASCA 155): H dictum in para [11] applied

*Davis v Tip NO and Others*1996 (1) SA 1152 (W): dictum at 1159A applied

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works A 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33): dictum in para [21] applied

*Makate v Vodacom Ltd*2016 (4) SA 121 (CC) (2016 (6) BCLR 709; [2016] ZACC 13): dictum in para [192] applied

Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO B 1997 (2) SA 636 (W) (1996 (8) BCLR 1071): dictum at 648A – C applied

*Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another*2003 (3) SA 64 (SCA) ([2003] 1 All SA 82): referred to

Singh and Others v Companies and Intellectual Property Commission and Others [2018] ZAGPPHC 12: confirmed on appeal

Slomowitz v Vereeniging Town Council C 1966 (3) SA 317 (A): referred to.

Legislation cited

The Companies Act 71 of 2008, s 219(1)*(a)* and 219(2): see Juta's Statutes of South Africa 2018/19 vol 2 at 1-451.

Case Information

DE Loggerenberg SC for the appellants.

ALS Msimang D for the first and second respondents.

HF Oosthuizen SC for the third respondent.

An appeal from the Gauteng Local Division of the High Court, Pretoria (Singh and Others v Companies and Intellectual Property Commission and Others [2018] ZAGPPHC 12, per Basson J).

Order E

1. The appeal is dismissed with costs on an attorney and client scale.
2. The first and second respondents are entitled to costs only in respect of the opposition to the application to admit further evidence, also on an attorney and client scale.

Judgment

Davis AJA (Navsa ADP, Mbha JA, Schippers JA and Mokgo- hloa AJA concurring): F

Introduction

[1] This case concerns the question whether the first respondent, being the Companies and Intellectual Property Commission (the Commission), established in terms of s 185 of G the Companies Act of 2008 (the Act), has jurisdiction to investigate a complaint lodged by the third respondent, Mr Ralston Smith (Smith), to the effect that his removal as a director of the second appellant, Lahleni Lakes (Pty) Ltd (Lahleni), H had been effected fraudulently. Smith alleged that either the first appellant, Mr Ramesh Singh (Singh), or persons associated with him, fraudulently filed documents with the Commission which reflected that Smith had resigned as a director.

[2] On 23 February 2016 the Commission recommended that the I complaint be investigated. As part of the investigation Singh was requested, in his capacity as a director of Lahleni, to appear before the Commission and to furnish certain information in respect of Lahleni as well as the third appellant, Finishing Touch (Pty) Ltd (Finishing Touch).

[3] Singh did not appear nor did he comply with the Commission's J request for documentation. Summons was subsequently served on

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Singh, on 5 April 2016, via email. The attorneys acting on behalf of A Singh objected to the way in which the summons was served and further contended that in terms of s 219(1)*(a)* of the Act, the complaint had been lodged more than three years after the alleged act, which was the cause of the complaint, had been committed. Hence, so it was contended, the complaint could no longer be investigated as it had prescribed. B

[4] The Commission remedied the objection to service of summons by ensuring that it was served by the sheriff on 7 April 2016. The appellants then launched an application to review and set aside the decision of the Commission to accept and investigate the complaint and to authorise C summons in terms of which Singh was requested to appear and provide information to the Commission, in his capacity as director of Lahleni and Finishing Touch.

[5] The court a quo dismissed the application with costs on an attorney and client scale. It is against that order that the appellants have D approached this court, with the leave of the court a quo.

The factual matrix

[6] The appellants and Smith, together with certain other parties, entered into a series of commercial agreements between September and E November 2012. The agreements were designed to transfer shares in Lahleni and Finishing Touch to Singh or entities controlled by him. It appears that the agreements were subject to various conditions precedent, including a clause which provided that all the existing shareholders and directors, other than Singh, had to resign within 30 days as from 3 October 2012. F

[7] A dispute arose as to whether the conditions precedent to the agreements had been fulfilled, and further whether Smith had resigned as a director of both Lahleni and Finishing Touch. On 21 May 2013 BTW Consulting (Pty) Ltd obtained a final liquidation order against Lahleni, which caused the latter together with the fourth G appellant (One Vision) to launch an application for the rescission of this liquidation order. Smith alleged that it was during the course of that litigation that he first ascertained that Singh had claimed that he, Smith, had resigned as a director of Lahleni and Finishing Touch. The claim of resignation as a director was based on a document dated 2 October H 2012, headed 'Mandate for Resignation of Director' of Lahleni Lakes (Pty) Ltd. The document which is purportedly signed by Smith states that he had consented to his resignation as a director. Smith alleged that his signature had been fraudulently affixed to the letter of resignation, upon the discovery of which he lodged a complaint with the Commission. I

[8] On 16 October 2014 One Vision 344 (Pty) Ltd (One Vision) launched an application in the North Gauteng High Court. The main relief sought was for specific performance of the memorandum of understanding (MOU) concluded between the various parties in respect of the sale of equity in Lahleni. According to the first appellant, one of the J

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material A issues in that litigation is whether the provisions of the MOU and the sale of equity had been fully executed and implemented, including the critical question as to whether Smith had resigned as a director of both Lahleni and Finishing Touch as contemplated in the MOU and the sale of equity agreement. On 26 October 2015, by agreement between B the parties, the application was referred to trial.

[9] On 18 February 2016 Smith filed two complaints with the Commission in terms of s 168 of the Act, alleging that the records of the Commission incorrectly did not reflect that he was a director of both Lahleni and Finishing Touch and that his purported resignation had C been fraudulently procured. Smith provided the Commission with a forensic report which concluded that the signatures used to effect his resignation as a director of Finishing Touch were 'without any doubt not authentic writing but a forgery'. He also deposed to an affidavit stating that the signatures used to reflect his resignation as a director of Lahleni D were also forgeries.

[10] Pursuant to these complaints, the Commission initiated an investigation, as indicated above in [2] and [3], and summoned Singh in his capacity as director to appear and to provide information on 25 April 2016. Not only did Singh refuse to comply with the summons but, as stated above, he also applied to court to review and set aside the decisions of the Commission to accept the complaints, authorise summonses in which Singh was requested to appear and provide information to the Commission, and in the alternative an order setting aside the decision to investigate and issue summons, and in the further alternative that all these acts of the Commission were ultra vires.

The judgment of the court a quo

[11] In dismissing the application with costs, Basson J in the court a quo found that the summons had been correctly served on 7 April 2016 by the sheriff. On the merits, the learned judge dismissed the application, essentially for the following reasons:

> 'The investigative powers conferred upon CIPC are central to the statutory duty to maintain the companies register. I am further in agreement with the submission that it would be absurd to suspend the investigative powers of CIPC in exercising its statutory duties merely because an affected party has instituted proceedings into other matters relating to the investigation regardless of whether the statutory regulator (such as CIPC) is a party to those proceedings. Moreover, there is no reason, in my view, why the investigation conducted by the CIPC (which is a statutory obligation) cannot run concurrently to action proceedings instituted by a party to the investigation process. Lastly, if regard is had to the relief sought in the action proceedings, it is apparent that no relief is claimed with regard to the correction of the companies register maintained by CIPC.'

The appeal

[12] On appeal, the appellants' counsel raised a series of arguments which can be reduced to the following:

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1. The complaint was time-barred.

2. There is currently an action pending in the High Court which deals with the same matter, that is the action launched by One Vision; and that matter ought to have been referred to trial and consolidated with this case.

3.1 Either on the basis of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), inter alia, on the basis that the decision to investigate the complaints was based on incomplete information; or

3.2 the residual principal of legality, in that the Commission exceeded its statutory authority by taking decisions, where s 219(1) of the Act clearly precluded the initiation of the complaint; furthermore, the appellants contended that the decision to pursue the complaint was neither rational nor reasonable.

[13] For those reasons, therefore, it was argued by the appellants that the Commission lacks jurisdiction to investigate the complaints.

Was the complaint time-barred?

[14] Section 219(1) of the Act provides as follows:

> 'A complaint in terms of this Act may not be initiated by, or made to the Commission or the Panel, more than three years after —
>
> *(a)* the act or omission that is the cause of the complaint; or
>
> *(b)* in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.'

[15] Counsel for the appellants contended that Smith had lodged a complaint with the Commission more than three years after the alleged fraudulent submissions had been made removing him as a director of Lahleni and Finishing Touch. The court a quo found that the complaint was based upon 'a course of conduct or continuing practice' within the meaning of s 219(1)*(b)* of the Act. The reason for this, so it was said, is to be found in the obligation imposed upon the Commission to ensure that the records and registers which it administers are maintained accurately. Section 187(4) of the Act provides that the Commission is obliged not only to establish but also to maintain the companies register in the prescribed manner and form. This implies that the continued accuracy of the register is part of its mandate. It is clear that, if a record reflects a fraudulent entry and is not corrected, the records maintained by the Commission are not accurate. It must follow that if the Commission discovers a fraudulent entry some three years after the fraud was perpetrated, on the basis of the argument of appellants' counsel, it would be powerless to effect a change.

[16] Counsel for the appellants focused his submission on the finding of the court a quo, based as it was on s 219(1)*(b)* of the Act, that the records of the company continued to reflect that Smith was not a director, was an omission which constituted a continuous practice. He submitted that an incorrect insertion into a record of a company is a single act. In the view of counsel for the appellants, the words 'continuing practice' were therefore inapplicable in this case.

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[17] In my view, it is possible to find an answer to this submission in the dictum of Wallis AJ, in *Makate v Vodacom Ltd*2016 (4) SA 121 (CC) (2016 (6) BCLR 709; [2016] ZACC 13) para 192, where he states:

> 'In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that *while the original wrongful act may have occurred in a time past the wrong itself continues for so long as it is not abated*.' [Emphasis added.]

See also *Barnett and Others v Minister of Land Affairs and Others*2007 (6) SA 313 (SCA) (2007 (11) BCLR 1214; [2007] ZASCA 95) paras 20 – 21; and *Slomowitz v Vereeniging Town Council*1966 (3) SA 317 (A) at 330H – 331G, which judgments accept the description of a continuing wrong as one which still is in the course of being committed and is not to be located wholly in a single past action.

[18] In the present case, however, it appears to me to be unnecessary to decide this issue on the basis of a 'continuing practice', in that s 219(1)*(a)* of the Act is applicable rather than s 219(1)*(b)* in which the phrase 'course of conduct or continuing practice' is employed. Section 219(1)*(a)* refers to an 'act or omission', either of which is applicable in this case. The Commission has an obligation to maintain an accurate register of companies. This obligation is not frozen in time. If it were it would compel the Commission to work knowingly with inaccurate information, even in a case where the record was tainted by fraudulent activity. If, as must be the case, the Commission is enjoined to maintain accurate records and thus effect necessary corrections to ensure accuracy, the failure by a company to ensure that inaccuracies are corrected amounts either to a misrepresentation of the correct position or an omission to correct the incorrect entry. In summary, when s 219(1)*(a)* of the Act employs the words 'the act or omission' the purpose thereof is to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they are corrected. Thus, if the records of the company reflect incorrect information, there is an obligation on officers of the company to ensure that the inaccuracy is cured. Thus, the failure to ensure that the record is maintained accurately constitutes either an act or an omission which falls within the scope of s 219(1)*(a).* Thus, if there is a complaint that the records of the company are inaccurate, that constitutes a complaint that there has been an act or an omission which in terms of s 219(1)*(a)* constitutes the cause of the complaint. The failure to cure the inaccuracy or to draw it to the attention of the Commission constitutes a discrete act which is not frozen in time, which was the appellants' argument in respect of prescription.

The effect of pending litigation

[19] The appellants' counsel contended that the pending litigation before the High Court will be required to determine whether Smith had

resigned as a director of Lahleni and Finishing Touch. In terms of an amended notice of appeal, it was argued that the precise dispute which J confronts this court is pertinently relevant to the litigation which has

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been launched. If the Commission's investigation was allowed to A continue, it would lead to 'a preview of the evidence to be presented at the upcoming trial' regarding the exact same issues, namely whether Mr Smith had resigned of his own free will or whether the resignation had been fraudulently procured.

[20] Counsel for the appellants contended that s 219(2) of the Act B prevented the Commission from investigating a complaint where the civil action was pending before the High Court. Section 219(2) of the Act provides as follows:

> 'A complaint may not be prosecuted in terms of this Act against any person that is, or has been, a respondent in proceedings under another C section of this Act relating substantially to the same conduct.'

[21] The wording of this section makes it clear that a complaint cannot be prosecuted if there are other proceedings relating to substantially the same conduct that gave rise to the complaint, where such other proceedings are based on a section of the Act. In this case the D proceedings before the High Court are contractual in nature and thus are not based on any provision of the Act. Hence s 219(2) of the Act is inapplicable to the present case. The appellants' counsel sought to argue further that the first appellant could be prejudiced if he was to be compelled to cooperate with the Commission's investigation, given that the same question about an alleged fraudulent signature was the subject E of civil litigation.

[22] This submission flies in the face of formidable authority. In *Davis v Tip NO and Others*1996 (1) SA 1152 (W) at 1159A the question arose as to whether a disciplinary inquiry should be postponed pending the F conclusion of criminal proceedings relating to the same conduct. Nugent J said:

> 'In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being G found guilty of misconduct, and not a punishment to induce him to speak. Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice.'

[23] This approach commends itself to the present case, where the issue H concerns a choice between pursuing a civil action and a refusal to comply with a lawful demand issued by the Commission. This conclusion finds further support in the judgment of Navsa J in *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO*1997 (2) SA 636 (W) (1996 (8) BCLR 1071) at 648A – C, where the learned judge was required to deal I with an application staying a civil action, pending the determination of a criminal case, both of which stemmed from the same conduct. In his judgment Navsa J said:

> 'I agree with Nugent J that the discretion the cases speak of, is not one in the traditional sense. To me, it means that a Court has authority to J

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> stay A proceedings in suitable cases. In order to arrive at a decision whether to do so or not, a Court weighs all the facts and circumstances to determine whether prejudice might attach to the accused person if the civil proceedings were to continue. Once potential for prejudice is established, the Court will stay proceedings or find a formula for preventing prejudice, such as, in appropriate cases, ruling that information B obtained should not be subsequently disclosed, or barring the use of compelling or coercive measures.'

[24] Applying these dicta to the present dispute, the appellants have shown no prejudice of a kind which these judgments had in mind, in the event that the Commission proceeds with its investigation of the C complaint, nor was appellants' counsel able to suggest any prejudice which would justify the relief sought by appellants. Simply put, when a party is required to appear in different fora, each of which has jurisdiction in respect of the subject-matter, the manner in which that party deals with the process in each forum is a matter of choice, which holds particular consequences attendant on the choice so made. Ironically, it is D the appellants who launched the litigation that they now contend should be put on hold, pending the outcome of litigation elsewhere or consolidated.

The significance of the Commission's mandate

[25] E The crisp issue which confronts this court is the role of the Commission under s 7*(b)*(iii) read with s 185(2) of the Act, in terms of which it is required to act independently and impartially and to perform its functions without fear, favour or prejudice, to encourage transparency and high standards of corporate governance. It is empowered to investigate complaints, particularly those which are sufficiently serious, F such as the allegation of the fraudulent removal of a director in contravention of the provisions of the Act. Decisions taken in this regard by the Commission must be designed to ensure that it performs one of its core functions, namely the enforcement of proper compliance with the administrative provisions of the Act. In the event that an investigation G concludes that there is no merit to the complaint, that would be the end of the matter. In terms of s 170(1)*(c)* of the Act, the Commission may 'issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek remedy in court'. Alternatively, the investigation may indicate that the non-compliance requires a referral to the Companies Tribunal or the H National Prosecuting Authority or that proceeding may commence in the name of the complainant.

[26] Whatever the situation may be with regard to a private action launched in the High Court concerning contractual disputes, the present dispute, which deals with the accuracy of company records, falls within I the jurisdiction of the Commission, namely to investigate a complaint. This function, as indicated, goes to the heart of its mandate, namely to ensure the proper administration of the Act and compliance with the principles of good corporate governance.

[27] One would expect if there was an order of preference or priority in J relation to the competing fora, the statutory regulator would enjoy

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preference. The share register is, after all, a document in which the world A at large should have confidence. Thus, the Commission must be empowered to fulfil its obligations to ensure accurate records of companies under its jurisdiction, the fulfilment of which is manifestly in the public interest. It stands to reason that the Commission's powers to investigate a complaint concerning the accuracy of a company record must enjoy primacy over private litigation involving companies. B

Argument concerning a review based upon rationality/reasonableness

[28] Much of the argument raised, albeit very tentatively, by the C appellants' counsel with regard to whether there is a ground to review the decision of the Commission, turned on a recourse to PAJA. This argument turns on whether the investigation of a complaint lodged with the Commission constitutes administrative action. The definition of administrative action in s 1 of PAJA has been described as simultaneously cumbersome, convoluted and narrow in its scope. [1] But it does not D stretch to cover a referral to a statutory body of an investigative nature — this is clear from the *Competition Commission of SA v Telkom SA Ltd and Others* [2010] 2 All SA 431 (SCA) ([2009] ZASCA 155) para 11, which decision followed and relied on *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another*2003 (3) SA 64 (SCA) ([2003] 1 All SA 82) para 17. E

[29] The alternative argument raised, albeit with equally little enthusiasm by appellants' counsel, was based upon the residual concept of legality, namely whether the Commission was entitled in law to investigate the complaint. That is an issue that I have already determined, namely, that F the Commission received a complaint which it was empowered to investigate in terms of s 169 of the Act and which had not prescribed in terms of s 219 of the Act. For this reason the jurisdictional facts required for the Commission to initiate a complaint are clearly present.

[30] There was some suggestion that there was insufficient evidence G which had been contained in the complaint for the Commission to act rationally. The principle that all public power must be exercised within the confines of applicable law has been applied through the concept of legality. Its application is context driven, that is, the application of legality depends on the facts of the particular case, particularly to ensure H that a parallel universe of administrative law is not developed. See C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 130 – 2. Suffice to say that there is an obligation placed upon the Commission to act rationally when it exercises its statutory powers.

[31] In the present case it is difficult to follow the basis of the argument I that the Commission did not act rationally, particularly since Singh has

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steadfastly A refused to testify before the Commission or provide further documentation which may be relevant to its inquiry.

[32] In summary, it would be inappropriate at this stage of the Commission's investigation to prevent it from performing its statutory role and prevent it from investigating what is a serious complaint. If the B Commission makes a finding on the basis of inadequate evidence, then the possibility of a review of a substantive decision based on questions of rationality or reasonableness may come into play. But, on the papers before this court, no case has been made out to review its decision, whether in terms of PAJA or legality.

Application to allow further evidence on appeal C

[33] The first appellant applied to have further evidence received by this court. This evidence relates to the amended pleadings and the facts set out therein, which were filed before the High Court in the action to D which reference has been made earlier in this judgment.

[34] This application was not opposed with any vigour by the respondents but counsel for the third respondent correctly noted that the contents of the evidence on which the application was based were totally irrelevant to whether the Commission was empowered to investigate the complaint. For this reason the respondents contended that the irrelevancy E thereof was significant in respect of the award of costs.

[35] The appeal to this court was devoid of any merit. It appeared to be no more than an exercise in deferment; that is, litigation designed to postpone a legitimate inquiry. This kind of litigation should be discouraged. For this reason a punitive costs order is clearly justified. However, F as the Commission did not adopt a clear stance in opposing the appellants' litigation strategy, it is only entitled to its costs which were incurred in its opposition to the admission of further evidence by the appellants.

[36] In the result:

1. G The appeal is dismissed with costs on an attorney and client scale.
2. The first and second respondents are entitled to costs only in respect of the opposition to the application to admit further evidence, also on an attorney and client scale.

Appellants' Attorneys: *Hogan Lovells (SA) Inc*, Johannesburg; *Honey Attorneys*, H Bloemfontein.

First and Second Respondents' Attorneys: *Rudman & Associates Inc*, Pretoria; *Horn & Van Rensburg Attorneys*, Bloemfontein.

Third Respondent's Attorneys: *Veneziano Attorneys*, Pretoria; *Symington De Kok*, Bloemfontein.

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* Section 219(1) provides that:
'A complaint in terms of this Act may not be initiated by, or made to the Commission . . . more than three years after —
(a) the act or omission that is the cause of the complaint; . . .'. .

† Section 219(2) provides that '(a) complaint may not be prosecuted in terms of this Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct'.

1 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33; [2005] ZASCA 43) para 21.