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[HOUSE OF LORDS]

ALFRED CROMPTON AMUSEMENT MACHINES LTD. . . . . APPELLANTS

AND

CUSTOMS AND EXCISE COMMISSIONERS (No. 2) . RESPONDENTS

B

1973 Jan. 15, 16, 17, 18, 22, 23, 24, 25, 29; July 4

Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Cross of Chelsea and Lord Kilbrandon

Practice—Discovery—Privilege—Professional privilege—Purchase tax assessment dispute referred to arbitration—Communications between customs and excise commissioners and own legal department—Communications in anticipation of arbitration proceedings—Whether privileged

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Crown—Privilege—Evidence—Objection to produce documents—Claim by head of department—Documents containing information from third parties supplied in confidence—Information in connection with determination of purchase tax and anticipated arbitration—Whether documents privileged on ground of confidence

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By a letter dated July 31, 1967, the complainant company, which had for some years paid purchase tax on the wholesale values of machines made and sold by them on the basis of a formula negotiated with the Customs and Excise Commissioners, claimed that the assessment was too high and asked that the letter be treated as a request for arbitration under section 36 of the Purchase Tax Act 1963. The commissioners thereupon began to investigate the company's books and affairs and obtained from customers and other sources information relevant not only to the ascertainment of the wholesale value but also (as the Court of Appeal found) to the possible arbitration. On December 8, 1969, they gave their formal "opinion" under section 3 (1) of the Act on the way the tax should be computed. No agreement was reached and pleadings went ahead for arbitration. When the commissioners served their list of documents they claimed (1) legal professional privilege for bundles of documents consisting of communications between themselves and their legal department (a) in the ordinary course of work and (b) for the purpose of the anticipated arbitration; and also for internal memoranda, minutes and the like, stated to have been prepared, sent or received in confidence for the purpose of the arbitration; and (2) Crown privilege for a class of routine documents the disclosure of which the head of the department swore would be injurious to the public interest since they would reveal the commissioners' methods and contained confidential information from third parties supplied both voluntarily and pursuant to the exercise of the commissioners' powers under section 24 (6) of the Act.

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The company applied unsuccessfully to the master for an order for discovery of those documents; but Eveleigh J. on appeal ordered the commissioners to make their claims with greater particularity by a fixed date, in default of which they should produce the documents. Further affidavits were sworn, but the company, claiming that they were still insufficient to comply with Eveleigh J.'s order, took out another summons.

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It came before Forbes J. who made an order which in effect required production of most of the documents in dispute, but gave the commissioners leave to appeal. The Court of Appeal allowed the appeal, holding, (i) that legal professional privilege attached to all the communications between the commissioners and their internal legal advisers from the earliest date at which "litigation" was anticipated, namely, from July 31, 1967, and that professional privilege also attached to the internal memoranda used in the process of valuation under section 3 (1) or obtained in the exercise of the commissioners' powers under section 24 since those documents came into existence after "litigation" was anticipated; and (ii) that the claim for Crown privilege in respect of the class of routine documents could not be sustained, but that the commissioners were entitled to the inherent privilege available to all litigants to withhold from production information from third parties given in confidence for a restricted purpose, and that, accordingly, on that ground those documents were privileged from production.

The company appealed:—

Held, dismissing the appeal, (1) that in the circumstances legal professional privilege attached to the communications between the commissioners and their internal legal advisers from receipt of the letter of July 31, 1967, since the commissioners were entitled to take the view (which subsequent correspondence did nothing to disabuse) that whatever value was fixed would almost certainly be challenged (post, pp. 419E–F, 421E–G, 431A–D, 435A).

(2) (Viscount Dilhorne dissenting) that professional privilege did not attach to the memoranda for the first and immediate purpose for which those documents were obtained or came into existence was to assist the commissioners to ascertain the wholesale value of the goods in question in the manner prescribed by the Act (post, pp. 419E–F, 432G—433D, 435A).

Jones v. *Great Central Railway Co.* [1910] A.C. 4, H.L. (E.) applied.

Ogden v. *London Electric Railway Co.* (1933) 49 T.L.R. 542, C.A. and *Seabrook* v. *British Transport Commission* [1959] 1 W.L.R. 509 distinguished.

(3) That the class of documents of a routine kind were not privileged from production on the ground that they contained information from third parties given in confidence since no such ground of privilege existed (post, pp. 419E–F 429B–F, 430H, 435A).

Enthoven v. *Cobb* (1852) 5 De G. & Sm. 595; 2 De G.M. & G. 632 considered.

(4) But that the memoranda (which consisted principally of documents or information obtained from third parties) and documents of a routine kind were privileged from production on the ground that it was in the public interest that they should not be disclosed since knowledge that the commissioners could not keep such information secret might be harmful to the efficient working of the Act (post, pp. 419E–F, 422D–E, 434D–H, 435A).

Per curiam. "Confidentiality" is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest (post, p. 433G–H).

Decision of the Court of Appeal [1972] 2 Q.B. 102; [1972] 2 W.L.R. 835; [1972] 2 All E.R. 353 affirmed on different grounds.

The following cases are referred to in their Lordships' opinions:

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Admiralty Commissioners v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*, 1909 S.C. 335.

Birmingham and Midland Motor Omnibus Co. Ltd. v. *London and North Western Railway Co.* [1913] 3 K.B. 850, C.A.

Chantrey Martin & Co. v. *Martin* [1953] 2 Q.B. 286; [1953] 3 W.L.R. 459; [1953] 2 All E.R. 691, C.A.

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Crompton (Alfred) Amusement Machines Ltd. v. *Customs and Excise Commissioners* [1971] 2 All E.R. 843.

Enthoven v. *Cobb* (1852) 5 De G. & Sm. 595; 2 De G.M. & G. 632.

Hopkinson v. *Lord Burghley* (1867) 2 Ch.App. 447.

Jones v. *Great Central Railway Co.* [1910] A.C. 4, H.L.(E.).

Longthorn v. *British Transport Commission* [1959] 1 W.L.R. 530; [1959] 2 All E.R. 32.

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Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, H.L.(E.).

Ogden v. *London Electric Railway Co.* (1933) 49 T.L.R. 542, C.A.

Reynolds v. *Godlee* (1858) 4 K. & J. 88.

Seabrook v. *British Transport Commission* [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15.

Watson v. *Cammell Laird & Co. (Shipbuilders and Engineers) Ltd.* [1959] 1 W.L.R. 702; [1959] 2 All E.R. 757, C.A.

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Whitehill v. *Glasgow Corporation*, 1915 S.C. 1015.

The following additional cases were cited in argument:

Adam Steamship Co. Ltd. v. *London Assurance Corporation* [1914] 3 K.B. 1256, C.A.

Anderson v. *Bank of British Columbia* (1876) 2 Ch.D. 644, C.A.

Ankin v. *London and North Eastern Railway Co.* [1930] 1 K.B. 527, C.A.

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Attorney-General v. *Clough* [1963] 1 Q.B. 773; [1963] 2 W.L.R. 343; [1963] 1 All E.R. 420.

Attorney-General v. *Mulholland*; *Attorney-General* v. *Foster* [1963] 2 Q.B. 477; [1963] 2 W.L.R. 658; [1963] 1 All E.R. 767, C.A.

Bristol Corporation v. *Cox* (1884) 26 Ch.D. 678.

Bulman v. *Young, Ehlers & Co.* (1883) 31 W.R. 766, D.C.

Bustros v. *White* (1876) 1 Q.B.D. 423, C.A.

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City of Baroda, The (1926) 134 L.T. 576.

Connecticut Importing Co. v. *Continental Distilling Corporation* (1940) 1 F.R.D. 190.

Conway v. *Rimmer* [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).

Cowan v. *Stanhill Estates Pty. Ltd.* [1966] V.R. 604.

Customs and Excise Commissioners v. *Ingram* [1948] 1 All E.R. 927, C.A.

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Dunbar v. *Harvie* (1820) 2 Bligh 351.

Ellis v. *Watson* (1818) 2 Stark. 453.

Fenner v. *London and South Eastern Railway Co.* (1872) L.R. 7 Q.B. 767

Gamini Bus Co. Ltd. v. *Commissioner of Income Tax, Colombo* [1952] A.C. 571, P.C.

Gardner v. *Irvin* (1878) 4 Ex.D. 49, C.A.

Goodall v. *Little* (1851) 1 Sim.N.S. 155.

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Graham Farm Land Co. v. *Commonwealth* (1950) 70 A. 2d. 219.

Greenlaw v. *King* (1838) 1 Beav. 137.

Hargreaves (Joseph) Ltd., In re [1900] 1 Ch. 347, C.A.

Henderson v. *M'Gown*, 1916 S.C. 821.

Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A. A
Jenkins v. *Glasgow Corporation*, 1934 S.L.T. 53.
Krew v. *Commissioner of Taxation* (1971) 45 A.L.J.R. 249.
Lee v. *Birrell* (1813) 3 Camp. 337.
Macdonald v. *James Hedderwick & Sons* (1901) 3 F. 674.
M'Corquodale v. *Bell* (1876) 1 C.P.D. 471.
Mahony v. *National Widows' Life Assurance Fund Ltd.* (1871) L.R. 6 C.P. 252. B
Milne v. *Wakelin* (*Milne's Judicial Factor*), 1933 S.L.T. 274.
Mortimer v. *M'Callan* (1840) 6 M. & W. 58.
Norwich Pharmacal Co. v. *Customs and Excise Commissioners* [1972] Ch. 566; [1972] 2 W.L.R. 864; [1972] 1 All E.R. 972.
Parr v. *London, Chatham and Dover Railway Co.* (1871) 24 L.T. 558.
Polurrian Steamship Co. Ltd. v. *Young* (1913) 109 L.T. 901.
Reg. v. *Beynon* [1963] N.Z.L.R. 635. C
Reg. v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).
Reg. v. *Snider* [1954] S.C.R. 479.
Reid v. *Langlois* (1849) 1 Mac. & G. 627.
Rowell v. *Pratt* [1938] A.C. 101; [1937] 3 All E.R. 660, H.L.(E.).
Russell v. *Jackson* (1851) 9 Hare 387. D
Smith v. *East India Co.* (1841) 1 Ph. 50.
Society of Medical Officers of Health v. *Hope* [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.(E.).
Southwark and Vauxhall Water Co. v. *Quick* (1878) 3 Q.B.D. 315, C.A.
Storey v. *Lord Lennox* (1836) 1 My. & Cr. 525.
Theodor Körner, The (1878) 3 P.D. 162.
Westminster Airways Ltd. v. *Kuwait Oil Co. Ltd.* [1951] 1 K.B. 134; [1950] 2 All E.R. 596, C.A. E
Wheeler v. *Le Marchant* (1881) 17 Ch.D. 675, C.A.
Woolley v. *North London Railway Co.* (1869) L.R. 4 C.P. 602.

APPEAL from the Court of Appeal [1972] 2 Q.B. 102.

This was an appeal, by leave of the House of Lords, by the appellants, Alfred Crompton Amusement Machines Ltd., from an order of the Court of Appeal (Lord Denning M.R., Karminski and Orr L.JJ.) dated February 17, 1972, whereby it was ordered that the appeal of the respondents, the Commissioners of Customs and Excise, from an order of Forbes J. dated July 15, 1971, be allowed and that the order of Forbes J. (by which it was ordered that the respondents do file an affidavit specifying which of the documents contained in bundles A to G referred to in Part 2 of the respondents' affidavit of documents were communications passing between the respondents and their solicitors for the purpose solely of obtaining or giving legal advice or assistance, and that the respondents do produce immediately thereafter the remaining documents in those bundles) be set aside. F G

The main questions arising on this appeal were, whether the respondents were entitled in law to withhold from production certain documents listed by the respondents in their affidavit of documents sworn in the arbitration between the appellants and the respondents under section 36 of the Purchase Tax Act 1963 on the grounds (i) that all such documents were privileged; (ii) that the production of all such documents would be injurious H

A to the public interest; (iii) that certain of such documents were sent by or supplied to the respondents in confidence and/or for the purposes of the exercise by the respondents of their statutory duties under the Purchase Tax Act 1963.

The facts are set out in the opinion of Lord Cross of Chelsea.

Anthony Lincoln Q.C., Stanley Brodie and *Mary Hogg* for the appel-
B lants. The following questions arise in this appeal: (1) In relation to the third party documents, can a litigant rely, as a ground of obtaining privilege from producing such a document, on the fact that the document was entrusted to him confidentially? (2) Has legal and professional privilege been claimed in proper form for all the documents? (3) If not, ought the Court of Appeal to have made an order for inspection? (4) Could the respondent commissioners in the circumstances here properly claim legal
C professional privilege at a time when their department was collecting facts for a valuation figure before they, the commissioners, had given an opinion? (5) Is the court precluded by the public interest from ordering publication of documents collected pursuant to section 24 of the Purchase Tax Act 1963, that is, independently of any question of confidentiality?

As to (1), the rule of confidentiality as formulated by Lord Denning
D M.R. does not exist and the cases cited by him do not support the rule. The true rule (which also pertained before 1964 when the rules as to production were changed) is that confidentiality is not per se a ground for claiming privilege. The appellants accept that confidentiality may be an element which has to be considered in cases of Crown privilege and cases of professional legal privilege. Beyond those two heads confidentiality is not available as a ground. From early in the 19th century up to 1964
E cases are to be found in the books where objection was taken to the production of documents on the ground that the documents did not belong to the defendant and accordingly the question arose from time to time, "what was the property in the deponents of the documents called for?" This arose because deponents had to produce documents in their possession or power, but not in their custody. Now under R.S.C., Ord. 24, rr. 2 and 9,
F litigants are obliged to produce documents in their custody, possession or power and therefore the question of the nature of the deponent's property in the documents no longer arises. Before 1964 if the documents belonged to the deponent, he had to disclose them whether they were confidential or not. No privilege arose out of the closest confidential relationship: see *Bray on Discovery* (1885), pp. 191, 206, 207, 298, 302–305. For a resumé of the history of the Chancery practice relating to production and disclosure,
G see the *Supreme Court Practice* (1973), vol. 1, p. 389.

A perusal of such cases as *Greenlaw* v. *King* (1838) 1 Beav. 137; *Smith* v. *East India Co.* (1841) 1 Ph. 50; *Hopkinson* v. *Lord Burghley* (1867) 2 Ch.App. 447; *Enthoven* v. *Cobb* (1852) 5 De G. & Sm. 595; *Anderson* v. *Bank of British Columbia* (1876) 2 Ch.D. 644; *M'Corquodale* v. *Bell* (1876) 1 C.P.D. 471; *Reynolds* v. *Godlee* (1858) 4 K. & J. 88 shows that at this
H stage of the history of privilege the courts were not according any status to privilege on the grounds of confidentiality, save in the limited cases of communications to one's legal adviser where litigation was contemplated and cases where the national interest might be jeopardised by disclosure.

Thus, for example, in *Enthoven* v. *Cobb*, 5 De G. & Sm. 595 the court addressed itself to the question in whom the property in the document lay and not to that of confidentiality. Again, *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675; *Bulman* v. *Young, Ehlers & Co.* (1883) 31 W.R. 766 and *Attorney-General* v. *Clough* [1963] 1 Q.B. 773 show that confidentiality does not exist as a separate head of privilege.

As to the authorities cited by Lord Denning M.R., *Reid* v. *Langlois* (1849) 1 Mac. & G. 627 was again a case where what was under consideration was the question to whom the document belonged. *Chantrey Martin & Co.* v. *Martin* [1953] 2 Q.B. 286 shows that confidentiality is no ground for privilege apart from legal professional privilege and Crown privilege. Further, *Watson* v. *Cammell Laird & Co. (Shipbuilders and Engineers) Ltd.* [1959] 1 W.L.R. 702 is a pure case of legal professional privilege and not of confidentiality. *Attorney-General* v. *Mulholland*; *Attorney-General* v. *Foster* [1963] 2 Q.B. 477 and *Hubbard* v. *Vosper* [1972] 2 Q.B. 84 are of no assistance on this question; they do not lend support to a general principle of confidentiality.

In re Joseph Hargreaves Ltd. [1900] 1 Ch. 347 does not assist the respondents for although as Lord Reid observed in *Conway* v. *Rimmer* [1968] A.C. 910, 946 where a government department has obtained information for one purpose it cannot, except on showing very strong grounds, be used for another, in the present case the documents in question were obtained for the very purpose of the substantive proceedings in this case.

As to the category (c) documents,* there cannot be a universal blanket privilege claimed in respect of them; it must depend on common sense. And in relation to this class of documents, there is no valid ground for the Crown claiming privilege for them. But the Crown claimed that they are subject not only to section 24 and Crown privilege but also the Crown claim legal professional privilege in respect of them. The question is whether this latter claim has been effectively made. It is for the commissioners to state their grounds clearly and without obscurity. If the Crown assert a privilege they must, like any other person, state it clearly and in proper form. If the documents in question were obtained for the purposes of the valuation and also for the purposes of the litigation and were to be shown to their solicitor, the affidavit should have so stated. Reliance is placed on *Gardner* v. *Irvin* (1878) 4 Ex.D. 49 for the proposition that affidavits must be construed strictly in answer to an application for discovery.

The authorities establish that in order to claim legal professional privilege, there has to be a clear indication that the documents in question were materials required for the brief: see *Anderson* v. *Bank of British Columbia*, 2 Ch.D. 644, 656, 657, *per* James L.J. This was emphasised in *Southwark and Vauxhall Water Co.* v. *Quick* (1878) 3 Q.B.D. 315: see also *Bustros* v. *White* (1876) 1 Q.B.D. 423.

Strong reliance is placed on *Jones* v. *Great Central Railway Co.* [1910] A.C. 4 in respect of the dual purpose argument. In that case the documents were primarily for use in conducting union appeals and secondly for the use of the solicitor. In the present case the documents are primarily for the valuation department and secondly for the respondents' solicitor.

* See p. 426B–G.

An early case in line with the *Anderson* case, 2 Ch.D. 644 is *Storey* v. *Lord Lennox* (1836) 1 My. & Cr. 525. *The Theodor Körner* (1878) 3 P.D. 162 is contrary to the above line of authorities and is wrongly decided.

As to (2), the commissioners in carrying out their valuation function cannot be affected by the imminence of arbitration. The solicitor is not in control and the words of the affidavit are wholly inappropriate. The solicitor was on the periphery of the case. He cannot alter or change the valuation in any way.

The valuation officer has a role to play which is not that of an ordinary litigant: see *Society of Medical Officers of Health* v. *Hope* [1960] A.C. 551, *per* Lord Radcliffe. The valuation process which went on in the years 1967/68 involved the collection of data in order to reach a figure. There then follows an arbitration which is a second stage in the dispute to determine the actual figure payable. In the first stage, the central character is the valuation department and not the solicitor. It is emphasised that the document in question must be impressed with its destination ab initio in going to the solicitor in order to attract privilege. In *Bristol Corporation* v. *Cox* (1884) 26 Ch.D. 678 the privilege claimed was of a unique kind with apparently no authority to support it.

In *Seabrook* v. *British Transport Commission* [1959] 1 W.L.R. 509 Havers J., whilst drawing attention to the decision in the *Jones* case [1910] A.C. 4, made no comment upon it. The judge considered the words "wholly or mainly" in the affidavit at their face value and did not go behind the formula used which he was entitled to do. It is conceded that the court is not entitled to go behind the facts in the affidavit, but the judge felt himself bound by the formula and therefore fell into the trap mentioned by Hamilton L.J. in *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850, 860 in believing that making a formula is like uttering a spell. The key words in the affidavit in the *Seabrook* case were "if necessary" and if the judge had considered these words he would have rejected the claim for privilege since the case was then on all fours with the decisions in *Anderson*, 2 Ch.D. 644 and *Jones* v. *Great Central Railway* [1910] A.C. 4. In *Whitehill* v. *Glasgow Corporation*, 1915 S.C. 1015, a personal injuries case, an accident report was held not protected. It is plain that the rubber stamping of documents will not suffice to afford protection in Scotland. The decision in *The City of Baroda* (1926) 134 L.T. 576 is entirely in accord with the principles laid down in *Anderson*, 2 Ch.D. 644 and *Jones* [1910] A.C. 4. In *Ogden* v. *London Electric Railway Co.* (1933) 49 T.L.R. 542 no reference was made to the *Jones* case. *Ogden* was wrongly decided. In *Longthorn* v. *British Transport Commission* [1959] 1 W.L.R. 530 the primary purpose of the documents was to discover how the accident occurred. Similarly in the present case the purpose of the documents was to ascertain the true valuation. On the authority of *Jones* [1910] A.C. 4; *Anderson*, 2 Ch.D. 644; *The City of Baroda*, 134 L.T. 576; the observations of Hamilton L.J. in *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850; and *Bustros* v. *White*, 1 Q.B.D. 423, there is ample authority for the proposition that if a document comes into existence for the use of the deponent whether or not there is going to be litigation or if it comes to him in the ordinary course

of his business, then such a document is not privileged, but if the document comes into existence unconditionally and primarily for use as material for the brief or for advice by the solicitor, it is privileged.

There is an alternative approach to the present question: in the *Jones* case [1910] A.C. 4 when the documents were obtained, the solicitor was not at the centre of operations. In the light of that decision, the conclusion of Lord Denning M.R. [1972] 2 Q.B. 102, 131 cannot be sustained. Accordingly, since these affidavits are obscure and the principles applied by the Court of Appeal in relation to legal professional privilege are wrong, the Court of Appeal inspected the documents in the light of wrong principles and therefore came to the wrong conclusion from their inspection. There should therefore either be a further affidavit produced in the light of the correct principles announced by this House or inspection of the relevant documents by this House or production of them to the appellants.

Sir Michael Havers Q.C., S.-G., Christopher Staughton Q.C., Gordon Slynn and *Jarlath Finney* for the respondents. As to the category (c) documents, the Crown are under a duty not to disclose the source of their information. It does not come within any defined class. It is akin to the Crown's practice not to disclose the identity of informers in criminal cases on the ground that it would be contrary to the public interest in that if they were so to do, that particular source of information would soon dry up.

On the issue of confidentiality, the Crown undertake to forward documents to the appellants in any case where the owner waives his claim to confidentiality, subject to the proviso that such documents may still be covered from disclosure by legal professional privilege.

It is pertinent to observe that there are statutes that make it a criminal offence in certain cases to disclose information that the statute requires to be given to a government department, save for the limited purposes laid down in the act in question. For example, the following statutes tend to show that in the absence of statutory authority it would be unlawful for the commissioners to disclose the affairs of one tax payer to another: see section 5 of the Cinematograph Films Act 1957; section 3 (1) of the European Free Trade Association Act 1960; section 3 of the Finance Act 1967; section 59 of the Finance Act 1969 and section 69 of the Agriculture Act 1970. Reliance is placed on the statement of Lord Reid in *Conway* v. *Rimmer* [1968] A.C. 910, 946: "if the State insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes." [Reference was made to *In re Joseph Hargreaves Ltd.* [1900] 1 Ch. 347.]

As to confidentiality, as dealt with by Lord Denning M.R., a distinction is to be drawn between correspondence between a third party and a litigant and a document which came into existence between two third parties and subsequently was entrusted to a litigant in confidence. In the first case, correspondence between a third party and a litigant is not privileged simply because the contents are manifestly of a confidential nature or expressly stated so to be, for clearly the writer, the third party, takes the risk that the litigant will be involved in proceedings in which that document may be relevant. In the second case, however, a document produced by a third party either for his own purpose or given to a fourth party is privileged if it subsequently is entrusted to a litigant. If this issue be

A approached on that basis, the problems raised by the cases disappear. If one separates the two propositions given above, there is nothing in the judgment of Lord Denning M.R. which conflicts with the second of them. The distinction is drawn in the authorities: see *Enthoven* v. *Cobb*, 5 De G. & Sm. 595 and *Reynolds* v. *Godlee*, 4 K. & J. 88. For a modern statement of the rule relating to discovery in respect of communications between a third party and a litigant: see *Chantrey Martin & Co.* v. *Martin* [1953] B 2 Q.B. 286.

The distinction drawn above albeit it is a limited distinction is nevertheless a valid, and indeed, a vital distinction since the rules were changed in 1964.

As to Crown privilege and the (b) (i) and (ii) documents, Sir Louis Petch gives the grounds of public interest which override the interest of disclosure for the purposes of the present litigation.

C On legal professional privilege, *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675 is the genesis of the language used in Sir Louis Petch's Affidavit in respect of the privilege claimed under this head for the (b) (ii) documents: see the *Supreme Court Practice* (1973), vol. 1, pp. 395 and 397, for the notes on legal professional privilege.

Jones v. *Great Central Railway Co.* [1910] A.C. 4 is no authority on D the dual purpose aspect because there there was no solicitor involved.

As to dual purpose documents, there are four possible alternatives: (1) Those documents are privileged solely if they are produced for a solicitor. (2) Those documents are privileged only if provided primarily for a solicitor. (3) Those documents are privileged which if one important reason why they were produced was that they were for submission to a solicitor. (4) Documents are privileged even if they were only produced E for submission to a solicitor for an unimportant reason. The Crown contends for alternatives (2) and (3). Reliance is placed on *Southwark and Vauxhall Water Co.* v. *Quick*, 3 Q.B.D. 315 and *Westminster Airways Ltd.* v. *Kuwait Oil Co. Ltd.* [1951] 1 K.B. 134. The relevant question on this issue is to ascertain the purpose for which the document in question came into existence. Thus in the *Westminster Airways* case once a claim was F likely the document sent to the insurance company was privileged.

As to *Adam Steamship Co. Ltd.* v. *London Assurance Corporation* [1914] 3 K.B. 1256, the observations of the Court of Appeal must be read in the context of the language of the affidavit in that case. If the document originates for the purpose of contemplated litigation, although it is never in fact used, the document nevertheless is privileged. This is in accordance with the decision in the *Westminster Airways* case. Again, *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western* G *Railway Co.* [1913] 3 K.B. 850 is authority for the proposition that if material has for one of its purposes that of going to a solicitor in relation to threatened litigation, then it is privileged. The fact that it never reaches the solicitor because, for example, there is a settlement by the lay client is nihil ad rem. Reliance is placed on the established practice in these matters H as stated in *Halsbury's Laws of England*, 3rd ed., vol. 12 (1955), p. 46: see also p. 55. It is conceded that in *Longthorn* v. *British Transport Commission* [1959] 1 W.L.R. 530 that Diplock J. preferred the observations of Buckley L.J. to those of Hamilton L.J. in the *Birmingham* case

[1913] 3 K.B. 850. The Crown's contention, however, is supported by *Ogden* v. *London Electric Railway Co.*, 49 T.L.R. 542. It is to be observed that *Jones* v. *Great Central Railway Co.* [1910] A.C. 4 was cited in *Ogden*. In any event, *Jones* is distinguishable, for in that case when the letters were written litigation was not anticipated.

In conclusion, the following are examples of statutes which make it a criminal offence to divulge information which the Acts in question empower persons and bodies there specified to obtain: the Taxes Management Act 1970, ss. 6, 13–17, 21 and 110; the Parliamentary Commissioner Act 1967, ss. 1, 8 (3) and 11; the Sea Fish Industry Act 1970, ss. 10 and 42; the Iron and Steel Act 1967, ss. 41 and 43. Section 137 of the Finance Act 1972 is of importance in the present connection for there is a strong inference that the Inland Revenue Commissioners and the Customs and Excise Commissioners could not disclose information one to the other before the passing of this provision for otherwise that section is otiose. It would therefore be a breach of duty for the respondents to disclose the tax affairs of other tax payers in legal proceedings.

The modern statutes lead to the inference that Parliament thought it necessary to make plain beyond peradventure that the prohibition of disclosure which applied at common law over government departments applied to bodies set up by the statutes in question. It has been customary in modern statutes where there may be need for information for national purposes that there is entitlement to publish such information without disclosing the source, but apart from this, the publication of such information is prohibited. The Census Act 1920, for example, has a stringent penalty provision for disclosure of information.

Lincoln Q.C. in reply. On confidentiality, in *Mahony* v. *National Widows' Life Assurance Fund Ltd.* (1871) L.R. 6 C.P. 252 the court ordered disclosure of a document which expressly stipulated non-disclosure. Further, *Goodall* v. *Little* (1851) 1 Sim.N.S. 155 would exactly cover the cases of documents sent to insurers. As to the practice of disclosing reports, see *Adam Steamship Co. Ltd.* v. *London Assurance Corporation* [1914] 3 K.B. 1256. The *Westminster* case [1951] 1 K.B. 134 was concerned with whether the court should go behind the affidavit. The appellants do not have to go so far as to submit that the *Westminster* case was wrongly decided. It is emphasised that *The City of Baroda*, 134 L.T. 576 and the *Longthorn* case [1959] 1 W.L.R. 530 support the observations of Hamilton L.J. in the *Birmingham* case [1913] 3 K.B. 850. The House should apply *Jones* v. *Great Central Railway Co.* [1910] A.C. 4 here.

As to legal professional privilege, in the United States the rule has been formulated in like manner to the rule in England. Under English law the underlying principle is that it would be absurd to confine privilege to where the solicitor was calling for the materials for the brief. It applies also to his agent. In the United States the materials must be shown to be the work product of the attorney. In the present case it cannot be said that the papers required for valuation were necessarily required for anticipated litigation. At the end of the day the House must look at the affidavit. The basic issue is whether subsequent affidavits made clear the basis of the commissioners' claim. It is the commissioners public function to obtain a true valuation and the Crown should not obtain a blanket protection by

the use of a house solicitor which they could not obtain if they used an outside solicitor. Applying the observations of Hamilton L.J. in the *Birmingham* case [1913] 3 K.B. 850 and the decision in the *Longthorn* case [1959] 1 W.L.R. 530, these documents are not privileged.

So far as Crown privilege is concerned, and the contention that it would be contrary to the public interest that certain methods of inquiry should be disclosed, this contention could be met by the respondents swearing an affidavit differentiating the documents into those which would betray the methods of investigation and those which do not.

As to statutory powers and prohibitions against disclosure, apart from statutory provisions it would seem that the Crown are contending that by implication the court's power to order discovery of the documents has been limited by some higher law, namely, common law or customary law. This is not true. The cases establish that in the early 19th century departments of state were quite ready to disclose. If there were such a doctrine the consequences would be very far reaching. It is a much more rigorous doctrine than the doctrine of Crown privilege. No waiver would be possible and it could not be confined to third party cases. It is for the Crown to put forward authorities to support the very wide proposition contended for. It is to be noted that *Polurrian Steamship Co. Ltd.* v. *Young* (1913) 109 L.T. 901 is in line with *Jones* v. *Great Central Railway Co.* [1910] A.C. 4 and *The City of Baroda*, 134 L.T. 576. The statement of Pickford J. in *Polurrian*, at p. 905, is very close to the Scottish practice.

Although the *Birmingham* case [1913] 3 K.B. 850 may have laid down a rule of practice, it is pertinent to observe that life has changed since those times and if a great corporation or a Department of State by having a house solicitor can claim privilege, then they are in a privileged position over the ordinary citizen.

As to this novel doctrine now put forward, it is said that when a Department of State obtains information from the third party pursuant to a statutory power, it is precluded from disclosing that information in a court of law without the consent of the third party. It would seem that even the class of document must not be revealed. If this doctrine be correct, then it is emphasised that the Crown has a far greater privilege than has a private litigant.

In the appellants' submission, no authority can be found for the Crown's proposition. *Smith* v. *East India Co.*, 1 Ph. 50 is an ordinary case of Crown privilege. There is nothing in *Bray on Discovery* to support the proposition: see pp. 298 et seq. It would be surprising if there existed this underlying unwritten rule that there should be no reference to it in *Bray*, an authoritative work which deals exhaustively with questions of privilege and Crown privilege. It is conceded, however, that there is no reference in that work to the disclosure to the court of the tax affairs of third parties. As to *Bray*, p. 547, all that there is stated falls squarely under the heading of Crown privilege.

The true rule is that in the absence of an express prohibition in the statute, there is no presumption that information obtained under statutory powers must be withheld in judicial proceedings, apart from the exercise of the trial judge's discretion. In *Lee* v. *Birrell* (1813) 3 Camp. 337 an officer relied on his oath not to disclose but the court overruled his objec-

tion, holding that in effect the policy of the Act was to disclose in the circumstances of the case. If the rule contended for existed, the judgment in *In re Joseph Hargreaves Ltd.* [1900] 1 Ch. 347 would have been framed differently. That case shows that the court has a discretion. It is plain no one was contending apart from discretion in that case that there was a binding rule of law which precluded the disclosure of the documents in the hands of the Revenue.

In *Rowell* v. *Pratt* [1938] A.C. 101 counsel for the appellant (now Lord Morris of Borth-y-Gest) did not contend for any such provision as that relied on here. The Commonwealth decisions show a great reluctance on the part of the courts to cut down powers to order discovery unless there is an express statutory prohibition. The Australian case of *Krew* v. *Commissioner of Taxation* (1971) 45 A.L.J.R. 249 is akin to the present case. There was an express prohibition that officers should not produce documents themselves; nevertheless the judge held he would order production for inspection by the court. The judge applied the ordinary principles of Crown privilege and the decision is very similar to that of Forbes J. in the present case: see also the decision of Graham J. in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1972] Ch. 566.

A perusal of the Commonwealth and American cases shows that the courts will only relinquish their power to order discovery if they find very clear statutory words requiring them so to do: see *Cowan* v. *Stanhill Estates Pty. Ltd.* [1966] V.R. 604 where it was held that the court was not included in the phrase "any person whomsoever."

As to section 24 (6) of the Purchase Tax Act 1963, a person concerned with the "purchase" is the person concerned with the chargeable purchase and that is because it is found in a fasciculus of subsections which are concerned with charging. Subsection (6) is confined to the immediate parties in the purchase tax transaction. This was the construction adopted by Forbes J. and it excludes from the claim for privilege all the category (c) documents. If section 24 (6) was construed very widely, it would lead to a reductio ad absurdum.

As to the practice concerning disclosure by the Customs in the early 19th century: see *Ellis* v. *Watson* (1818) 2 Stark. 453 and *Dunbar* v. *Harvie* (1820) 2 Bligh 351. In those cases documents were revealed by the Customs without any protest, although they contained information concerning third parties.

As examples of the position under American law, see *Graham Farm Land Co.* v. *Commonwealth* (1950) 70 A. 2d. 219 and *Connecticut Importing Co.* v. *Continental Distilling Corporation* (1940) 1 F.R.D. 190. In the *Connecticut* case, there is an important reference to *Wigmore on Evidence* (1904–5), section 2377, ch. 83. From this it is plain that the head of privilege which attaches in the United States to information on trade secrets being compulsorily obtained is the creature of statute and statute only. There is a very convenient summary of all the decisions in the Commonwealth on this point. It is emphasised that the passage in *Wigmore* substantiates the appellants' contention that this privilege is a creature of statute. If it were a common law creation, it would emerge as a common law creation in the Commonwealth and in the United States. It shows

that if Parliament wishes to prevent documents from being exposed in judicial proceedings, Parliament so provides in no uncertain terms.

To return to the English authorities and *Dunbar* v. *Harvie*, 2 Bligh 351, it is quite plain from that decision that no sensible distinction can be drawn between the compulsory production of a litigant's income tax or customs return and a compulsory production of the return of a third party. If it is being said that the power to obtain information compulsorily is impaired if such documents are produced in court, then it will be impaired whether it be the litigant himself or whether it be a third party who is protesting at his return being revealed in court. There is no useful distinction which can be drawn between the two situations. Another example of the disclosure of tax returns without protest is *Gamini Bus Co. Ltd.* v. *Commissioner of Income Tax, Colombo* [1952] A.C. 571.

Reliance is placed on observations in the Canadian case of *Reg.* v. *Snider* [1954] S.C.R. 479, 482, 489. The judgments in that case are exceedingly valuable and are adopted as part of the present submissions. They concerned the application of express provisions in a statute. Therefore, there was no room for a discretionary power whatever. If that statute had not existed, it is quite plain from the whole series of judgments in that case that the court would not have applied any such rule as is contended for in the present case. Of course, it is not disputed that under the principle of Crown privilege there is always the "long stop" safeguard of the trial judge's discretion. It is not disputed that at the end of the day this House does have a discretion in this matter and can exclude the present documents on the ground that they are of marginal or peripheral importance or on any other ground. The discretion was exercised in the *Hargreaves* case [1900] 1 Ch. 347. On the present argument, the appellants are only concerned to establish that there is no statutory bar implied in section 24 (6), preventing the disclosure of these documents. [Reference was made to *Mortimer* v. *M'Callan* (1840) 6 M. & W. 58; *Jenkins* v. *Glasgow Corporation*, 1934 S.L.T. 53 and *Milne* v. *Wakelin* (*Milne's Judicial Factor*), 1933 S.L.T. 274.]

Henderson v. *M'Gown*, 1916 S.C. 821 is authority for the proposition that the court has power to order disclosure. There an application was made for discovery by the Department of Inland Revenue. The Revenue objected, but the court ruled that it had power in the exercise of its discretion to order the production of the documents in the custody of the department even though the department pleaded public interest as an objection to production. In the event, the court exercised its discretion and held that it was unnecessary to order production.

If one examines such statutes as the Public Health Act 1936, the Representation of the People Act 1949, the Agricultural Marketing Act 1958, the Population (Statistics) Act 1938, the Sea Fish Industry Act 1951 and the Restrictive Trade Practices Act 1956, one cannot find a single public policy emerging in relation to disclosure of the information required by those statutes. Sometimes criminal proceedings are expressly included in the prohibition and sometimes they are excluded according to the will of Parliament. Therefore, it is impossible to frame the unwritten rule embodied in this policy. In the *Norwich Pharmacal* case [1972] Ch. 566 the commissioners admitted that crime would be excepted. When one

might ask do criminal proceedings fall under the prohibition? When is consent necessary? Is the rule of law with regard to this particular government department that consent can cure all or that it cannot? The appellants' submission is that if one is seeking for this unwritten rule for which the Crown contends, and the House is asked to find it in other statutes which vary inter se, no answer would be found to the problem. The only proper answer is that the court can always override all obligations whether they are created by statute, regulations or common law. The correct approach to this problem is that propounded by Graham J. in the *Norwich* case. [Reference was also made to *Russell* v. *Jackson* (1851) 9 Hare 387 and *Customs and Excise Commissioners* v. *Ingram* [1948] 1 All E.R. 927.]

Sir Michael Havers Q.C., S.-G. in reply on the issue of Crown privilege. It was said that the inference to be drawn from various modern statutes relating to non-disclosure, was a novel proposition. In a sense this is really the first opportunity there has been to argue the question, because before 1947 when discovery did not lie against the Crown, this issue would not arise in any event. Between 1947 and the decision of this House in *Conway* v. *Rimmer* [1968] A.C. 910 blanket Crown privilege was always claimed. Thus it is only since 1968 that this issue arises in this way for the first time. Since the 1930s there is a consistent burden running through the statutory provisions, namely, that where there is to be a specific prohibition against disclosure the extent of non-disclosure may depend upon the particular subject matter of the statute and the same situation applies to provisions laying down penalties for disclosure of information. Quite often one finds that the reasoning behind the limited disclosure is that the figures or statistics are needed for national purposes, but great efforts are made to ensure that no individual is identified. For instance, in the *Gamini Bus Co.* case [1952] A.C. 571 statistics were required for finding out the cost ratio in respect of the other bus companies, but great care was taken not to identify any of the other companies.

As to disclosure, there can be disclosure where the statute expressly permits it. There are certain cases of this, but they are not tax cases. There can be disclosure where the statute contains an express limited prohibition and the document or documents do not come within that prohibition or where the informant is a party to the proceedings in which disclosure is sought, but in relation to this last instance, this only applies to the respondents, for the Commissioners of Inland Revenue do not make a practice even in that case of disclosing information. There are two further instances where disclosure will be given. The respondents and the revenue will also disclose a third party's tax returns on his express consent. There is also the exception of serious crime where the practice is to consult the Director of Public Prosecutions.

As to the authorities, apart from the limited disclosure in the *Gamini* case, there does not appear to be a single case in which information acquired as a result of statutory powers has ever been ordered to be disclosed against a third party. *Henderson* v. *M'Gown*, 1916 S.C. 821 was a partnership case and it was held that no confidentiality existed there because of the partnership. In *Lee* v. *Birrell*, 3 Camp. 337 the defendant was a collector of taxes; he was a party to the action and in order to prove the case his status had to be proved by calling the surveyor. Again, in *Rowell*

v. *Pratt* [1938] A.C. 101 that was a case in which there was a limited prohibition and also the informant was a party to the action. In *Ellis* v. *Watson,* 2 Stark. 453 the informant was a party to the proceedings. As to *Krew* v. *Commissioner of Taxation,* 45 A.L.J.R. 249 it is hard to draw any conclusions from the report and it is doubtful if there was in that case any information obtained by statute from third parties. In *Cowan* v. *Stanhill Estates Pty. Ltd.* [1966] V.R. 604 although there was an express prohibition in the Act, it did not prevent disclosure. It is to be remembered that both parties in that case wanted the information to be disclosed to the court.

As to section 24 (6) of the Purchase Act 1963, and how far it gave powers to the commissioners in relation to both sides in the chargeable transaction, for the appellants' submission to succeed, one would have to rewrite the whole of the subsection. In particular, the first line of subsection (6) which reads "every person concerned with the purchase or importation of goods" would have to be rewritten to read, "every person other than the Crown concerned with the chargeable purchase. . . ." Section 24 (6) covers every person concerned with the purchase of goods, the chargeability of which is in question, at any stage, and that means the purchase by the wholesaler from the manufacturers, the purchase by the retailer from the wholesaler and the purchase by the ultimate consumer from the retailer.

Their Lordships took time for consideration.

July 4, 1973. LORD REID. My Lords, I would dismiss this appeal for the reasons given by my noble and learned friend, Lord Cross of Chelsea.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the advantage of considering the speech prepared by my noble and learned friend, Lord Cross of Chelsea, and for the reasons which he gives I would dismiss this appeal.

VISCOUNT DILHORNE. My Lords, by the Purchase Tax Act 1963, purchase tax was chargeable on the wholesale value of the goods to which the Act applied. The wholesale value was by section 3 to be taken to be the price which, in the opinion of the commissioners, the goods would fetch on a sale made at the time the tax became due by a person selling by wholesale in the open market in the United Kingdom to a retailer carrying on business in the United Kingdom only if no tax were chargeable in respect of the sale and it were made in the circumstances specified in Schedule 2 to the Act.

If the trader desired to dispute the commissioners' opinion as to the wholesale value, he had within the prescribed time or within such further period as might be allowed, to give notice requiring a reference to arbitration under section 36 (1) to the commissioners (section 36 (2)).

The course of events in this case did not follow the pattern envisaged by the Act. Indeed, in the vast majority of cases it did not. In most cases the commissioners and the trader were able to reach agreement as to the wholesale value and tax was levied in accordance with the agreement and without the commissioners giving an opinion under section 36 (2). In such cases

the figure agreed on or a formula agreed on to determine the wholesale value were to be taken as expressing the commissioners' opinion of the value or their agreement that the formula would produce a figure which was in their opinion the value.

Only when agreement could not be reached, was it necessary for the commissioners to give a formal opinion and then the trader could if he wished to dispute it, give notice requiring a reference to arbitration.

In this case the appellants and the commissioners initially agreed a formula, the application of which would determine the wholesale value of the machines produced by the appellants. It was

> " the value basis of total selling price including service charge, less any freely available cash discount less the included purchase tax, less an allowance of 17½ per cent. to cover retailing and servicing, plus delivery and insurance.

On July 31, 1967, the appellants' then solicitors wrote to the respondents saying that they had advised the appellants that neither they nor the appellants' consultant accountant were satisfied that they were paying the correct amount and considered that the amount properly payable was less. They mentioned a reference to arbitration.

They, however, continued to pay the tax due under the 1964 formula and it was not until September 11, 1968, that their solicitors wrote asking the commissioners to treat their letter as formal notice under section 36 of the Act requiring a reference to arbitration. They had also mentioned a reference to arbitration in letters dated August 1 and 2, 1968.

It was clear, therefore, from July 31, 1967, that the appellants were challenging the correctness of the 1964 formula on the ground that it produced too high a figure for the wholesale value.

On receipt of this letter the commissioners investigated the matter and in so doing made use of their powers under section 24 (6) of the Act to obtain information from the appellants and also from persons concerned with the purchase of goods from them. As a result of the information they obtained, they came to the conclusion that the formula agreed in 1964 produced too low a figure. From the moment they received the letter of July 31, 1967, they anticipated that there would be a reference to arbitration.

They did not give their formal opinion on the wholesale value until December 8, 1969. The appellants' solicitors' request that their letter of September 11, 1968, should be treated as notice requiring a reference to arbitration was therefore premature and inappropriate as were the mentions of a reference to arbitration in the letters of July 31, 1967, and August 1 and 2, 1968.

The letter of September 11 was, nevertheless treated as notice requiring a reference and in their statement of claim the appellants challenged the commissioners' opinion and claimed a deduction of 17½ per cent. or of 12½ per cent. from the gross tax inclusive price of each machine sold by them in respect of after sales service and also a deduction of 33⅓ per cent. or such percentage as the referee might find appropriate from their sale price exclusive of purchase tax in respect of a retailer's margin. The commissioners in their defence denied this and, for reasons it is not necessary to state, maintained that their opinion was correct.

On discovery the commissioners objected to producing a large number of documents and, at the hearing of the appeal in this House, it was contended on their behalf that they were entitled to do so on two grounds (1) that the documents were protected by legal privilege and (2) by what is commonly, though inaptly, called Crown privilege.

In respect of litigation, legal professional privilege cannot be claimed for documents which come into existence prior to the date when litigation can reasonably be anticipated. If here the commissioners had merely been asked to give their opinion as the Purchase Tax Act 1963 required them to do and there had been no prior threats of arbitration, the commissioners could not have reasonably anticipated litigation until after December 8, 1969, when they gave their opinion and presumably not until the appellants had given notice requiring arbitration. But here the appellants made it clear that they wanted a reference to arbitration more than two years before the commissioners' opinion was given, and I agree with Lord Denning M.R., Karminski and Orr L.JJ. and Eveleigh J. ([1971] 2 All E.R. 843) that, owing to the conduct of the appellants, the commissioners were entitled reasonably to anticipate litigation on receipt of the letter of July 31, 1967. As Karminski L.J. said [1972] 2 Q.B. 102, 136:

> ". . . there was a definite prospect of litigation between the parties from the end of July 1967. There was a faint possibility that the differences between the parties might be adjusted, but the probability of litigation between them was strong."

Indeed, unless the commissioners were prepared to value the appellants' machines at less than the figure the 1964 formula produced or the appellants abandoned their contentions, litigation was certain.

The commissioners from that date anticipated that there would be an arbitration. In the circumstances of this case that was a reasonable conclusion.

The finding that from July 31, 1967, onwards the commissioners reasonably anticipated that there would be an arbitration is, in my opinion, crucial in relation to their claim for legal professional privilege.

The documents which the commissioners claim are covered by legal professional privilege, came into existence in the course of the investigation. They had a dual purpose, to enable the commissioners to form their opinion and for the use of their solicitors whose task it was to secure the material necessary for the arbitration, to advise thereon and to prepare the commissioners' case.

Where an event occurs which is likely to lead to litigation, e.g., an accident on a railway, it has long been established that reports made in anticipation of litigation and for the use of the defendant's solicitors are protected, and that the reports need not be made solely or primarily for the use of the solicitors: *Ogden* v. *London Electric Railway Co.* (1933) 49 T.L.R. 542 and *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850. So the fact that the documents come into existence for a dual purpose does not deprive them of protection if one purpose is their use by solicitors when litigation is reasonably anticipated.

In this case there could not, however, be any litigation until after the commissioners had stated their opinion. Does that make any difference? I think not. If one accepts that on receipt of the letter of July 31, 1967, the commissioners were justified in anticipating that there would be litigation, then, in my view, it matters not that the foundation of that litigation, the commissioners' opinion, occurred much later. If it were otherwise, legal professional privilege could not apply to documents which came into existence when a quia timet action was contemplated.

I do not think that the case of *Jones* v. *Great Central Railway Co.* [1910] A.C. 4 is at all analogous. There a member of a trade union furnished his union with information to enable the union to decide whether to support an action by him for wrongful dismissal and whether to give him the assistance of their solicitor. It was held that the letters containing the information sent to the union by the member were not protected by legal professional privilege. In that case when the letters were written, litigation was not anticipated. It might ensue but whether it did or not depended in the first place on the decision of the union. Here the documents in question came into existence after litigation was reasonably anticipated and for the use of the solicitors.

It is for these reasons that I am unable to agree with the opinion of my noble and learned friend, Lord Cross of Chelsea, which I have had the advantage of reading, on the first issue in this appeal. In my opinion, the documents in question are protected by legal professional privilege.

With his observations on what may be called the Crown privilege issue, I entirely agree and have nothing to add.

In my opinion this appeal should be dismissed.

LORD CROSS OF CHELSEA. My Lords, under section 1 (1) of the Purchase Tax Act 1963, purchase tax is charged on the wholesale value of chargeable goods which are purchased from or appropriated by persons required by the Act to be registered. Section 2 (1) provides that the wholesale value of any goods in respect of which tax is chargeable shall be taken to be the price which in the opinion of the commissioners the goods would fetch on a sale made at the time when the tax in respect of the goods became due by a person selling by wholesale in the open market in the United Kingdom to a retail trader carrying on his business in the United Kingdom only, if no tax were chargeable in respect of the sale and it were made in the circumstances specified in Schedule 2. Section 36 provides that if any dispute arises as to the wholesale value of any goods then if the person accountable for the tax gives notice within the prescribed period requiring a reference to arbitration and deposits with the commissioners the amount of tax payable on the basis of their opinion the dispute as to value shall be referred to an arbitrator appointed by the Lord Chancellor whose decision shall be final and conclusive. Under the regulations made under the Act the registered wholesaler makes quarterly returns of his sales. References to arbitration are rare. In the vast majority of cases the wholesale value on which tax is chargeable is agreed between the taxpayer and the commissioners. When the commissioners accept a payment in respect of tax calculated in accordance with such an agreement they must, I think, be taken to be expressing their opinion that the wholesale value on which

A tax is being paid for the quarter in question has been correctly ascertained even though they do not say so in terms. A formal expression of their opinion is only required when the taxpayer disputes it and wishes the matter to be referred to arbitration.

The appellants manufacture amusement machines which they sell through their "sales" company, Alfred Crompton Ltd. They claim that in the main the sales are made directly to "consumers"—i.e., to those B who run amusement arcades or cafés and instal machines in them—and not to retailers who sub-sell them or hire them out to consumers. It follows, they say, that it is not right to treat the price at which they sell a machine as the "wholesale price," but that some deduction should be made for it in respect of what is called the "retailers' margin." In 1964 the appellants and the commissioners agreed a formula by reference to which the purchase tax should be calculated. It was "total selling price C including service charge less any freely available cash discount less the included purchase tax less an allowance of 17½ per cent. to cover retailing and servicing plus delivery and insurance." The appellants paid tax and the commissioners accepted tax calculated in accordance with that formula down to the end of the first quarter of 1967. It appears that in 1963, before the appellants started to trade and when the business was still D carried on by Mr. Crompton himself, a Mr. Tuckwell, who was his consultant accountant, negotiated an agreement with the commissioners in respect of a machine called the "Six-way" machine under which as well as the deduction of 17½ per cent. for the retailers' margin Mr. Crompton was allowed a further deduction of £135 per machine in respect of the "servicing" of the machine after delivery. Mr. Tuckwell had nothing to do with the negotiating of the 1964 agreement but later when he became E consultant accountant to the appellants he took the view that the 1964 agreement was too favourable to the commissioners because it allowed no deduction for "servicing." So on July 31, 1967, the appellants' solicitors wrote to the commissioners a letter in the following terms:

"We enclose herewith the following:

F (1) Form P.T. 11 relating to Alfred Crompton Amusement Machines Ltd.

(2) Form P.T. 11 2/67 (A.D.P.) relating to Alfred Crompton Development Co. Ltd.

(3) Cheque for £30,254 15s. 11d. drawn on Alfred Crompton Amusement Machines Ltd.

G "We have advised our clients that neither we, nor the companies' consultant accountant, are satisfied that this is the correct amount payable, but consider that the amount correctly payable is, in fact, less.

"We should, therefore, be glad if you would consider this sum is paid to you by way of deposit. If an assessment has been made pursuant to the Finance (No. 2) Act 1940, section 21, we should be glad if you would regard this letter as a request for a reference to the H referee."

The reference to section 21 of the Finance (No. 2) Act 1940 was clearly a mistake for section 36 of the Purchase Tax Act 1963. In fact, so far as I can

see, there was no need for the appellants—at this stage—to have requested a reference or deposited the tax for the quarter ending July 31 calculated on the 1964 basis. All that they needed to have done was to say that they were no longer prepared to go on paying tax on the 1964 formula because it made no deduction for servicing and to have put in a return on what they claimed was the right basis. It was only if no agreement on the point could have been reached that they would have needed to invite the commissioners to give a formal opinion which they could challenge in arbitration proceedings. If they had taken that course the present dispute so far as it relates to the claim to "legal professional privilege" might well never have arisen.

On receipt of the letter of July 31, 1967, the commissioners embarked on a prolonged investigation of the whole position in the course of which they invoked the powers given to them by section 24 (6) of the Act which runs as follows:

> "(6) Every person concerned with the purchase or importation of goods, or with the application to goods of any process of manufacture, or with dealings with imported goods, shall furnish to the commissioners, within such time and in such form as they may require, such information relating to the goods, or to the purchase or importation of them or to the application of any process of manufacture to them, or to dealings with them, as they may specify, and shall, upon demand made by any officer or other person authorised in that behalf by the commissioners, produce any books or accounts or other documents of whatever nature relating thereto for inspection by that officer or person at such time and place as that officer or person may require."

On December 6, 1968, they served on the appellants a notice under the subsection calling upon them to produce for inspection (inter alia) all books accounts and other documents relating to machines which they had sold since April 1, 1967; but also—what is more important—they made inquiries of a number of those who had purchased Crompton machines and obtained from them documents and information relating to the terms on which they bought the machines and how they had dealt with them. It appears that this information from third parties was obtained "voluntarily" in the sense that notices under the subsection were not served on them, but no doubt those concerned knew that the commissioners possessed statutory powers enabling them to compel its disclosure and the fact that no notices were served appears to me to be irrelevant.

As a result of their investigation the commissioners—rightly or wrongly—formed the opinion that the appellants ought not to be treated as wholesalers supplying directly to consumers but as wholesalers supplying to retailers. Accordingly, in their formal opinion which they gave on December 8, 1969, they fixed the wholesale value for the purpose of purchase tax of the appellants' machines sold from April 1, 1967, to December 30, 1968, on the basis that the appellants were not entitled to any deduction either in respect of retailers' margin or in respect of after

sales service. The appellants disputed the correctness of this opinion and the matter was duly referred to arbitration. The amount of tax in dispute is some £100,000. In their statement of claim delivered on March 19, 1970, the appellants maintained their contention that they sold in the main to consumers and provided an after sales service the cost of which should be taken to be included in the price, and claimed a deduction of 33⅓ per cent. for retailers' margin and of 12½ per cent. for the after sales service. By their defence delivered on April 16, 1970, the commissioners denied that the appellants supplied machines directly to operators or that they provided an after sales service. One of the reasons which they gave as justifying their opinion as to value ran as follows:

> "5 (h) In determining the wholesale value of the said chargeable goods as set out in their said opinion the respondents were entitled to and did rely upon the gross tax inclusive prices shown in the current price list of Alfred Crompton Ltd. and the discounts allowed by Alfred Crompton Ltd. on sales by the company of chargeable goods sold or transferred to that company by the complainants to customers in the United Kingdom who were, in respect of the transactions taken into account by the respondents, in the equivalent position to a retailer."

The appellants asked (inter alia) for the following particulars under paragraph 5 (h):

> "(b) Of the alleged sales by Alfred Crompton Ltd., of chargeable goods to customers in the United Kingdom who were, in respect of the transactions taken into account by the respondents, in the equivalent position to a retailer, identifying and giving full particulars of each and every sale, customer and transaction referred to; stating how and to what extent each of the alleged transactions was taken into account by the respondents: and stating what is meant by the allegation that the said customers were in the equivalent position to a retailer and the facts and matters relied on in support of this allegation in relation to each such customer."

This request was answered as follows:

> "(b) Inquiries made by the respondent in relation to sales of Alfred Crompton Ltd. of the said machines have disclosed in particular cases the fact that certain of the customers of Alfred Crompton Ltd. were purchasing the said machines from, and with knowledge of, Alfred Crompton Ltd. for the purpose of resale to individual end users of the same and it is these transactions upon which the respondents rely as alleged. Full details of the said transactions are contained in the records of Alfred Crompton Ltd. i.e. the order files and invoices and will appear on discovery herein."

In their list of documents served on June 5, 1970, the commissioners claimed privilege for a large number of documents on the ground in some cases of legal professional privilege and in others of what used to be called "Crown privilege." On a summons taken out by the appellants Eveleigh J. on March 8, 1971, held that privilege had not so far been

properly claimed and directed the commissioners, if they wished to maintain their claim, to file a further affidavit which would show with greater particularity what privilege was claimed for what sorts of document and on what grounds. As a result of that order the commissioners disclosed a number of documents for which they had previously claimed privilege and on April 23, 1971, Sir Louis Petch, their chairman, swore a further affidavit claiming privilege for the documents enumerated in Part 2 of the schedule, which was in the following terms:

> "(a) Communications between the respondents and their solicitor in his professional capacity and instructions to and opinions of and documents settled by counsel for the purpose of obtaining or giving legal advice or assistance; and
>
> "(b) (i) Communications passing between the respondents their officers, servants and agents and respondents' solicitor when arbitration between the complainants and the respondents was contemplated or pending, the same having been prepared sent or received confidentially for the purpose of obtaining for or furnishing to the said solicitor information or evidence to be used in such arbitration, or information as to the evidence which could be obtained, or otherwise for the use of the said solicitor, to enable him to conduct, and/or advise the respondents their officers servants and agents in relation to the said arbitration; and (ii) Memoranda, notes, minutes, correspondence, reports and schedules passing between the respondents' and their officers servants and agents and between the respondents' officers servants and agents at a time when arbitration between the complainants and the respondents was contemplated or pending, the same having been prepared sent or received confidentially for the purpose of obtaining or furnishing information and/or evidence with reference to and for the purposes of the said arbitration.
>
> "(c) Orders, invoices, confidential price lists, credit notes, extracts from ledgers, correspondence between third parties, agreements between third parties and information supplied to the respondents by persons other than the complainants relating to the purchase and sale of amusement machines manufactured by the complainants at a time when arbitration between the complainants and the respondents was contemplated or pending the same having been obtained and received by the respondents confidentially for the purpose of obtaining information and/or evidence with reference to and for the purpose of the said arbitration."

The members of the Court of Appeal inspected the documents referred to in 2 (b) (ii) and (c) which are described by Lord Denning M.R. [1972] 2 Q.B. 102, 131, as follows:

> "On inspecting these documents, in 2 (b) (ii) it appears that they are all internal memoranda within the department itself made in the course of their investigations. There are instructions issued by senior officers to the staff about the methods to be employed. There are many schedules prepared by the staff showing the prices charged for machines. There are many minutes of meetings which were had by

A the staff of the commissioners with the staff of the company, or its accountant and solicitors. There are memoranda containing comments on the attitude and conduct of the company and its advisers."

And at p. 133:

"Our inspection of the documents in bundle 2 (c) shows that they are all documents which emanated from third parties. B Cromptons used to supply machines to third parties (who were retailers), and these retailers supplied them to the operators in the arcades. These third parties issued invoices to their customers, including Crompton Machines, and price lists including them, also hire-purchase agreements, and so forth. All of these documents were material in the investigation as to 'wholesale value,' because they would go to show the retailers' margin."

C

It was common ground before us that the documents listed in 2 (a) are the subject of legal professional privilege. The commissioners claim that the documents listed in 2 (b) and (c) are also entitled to privilege on the same ground. Alternatively that their disclosure would be contrary to the public interest. The case for saying that they are covered by legal D professional privilege is set out in paragraph 16 of the affidavit of Mr. Fletcher, a principal in the valuation division, sworn on October 6, 1970, and paragraph 15 of a second affidavit sworn by him on May 13, 1971. At the time when the first affidavit was sworn the commissioners were not yet claiming that legal professional privilege applied to the documents in 2 (c) but, although by the time that the second affidavit was sworn the claim had been extended to the 2 (c) documents paragraph 15, which E is substantially to the same effect as paragraph 16 of the earlier affidavit, appears still to relate only to the 2 (b) documents. What is said may be summarised as follows. When the commissioners received the letter of July 31, 1967, they took the view that any opinion which they might express as to value would be disputed by the appellants and referred to arbitration—a view which was, in fact, confirmed by the repeated references F to arbitration in subsequent correspondence. Accordingly, the valuation department at once acquainted the legal department with the facts of the case and the investigation leading up to the giving of the formal opinion as to value was conducted under the supervision of that department. The legal officers of the commissioners gave advice as to the nature of the material to be collected and methods to be employed. All of the documents in question were prepared in the knowledge, and had as one G of their important purposes, that they would in due course be the subject of advice from the legal officers in connection with the arbitration and would be used by such officers in preparing the commissioners' case in the arbitration.

The grounds for the claim that the disclosure of the 2 (b) and (c) documents would be contrary to the public interest are contained in a H certificate by Sir Louis Petch given on October 6, 1970, and an affidavit sworn by him on May 14, 1971, which repeats and somewhat amplifies them. The grounds alleged in respect of the 2 (b) documents are, briefly stated, (1) that such documents or some of them disclose the methods

of inquiry adopted by the commissioners in cases of this kind, (2) that such documents or some of them make reference to information obtained from some traders with regard to the trading practices of other traders—in particular those of the traders whose affairs are being investigated—that such information is sometimes discreditable to the trader concerned and that if it were known that it was liable to be disclosed the informants would no longer give the information and in any case the commissioners' staff would hesitate to receive it or comment on it, (3) that many of the 2 (b) documents contain or are based on the information contained in the 2 (c) documents and that if it is contrary to the public interest that the latter be disclosed it must follow that the former should not be disclosed. The grounds upon which privilege is claimed for the 2 (c) documents are, briefly stated, as follows: (1) that the commissioners are not entitled to disclose documents and information obtained by them pursuant to the powers conferred on them by section 24 (6) of the Act, (2) even if the commissioners are entitled to disclose such documents and information it would be contrary to the public interest that they should do so because such material is confidential in character, that it would cause general resentment if it were known that information of this sort obtained by the exercise of compulsory powers was liable to be disclosed to other persons including trade competitors of the informant, that traders hereafter asked for information of this sort would be tempted to withhold it and that the good relations which usually exist between the commissioners and their officers, on the one hand, and the traders with whom they deal, on the other, would be impaired.

The appellants challenged these claims to privilege by a summons issued on June 15, 1971, which came before Forbes J. who rejected both claims. His grounds for rejecting the claim to legal professional privilege were, (a) that in this field salaried legal advisers are not in the same position as solicitors practising on their own account, (b) that litigation cannot be anticipated before a cause of action has arisen and the mere fact that the commissioners thought that it was most unlikely that the appellants would accept their opinion did not mean that they were anticipating litigation within the meaning of the rule, (c) that in any case the information in question was obtained and the documents in question came into being in order to enable the commissioners to fix the wholesale value correctly and that the fact that the information and documents were to be submitted to the legal department to prepare the commissioners' case in the arbitration was so subsidiary a purpose that it could be disregarded. As regards the public interest claim he held that the commissioners had power to disclose the material in question and that the public interest would suffer far more damage by non-disclosure than by disclosure.

The commissioners appealed from the decision of Forbes J. to the Court of Appeal who allowed the appeal. Counsel appear to have failed to make it clear to the court, or at all events to Lord Denning M.R., that the claim to legal professional privilege extended to the 2 (c) documents as well as to the 2 (b) documents. Lord Denning M.R. held (1) that the 2 (b) documents were covered by legal professional privilege; (2) that the 2 (c) documents were not covered by Crown—i.e., "public interest"—

A privilege but (3) that there was a general ground of privilege—not peculiar to the Crown—applicable to documents entrusted in confidence by a third party to the person from whom discovery of them is sought. Karminski and Orr L.JJ. agreed with the judgment of Lord Denning M.R.—though the former at any rate appreciated that legal professional privilege was being claimed for the 2 (c) documents as well as for the 2 (b) documents and thought that this claim was justified.

B It will be convenient to deal first with the ground upon which Lord Denning M.R. upheld the claim to privilege with regard to the 2 (c) documents—a ground which we were told had not been relied upon by the commissioners in argument. It is clear that in general a party cannot object to produce a document not covered by legal professional privilege because the information contained in it was imparted to him in confidence. In *Chantrey Martin & Co.* v. *Martin* [1953] 2 Q.B. 286, 294 the Court of C Appeal approved the statement of the general principle in *Bray on Discovery* (1885), p. 206 which runs as follows:

> " the mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion D of the court being for this purpose distinguished from a voluntary disclosure out of court."

What Lord Denning M.R. is saying in the section of his judgment headed " An alternative ground of privilege " is, I take it, that the general principle is subject to the exception that as he puts it [1972] 2 Q.B. 102, 134:

> E " a party to litigation is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence."

Such an exception would be combining, if not confusing, two quite different considerations—the property in the document and the confidential nature of its contents—and I do not believe that it exists. Until the Rules of F Court were changed in 1964 a party from whom discovery was sought though he had to disclose the existence of documents which were in his custody but which belonged wholly or partly to a third party could not be ordered to produce such documents for inspection. That rule had nothing to do with the confidential nature of the contents of the documents: it applied to all documents whether confidential or not. Further, as *Bray* points out, at p. 206, it was no protection against an order for inspection G of a copy of the document (unless that too belonged to the third party) or against the disclosure of the contents of the document in answer to interrogatories. Even if the rules had remained unaltered I would not have thought that the commissioners could have taken an objection based on property in this case since we were told that the 2 (c) documents are photostats of the originals and presumably they belong to the com- H missioners; but in any case, as I have said, under the new rules there is no longer a distinction between the obligation to disclose the existence of documents and the obligation to produce them for inspection; see *Supreme Court Practice* (1973), p. 390 under the heading 24/2/4. If once

any objection based on property is out of the way there seems to be no logic in this alleged exception to the general rule. Privilege cannot be claimed for a letter written in the strictest confidence by a third party to the party from whom its discovery is sought: see *Hopkinson* v. *Lord Burghley* (1867) 2 Ch.App. 447; but such a letter might contain a summary of the contents of some document in the hands of the third party. Why, then, should a different rule apply if the document itself is handed over in confidence ?

The only authority which lends any support to the view that privilege might be claimed on the ground of "confidence" in the latter case is *Enthoven* v. *Cobb* (1852) 5 De G. & Sm. 595 and, on appeal, 2 De G.M. & G. 632 which is discussed at length by *Bray* on page 207. There two people—H and C—were suing E on similar causes of action in separate proceedings. C obtained from H a case to and opinion of counsel which H had taken for use in her proceedings on the understanding—express or implied—that C might take copies and use them for the purpose of his proceedings but not otherwise. Obviously E could not have compelled H to disclose these documents to him in the action H v. E but he contended—unsuccessfully—that he could compel their disclosure by C in the action C. v. E. Parker V.-C. based his judgment, 5 De G. & Sm. 595, partly on the ground that legal professional privilege applied as much in C's action as it would have applied in H's action since the documents were procured by C so that he could submit them to his legal advisers and partly on the ground that H had a property interest in the copies as well as the originals. In the Court of Appeal in Chancery, 2 De G.M. & G. 632, Knight Bruce L.J. said that he agreed with the judgment of Parker V.-C. but in his own judgment he used language which suggests that he may have thought that even if it was not a case of legal professional privilege and even if H had no property in the documents C could not be ordered to produce them because H had entrusted them to him in confidence. The decision in the case may well have been right on the ground that the documents were the subject of legal professional privilege in C's hands, but if and so far as Knight Bruce L.J. based his judgment simply on confidence I agree with *Bray* that his reasoning was wrong. The language used by Knight Bruce L.J. in *Enthoven* v. *Cobb* was relied on by Mr. Cairns Q.C. in the passage in his argument in *Reynolds* v. *Godlee* (1858) 4 K. & J. 88, 89 which is quoted by Lord Denning M.R. [1972] 2 Q.B. 102, 134 but it is not, with respect, right to say that Page Wood V.-C. accepted the proposition as correct. He referred to it but he did not say that he agreed with it and he decided the case before him on the ground that the documents in question were the subject of legal professional privilege. The other case to which Lord Denning M.R. refers—*Watson* v. *Cammell Laird & Co. (Shipbuilders and Engineers) Ltd.* [1959] 1 W.L.R. 702—was also a case of legal professional privilege. In my judgment, if the commissioners are to succeed with regard to the 2 (c) documents it must be on the ground either of legal professional privilege or of public interest.

The Court of Appeal hold that Forbes J. was wrong in holding that there was any distinction for the purpose of a claim to legal professional

A privilege between solicitors in private practice and salaried legal advisers and the appellants did not challenge that view in their appeal to this House. They did, however, submit that the commissioners ought not to have "anticipated litigation" within the meaning of the rules as to legal professional privilege as early as July 31, 1967. There was not, so far as I can see, any need for the appellants to have requested a reference to arbitration at that stage. It may well be that the request was made ex B abundanti cautela and that the appellants were hoping that they might obtain a reduction in the tax payable by a process of negotiation. But whatever may have been in their minds it does not lie in their mouth to complain that the commissioners on receipt of the letter formed the view that any value which they fixed would almost certainly be challenged and there was nothing in the subsequent correspondence to cause them to think otherwise. So even if the existence of privilege in respect of the C 2 (b) (i) documents depends on the reference to arbitration having been anticipated when they were written (which I doubt) I think that the Court of Appeal was right in holding that the claim was made out with regard to them as well as with regard to the 2 (a) documents.

The documents in 2 (b) (ii) and (c) appear to fall, in descending order of importance, under three heads:

D 1. Documents obtained from or containing information obtained from third parties by reason of the existence of the powers given by section 24 (6).

2. Documents containing observations by members of the staff of the commissioners as to the fixing of the wholesale value made in the light of and often referring to the documents and information obtained from the appellants and from such third parties.

3. Instructions as to the methods to be employed by the staff in E conducting its investigations.

Head 3 can be left out of account since the appellants made it clear that they had no wish to see any such instructions. The commissioners' case for claiming legal professional privilege with regard to the documents comprised in heads 1 and 2 may be stated as follows: "The documents were obtained or came into existence for two purposes—first to assist the F valuation department of the commissioners in fixing the wholesale value of the machines and secondly to assist the legal department in upholding that valuation in the arbitration which it was anticipated would be called for. If they had been obtained or had come into being for no purpose other than that of being laid before the legal advisers of the commissioners to help them in presenting the commissioners' case in anticipated litigation they would clearly have been entitled to legal professional privilege G and the cases show that the fact that they were obtained or came into existence for another purpose as well even though such other purpose was in fact the primary purpose makes no difference." This argument was accepted by the Court of Appeal—though Lord Denning M.R. thought that legal professional privilege was only being claimed for the 2 (b) (ii) documents. The most important of the many cases on this H subject are summarised in the judgment of Havers J. in *Seabrook* v. *British Transport Commission* [1959] 1 W.L.R. 509. In that case—and the facts in several of the other cases were very similar—employees of the defendants in pursuance of routine instructions had made a report to head office of

the circumstances of an accident which had occurred on the railway. There were several reasons why such reports were required. One was that the commission was under a statutory duty to report accidents to the Minister of Transport: another was so that the appropriate department might consider whether any disciplinary measures or changes in the methods of work were called for; yet another was that in the event of a claim being made by the party injured the report could be laid before the commission's solicitor for his advice. Havers J. pointed out that it was difficult—if not impossible—to reconcile all the cases, that the earlier cases tended on the whole to favour disclosure in such circumstances; but that after the approval of the judgment of Buckley L.J. in *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850, by Scrutton L.J. in *Ogden* v. *London Electric Railway Co.* (1933) 49 T.L.R. 542, it must be taken as established that the fact that the purpose of submission to the legal adviser was only one and may be not the most important of several purposes for which the report was prepared did not prevent it from being privileged. The *Seabrook* case was considered a few months later by my noble and learned friend, Lord Diplock—then Diplock J.—in *Longthorn* v. *British Transport Commission* [1959] 1 W.L.R. 530. There the commission had held an inquiry into the circumstances of the accident before the plaintiff, who was one of their employees and gave evidence at the inquiry, issued his writ. In the action the commission claimed privilege for the report of the inquiry but the judge having looked at it held that it was not privileged because the inquiry was not to any appreciable extent held for the purpose of obtaining for or furnishing to the solicitor evidence or information to help him in defending any proceedings which the plaintiff might bring. In his judgment he said that it was not necessary for him to decide to what extent the purpose of submission to the solicitors must be the main or substantial purpose of the coming into being of the document in question since he was satisfied that the mere fact that it was *a* purpose however insubstantial could not found a claim for privilege; but reading the judgment as a whole it is, I think, fair to conclude that my noble and learned friend viewed the trend of the decision since 1913 with some distaste and that he inclined to prefer the judgment of Hamilton L.J. in the *Birmingham* case [1913] 3 K.B. 850 to that of Buckley L.J.

One day it may be necessary for this House to consider the point but in my judgment it does not arise for decision in this case. In the *Ogden* and *Seabrook* type of case the reports in question are obtained for two or more quite separate purposes. Here the two purposes for which the documents in question were obtained or came into existence were parts of a single wider purpose—namely, the ascertainment of the wholesale value in the manner prescribed by the Act. The first, and the sole immediate, purpose was to help the commissioners to fix what in their opinion was the true value; the second purpose was to help the solicitor, if the commissioners' opinion was challenged, to prepare their case for the arbitration. It was not—and hardly could have been—suggested that the mere fact that the commissioners would know in every case that their opinion might be challenged would itself enable them to claim that such documents as are in question here would be the subject of legal profes-

sional privilege whenever in fact their opinion was challenged. What is said to make them privileged in this case is the fact that the commissioners happened to expect that there would be an arbitration and called in the solicitor to "hold their hands" in the early stages. But, even so, in this case just as much as in cases in which no arbitration was in fact anticipated the commissioners had to form their own opinion as to value on the evidence available to them, including these documents, before any arbitration could take place. This feature of the case appears to me to distinguish it from the *Ogden* or *Seabrook* type of case and to make it analogous to the case of *Jones* v. *Great Central Railway Co.* [1910] A.C. 4. There a member of a trade union who thought that he had been unjustly dismissed by his employers furnished the union authorities (as required by the rules) with information in writing as to the facts of the case as he saw them in order to satisfy them that it was proper for them to sanction the employment of a solicitor to conduct the case and also for use by the solicitor in the conduct of the action if the employment of a solicitor was sanctioned. This House held that the letters in question were not the subject of legal professional privilege because the union authorities had themselves to consider them and act on them before the solicitor was employed to conduct the case. So here the commissioners had to form their own opinion as to value before the solicitor would use the documents for the purpose of defending their opinion in the anticipated arbitration.

I turn now to the question of "Crown privilege" or rather privilege on the ground of "public interest." Sir Louis Petch first submits that the commissioners have no power to disclose documents obtained from or containing information obtained from third parties in pursuance of the powers conferred by section 24 (6) of the Act unless they have express statutory authority for so doing. Lord Denning M.R. rightly rejected this contention which your Lordships have held to be ill-founded in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] A.C. 133. But then Sir Louis says that even if they have power to do so the commissioners think that it is contrary to the public interest for them to disclose such documents or any other documents which contain references to the contents of documents obtained under section 24 (6) because such documents were obtained in confidence from the third parties concerned on the understanding that the commissioners would not disclose them to anyone else. Such disclosure, it is said, would be unfair to the third parties and would be harmful to the proper working of the department. So far as I can see the Court of Appeal did not deal with this argument at all. It is true, as Lord Denning M.R. points out, that the 2 (c) documents are documents of an ordinary character—invoices and so on—such as are normally disclosed by parties to litigation; but Sir Louis' objection to their disclosure is not based on their character but on the manner in which they were obtained. "Confidentiality" is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those

which suggest that it is in the public interest that they should not be disclosed and to balance one against the other. Plainly there is much to be said in favour of disclosure. The documents in question constitute an important part of the material on which the commissioners based their conclusion that the appellant sell to retailers. That is shown by the reply which the commissioners made to the request for particulars under paragraph 5 (h) of the defence. Yet if the claim to privilege made by the commissioners is upheld this information will be withheld from the arbitrator. No doubt it will form part of the brief delivered to counsel for the commissioners and may help him to probe the appellants' evidence in cross-examination; but counsel will not be able to use it as evidence to controvert anything which the appellants' witnesses may say. It is said, of course, that the appellants cannot reasonably complain if the commissioners think it right to tie their own hands in this way. But if the arbitrator should decide against them the appellants may feel—however wrongly—that the arbitrator was unconsciously influenced by the fact that the commissioners stated in their pleadings that they had this further evidence in support of their view which they did not disclose and which the appellants had no opportunity to controvert. Moreover, whoever wins it is desirable that the arbitrator should have all the relevant material before him. On the other hand, there is much to be said against disclosure. The case is not, indeed, as strong as the case against disclosing the name of an informer—for the result of doing that would be that the source of information would dry up whereas here the commissioners will continue to have their powers under section 24 (6). Nevertheless, the case against disclosure is, to my mind, far stronger than it was in the *Norwich Pharmacal* case. There it was probable that all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all. Here, on the other hand, one can well see that the third parties who have supplied this information to the commissioners because of the existence of their statutory powers would very much resent its disclosure by the commissioners to the appellants and that it is not at all fanciful for Sir Louis to say that the knowledge that the commissioners cannot keep such information secret may be harmful to the efficient working of the Act. In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non-disclosure. Forbes J. was so impressed by those possible ill-effects that he failed to appreciate how reasonable Sir Louis' objections to disclosure were and dismissed them with the remark "We are not living in the early days of the Tudor administration." I do not regard Sir Louis as a modern Cardinal Morton. His objections to disclosure were taken in the interests of the third parties concerned as much as in the interests of the commissioners and if any of them is in fact willing to give evidence, privilege in respect of any documents or information obtained from him will be waived. In the result therefore I would dismiss the appeal—though not for the reasons given by the Court of Appeal.

LORD KILBRANDON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Cross of Chelsea. I agree with it and have therefore not prepared one of my own.

I would like, however, to add a word or two about the somewhat diverging trends of authority, on the question of discovery of documents said to have been prepared for the purposes of litigation, which may be typified by the judgments of Buckley L.J. in *Birmingham and Midland Motor Omnibus Co. Ltd.* v. *London and North Western Railway Co.* [1913] 3 K.B. 850 and of Havers J. in *Seabrook* v. *British Tansport Commission* [1959] 1 W.L.R. 509, on the one hand, and those of Hamilton L.J. in the *Birmingham* case and of Diplock J. in *Longthorn* v. *British Transport Commission* [1959] 1 W.L.R. 530 on the other. Like my noble and learned friend, I prefer the approach of the latter to that of the former. In my opinion, any practice of "blanket" classifying of documents, especially when they concern, as they normally do, claims arising out of accidents, is to be discouraged. In *Ogden* v. *London Electric Railway Co.* (1933) 49 T.L.R. 542, Scrutton L.J. said this of the documents there in question, at pp. 543–544:

> "Mr. Eastham, as I understand, argues that they are not,"—that is to say, not prepared for solicitors—"because the reports were made to a company to enable it to conduct its own business—namely, to carry on its business without accidents—without any regard to litigation. That may be so. It may be that that is part of the purpose of making the reports, but there is also the substantial purpose that if a writ is issued these are the materials that will be wanted by the solicitor conducting the litigation, and they are obtained for that purpose, among others, and as appears from the form at which we look—because the judge below has looked at these documents—the reports are made on a form headed: 'For the information of the company's solicitors only,' which is a very important heading to have, because if you know that you are making a confidential report to the solicitor you are much more likely to state accurately what has happened than if you are afraid that somebody presently seeing that report may take proceedings against you in respect of the statements that you have made, which may be defamatory."

My Lords, I find this hard to accept. When one recollects the circumstances in which such reports are made, and the grade of employee who is commonly required to make them, it seems to me to be unreal to suggest that he will adjust the form and content or vary the candour of the report he is required to make according as the report on its face bears or does not bear that it will at an early stage, or at any stage, be submitted to his employer's solicitor. The point was raised in very similar circumstances before the Court of Session—where the practice in these matters is rather different—in *Whitehill* v. *Glasgow Corporation,* 1915 S.C. 1015. The report in that case was made on a form which had as a printed heading: "For the use of the corporation solicitors to enable them to defend should litigation ensue." In holding that the defenders were bound to produce the report, the Lord President (Lord Strathclyde) observed, at p. 1017:

"These words cannot alter the character of the report which is made by the employee for the purpose of informing his employers of the accident, and made at the time."

Such reports would be produced on the authority of *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*, 1909 S.C. 335, *per* Lord Dunedin at p. 340.

I agree with the order proposed.

Appeal dismissed.

Solicitors: *Needham & Grant; Solicitor, Customs and Excise.*

J. A. G.

[HOUSE OF LORDS]

THE ATLANTIC STAR

ATLANTIC STAR (OWNERS) . . . . . APPELLANTS

AND

BONA SPES (OWNER) . . . . . RESPONDENT

1973 Feb. 12, 13, 14, 19, 20, 21, 22; April 10

Lord Reid, Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Simon of Glaisdale and Lord Kilbrandon

Practice—Stay of proceedings—Admiralty—Collision in Belgian waters involving Dutch and Belgian vessels—Report by surveyor appointed by Belgian Commercial Court—Multiple claims against Dutch owners begun in Antwerp court—Action in rem by one claimant started in English Admiralty Court—Motion to stay English action—Antwerp most appropriate forum—Whether plaintiff entitled to bring action in forum of his choice—International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, art. 1 (1) (2) (3) (*Brussels, May* 10, 1952) [1]

Ships' Names—Atlantic Star

In January 1970 the Dutch container vessel *AS*, when attempting in sudden dense fog and without the help of tugs to enter a lock in Belgian river waters, collided with the Dutch-owned barge *B* lying moored outside a Belgian barge against the quay wall. Both barges were sunk with their cargoes, two men were drowned, and port installations were damaged. The two barge owners applied to the Antwerp Commercial Court for the appointment of a court surveyor who reported on the circumstances and causes of the collision in February 1971. The trend of his report was that the collision was due to the difficulties caused by sudden fog.

[1] See post, p. 472C–E.

REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

1/12/2014 .....
DATE

.....
SIGNATURE

CASE NO: 2013/32512

In the matter between:

THE RIGHT2KNOW CAMPAIGN	First Applicant
THE SOUTH AFRICAN HISTORY ARCHIVE	Second Applicant
M & G MEDIA LIMITED	Amicus Curiae

and

THE MINISTER OF POLICE	Respondent
THE NATIONAL DEPUTY INFORMATION OFFICER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent

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JUDGMENT

SUTHERLAND J:

Introduction

[1] This is a case about whether or not the people of South Africa ought to know what places and areas are national key points, as contemplated by the National Key Points Act 102 of 1980 (NKP Act). In terms of section 11(3) of Promotion of Access to Information Act 2 of 2000 (PAIA) a 'requester' of information, other than compliance with the formal request procedures, need not justify a request for information held by the State. If the information is refused, the refusal must be justified on one or more grounds set out in Chapter 4 of PAIA.

[2] A request by the second applicant, to the Second respondent, within the contemplation of section 18(1) of the PAIA to disclose the national key points, was made on 4 October 2012 and refused on 16 November 2012. The internal appeal, provided for in section 74 of PAIA, to the First Respondent was dismissed on 28 February 2013.

[3] These decisions by the respondents provoked this application in which the relief sought is to declare that the decisions of the respondents refusing the request for information in terms of PAIA are unlawful and unconstitutional, to

review and set aside the refusals and to direct the provision of the requested information, being:

(1) records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980 and

(2) the bank statements from 2010 to 2012 of the Special Account for the Safeguarding of National Key Points provided for in section 38 of the National Key Points Act.

The Parties

[4] The first applicant, the RIGHT2KNOW campaign and the second applicant, the South African History Archive are civil society organisations whose objectives are to serve the public interest. Both have an interest in advancing constitutional values, the first applicant by promoting transparency, accountability, a free media, effective governance of public and private bodies, and a human rights culture; the second applicant by the collection and preservation in accessible mode of materials of importance to the history of and an understanding of South African society. The Amicus, whose admission was granted unopposed, is a publisher of news in South Africa and who has insight into the role of professional journalists in reporting on public affairs and the restrictions that are constructed to inhibit their function in unearthing information for dissemination to the general public. The Amicus associates itself with the relief sought by the applicants.

[5] The second respondent is the designated Information Officer of the South African Police Service as contemplated in the definition thereof in section 1 and in the provisions of section 17 (1) of PAIA and is the deponent to the answering affidavit. The incumbent of such office is required in terms of sections 19 and 25 of PAIA to assist requesters of information and provide the information sought subject to the caveats provided for in various other provisions of PAIA. The first respondent is the political officer bearer in whom the power is vested to make declarations of places as national key points.

The Respondents reasons for refusal.

[6] The answering affidavit of the respondents seeks to justify the refusal. The deponent alleges that beyond disclosing that there are 200 national key points, that most are privately owned by juristic and by natural persons, and that key points can be categorised as banks, munition industries, petro-chemical industries, water supply, electricity, communications, transport, government institutions, data processing, research or 'chemical information'(sic) systems, no more information can appropriately be disclosed.

[7] The rationale is that 'mere mention' of such a place will attract 'unnecessary attention' and what would at present be seen as insignificant would attract such attention. For example, so it is alleged, not everyone knows that OR Tambo airport is a key point, but if that fact was disclosed, interest would be

attracted. How information about a key point is used is unpredictable and 'people who seek to hurt the public' may be encouraged to take an interest in such places. The categories of key points listed are 'pivotal' to the 'security and stability' of the country. It is inappropriate to reveal any of the places because to do so would prejudice the security of the owners and their buildings and the 'defence and safety' of the country. Non-disclosure is 'necessary or expedient for the safety of the Republic'. Apparently, there are 'dark forces' who are out to destabilise peace-loving countries, like our own. By way of illustration, the bombing of the mall in Nairobi shows 'how vulnerable countries and their citizens are.'

[8] The deponent says that PAIA and section 2 of the NKP Act should be read together. Section 2 reads:

> (1) If it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest, he may declare that place or area a National Key Point.
>
> (2) The owner of any place or area so declared a National Key Point shall forthwith be notified by written notice of such declaration. (Emphasis supplied)

By inference, the allegation must be understood to mean that the deleterious occurrences that are listed, ie, a risk of loss, damage, disruption or immobilisation of the key point will result from disclosure.

[9] Lastly, in responding to a criticism in the founding affidavit that no attempt was made by the respondents to 'excise' any of the information and that a blanket refusal was given, the deponent concedes the total refusal but alleges that 'no information could be excised' for the reasons which have been described.

[10] The reasons in the answering affidavit are not the reasons initially invoked by the second respondent. On 16 November 2012 when the second applicant refused the request, she invoked only section 38(a) & (b)(i)(aa) of PAIA. Those provisions read:

> Mandatory protection of safety of individuals, and protection of property
> The information officer of a public body-
>
> (a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or
>
> (b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair-
>
> (i) the security of-
>
> (aa) a building, structure or system, including, but not limited to, a computer or communication system;
> (bb) a means of transport; or
> (cc) any other property; or
>
> (ii) methods, systems, plans or procedures for the protection of-

(aa) an individual in accordance with a witness protection scheme;
(bb) the safety of the public, or any part of the public; or
(cc) the security of property contemplated in subparagraph (i) (aa), (bb) or (cc).

[11] The refusal was amplified by this statement by the second respondent:

> "To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure security at the relevant property or safety of an individual (eg if a person plans, intends or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building – a person who intends to harm the relevant individual may with ease harm the individual if he or she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm."

[12] Plainly, the safety of the country was not, at that time, thought to be a consideration; the concern was wholly about unidentified individuals. This focus on individuals does not sit well with the import of Section 2 of the NKP Act (cited above) a theme to which I shall return.

[13] In the dismissal of the internal appeal on 28 February 2013, the First Respondent regurgitated the second respondent's rationale and then added further reasons to justify a refusal. Extrapolating on the theme of individuals' well-being, the first respondent contended that because the majority of key points are privately owned, the name of the place also 'qualified' as a person's address and this constituted 'personal information' as defined. He referred to the definition

and to section 34 which concerns 'mandatory protection of the privacy of a third party' if that person is a natural person. Where disclosure of information that might be personal information, or confidential information of a natural person, section 47 requires notice to them before disclosure to enable *audi alterem partem* on the decision to disclose. The allusion to this aspect was not developed and was alluded to only to justify the idea that giving notice to the owners of the majority of the 200 places that were key points was unduly onerous within the meaning of section 45(b) of PAIA which provides that ' ...a public body may refuse a request for access to a record of the body if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.' (The resistance by the respondents based on Section 45(b) was not persisted with in the answering affidavit nor in argument.)

[14] The first respondent invoked, without express reference, the terminology of section 2 of the NKP Act, alleged these places would be 'soft targets', gave the list of categories of key points already mentioned in the answering affidavit, and emphasised that knowledge that a place was a key point exposed the individuals at the key point to danger as the knowledge was 'highly likely to prejudice or impair the security of such places.'

[15] The first respondent added, gratuitously (because the information was not solicited) certain information about the security arrangements at certain key points; ie 'VIPS' who are 'at the key points' are guarded by the VIP protection

unit. This unsolicited information seems to have been given to justify the non-existence of the special account established by section 3B of the NKP Act and to indicate that the costs of the protection of the VIPS was catered for in the funding of the VIP protection unit. This disclosure was misdirected, more especially, because security relevant to the NKP Act is about places not about people.

[16] The respondents' articulations of their reasons fail the test set by Ngcobo CJ in President, RSA v M & G Media Ltd 2012 (2) SA 50 (CC) at [23] – [25]:

> [23] In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.
> [24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.
> [25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any

> indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame. (Footnotes omitted)

The criteria for a judicial peek

[17] In argument, counsel for the respondents, quite properly, was driven to concede that there was no *evidential material* disclosed in the papers to support the refusal. He contended that the predicament of the respondents was illustrated by the experiences of that well known gentleman adventurer and upholder of noble causes, James Bond, who, albeit it must be supposed, with his customary charm and grace, declined to disclose a fact to a questioner, because were he to do so, he would have to kill him. This is an interesting submission, which, alas, is spoilt by the absence of such an allegation under oath.

[18] A solution to a predicament of such a sort is addressed in Section 80 of PAIA which provides that:

> (1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.
>
> (2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)-

(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or

(b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39 (3) or 41 (4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.

(3) Any court contemplated in subsection (1) may-

(a) receive representations ex parte;

(b) conduct hearings in camera; and

(c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.

[19] However, as already said, the contention of counsel is not foreshadowed in the answering affidavit, notwithstanding an invitation therein from the respondents to peek at the information. Indeed, no attempt is made even to justify the invitation to peek; the most that is said in the affidavit is that a court may do so and the respondents are not adverse thereto. There is no allegation by the respondents of being hamstrung in presenting their case, not to mention a plausible basis being laid for such an allegation. This distinguishes these circumstances from those addressed in the majority judgment in President of the RSA v M&G Media Ltd 2012 (2) SA 50 (CC) in which Ngcobo CJ, at [37], [39], [45], [46], [50] and esp [60] dealt comprehensively with the approach of a court to examining the material which is the subject matter of a disclosure dispute. In that matter a peek was ordered and the matter referred back the High court to do so.

That was done, and the material, a report on the 2002 Zimbabwe Election was examined by the judge who ordered its disclosure. That decision was appealed against, and the SCA in President, RSA v M & G Media Ltd ZASCA 124 (19/09/2014) addressed the decision to do so, yet again. The gravamen of the judgment delivered by Ngcobo CJ was the court's response to a plausible allegation that the State's 'hands were tied' or 'hamstrung' in meeting the threshold requirements of PAIA to justify the non-disclosure. Where such a predicament was claimed and shown to be plausible, the interests of justice had to prevail and a peek becomes appropriate. Brand JA summarised the approach approved by the Constitutional Court at [12] - [14]:

> [12] In writing for the majority in the Constitutional Court Ngcobo CJ also concluded that the evidence put forward by the Presidency in its answering papers was insufficient to discharge the onus resting on it in terms of s 81(3), to establish that the report fell within the scope of the exemptions claimed. But, so he held, that was not the end of the matter, because proceedings under PAIA differ from ordinary civil proceedings in several respects (see paras 33-35). One of these differences most pertinent for present purposes, so the Chief Justice said, is that parties to disputes under PAIA may be constrained by factors beyond their control in presenting and challenging evidence. From the requestors' perspective, the facts upon which the exemption is justified, will be exclusively within the knowledge of the holder of the information. In consequence they may have to resort to bare denials of facts relied upon by the holder as justifying refusal of access. On the other hand, holders of information may be compelled to rely on the contents of the record itself to justify the exemption. But they will be precluded from doing so by the provisions of ss 25(3)(b) and 77(5)(b) of PAIA. The second feature distinguishing PAIA disputes from ordinary civil proceedings, which is pertinent in this case, so the Chief Justice continued, is that courts are afforded the discretion to call for additional evidence in the form of the contested record itself and have, what is referred to in the parlance of American jurisprudence, 'a judicial peek' at its contents.

[13] As to when courts should exercise their discretion in favour of resorting to a judicial peek into the contested record, Ngcobo CJ held (in para 44) that it should be reserved for the situation where an injustice may result from the unique constraints placed upon the parties in PAIA disputes: where, for instance, the holder of the information had failed to discharge its burden under s 81(3), but indicated that it was prevented from doing so by the provisions of PAIA, the courts should generally invoke s 80 (para 46). Or where the probabilities are evenly balanced and the doubt as to the validity of the exemptions claimed can be explained in terms of the limitations placed on the parties to adduce evidence (para 47).

[14] In concluding that the provisions of s 80 should have been invoked by the high court in the circumstances of this case, Ngcobo CJ was primarily swayed by three considerations (paras 54-66). First, the conclusion of the SCA that the refusal of access to the report might have been justified, but since this had not been established by acceptable evidence, disclosure of the report was inevitable. Secondly, that the Presidency had alleged in its answering papers that its hands were tied by sections 25(3)(b) and 77(5)(b) of PAIA in presenting evidence in support of its claim to exemptions. Thirdly, that even if refusal of access to the report as a whole was justified, s 28 of PAIA provides for disclosure of information that is not protected and that can reasonably be severed from the protected part. Although the Presidency asserted that the report was not severable, M & G was placed at a disadvantage in challenging this assertion as it did not have access to the report. In consequence, the assertion of non-severability could not be decided without having regard to the content of the report.

[20] However, ultimately, in argument before me, the suggestion in support of a peek veered towards the peek being used to merely perform the very exercise which the respondents were obliged to undertake; ie to sift through the declarations and decide if there were any key points whose identity, upon good grounds recognised by PAIA, might not be appropriate to disclose. That expectation is inappropriate. Cameron J, dissenting from the order made in President, RSA v M & G (CC) supra, cautioned as follows about the implications of a peek:

[123] It is nevertheless necessary to consider the course proposed in the judgment of Ngcobo CJ. The judgment affirms the ambit and importance of the right of access to information; notes that disclosure is the rule and exemption is the exception; observes that in comparable foreign jurisdictions, the state must show that the record is covered by the exemption claimed; requires government to produce evidence to show that, on the probabilities, the information falls within the exemption; and disclaims recitation of statutory language and ipse dixit formulaism — but nevertheless decides on remittal so that the High Court can invoke s 80 of the statute. In my respectful view this is wrong.

[124] Section 80 permits a court in all circumstances to examine the disputed record itself, but the examination must be secret and the parties excluded. This provision can indeed, as Ngcobo CJ states, be employed to test claims of secrecy and to facilitate, rather than obstruct, access to information. But its provisions should be invoked with care. M & G urged that judicial examination of the disputed record (a 'judicial peek') should be resorted to only in exceptional circumstances. I agree. There are two reasons for this conclusion.

[125] First, a cautious approach to s 80 accords with the structure of the statute. The Constitution creates an entitlement to information held by government, which the statute has limited under the Bill of Rights. The structure of PAIA is to stipulate the process required to claim access, and to enumerate the instances where it may be refused. The statute creates an overriding judicial power to examine the record, but goes on to provide explicitly that the burden of establishing that an exemption is properly invoked lies on the party claiming it. If the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of information.

[126] Both the onus and the judicial examination provisions must be given effect, but within their appropriate fields of application. Judicial examination should not be a substitute for requiring government to discharge its burden of showing that the statute's exemptions applied. Still less should it be invoked to avoid an order of disclosure when government has failed to establish its case under the statute.

[127] The provision should in my view be invoked only when government plausibly asserts the hands-tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed. The provision

should, in other words, be used to amplify access, and not to occlude it. It should only be a last resort. It should not be used to help government make its case when it has failed to discharge the burden the statute rightly places on it.

[128] Second, the very provisions of s 80 make it plain that the power it confers should be of rare recourse. The provision makes the court a party to the secrecy claimed, and prohibits it from disclosing the disputed record to any person, 'including the parties to the proceedings concerned'. In effect, two fundamental principles of the administration of justice are here upended: first, the adversary nature of the parties' dispute, in which the court is a disinterested arbiter, is suspended; and, second, the indispensable attribute of the administration of justice, its openness, is shrouded. These are consequences that we should be reluctant to countenance too readily.

[129] Secret in camera examination of disputed records requires courts to lay aside the foundations of their precious-won authority. As the United States Circuit Court of Appeals for the District of Columbia has stated, a 'denial of confrontation creates suspicion of unfairness and is inconsistent with our traditions'. The blunt risk is that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process. That may sometimes be necessary. The power the statute creates is for cases of necessity. But the risks inherent in resorting to secret judicial examination are so grave that it should be avoided if at all possible. The Supreme Court of Appeal rightly said of this:

'Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.'

[130] Nor should the public ever fear that courts may assist in suppressing information to which the Constitution says they are entitled. To give secret judicial examination of disputed records a central place in deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in my view a grave error.

(Footnotes omitted)

[21] Accordingly, to sum up, in my view, the idea of a peek in this particular case is inapposite because no case is attempted to justify its need, and it is plain

that because of the grave policy considerations that attend upon its use, it is never available for the asking, but must be seriously motivated as the only appropriate mechanism to avert a failure of justice.

The National Key Points Act: an examination

[22] At the heart of this controversy in the NKP Act. What is a national key point? It is a place that the designated Minister [at present the Minister of Police, formerly the Minister of Defence] declares to be one. The Minister is empowered to do so in section 2 of the NKP Act (Cited Above). It confers a wide discretion for it requires merely that 'it appears' to the minister that the prescribed circumstances exist or he 'considers' it necessary or expedient or he 'considers' it to be in the public interest. More specifically, the Minister may declare a place a key point if 'it appears' 'so important' that its loss, disruption or immobilisation may prejudice the Republic. A common sense view might think of airports, sea ports and the like. The second thought that can occur to him is that he 'considers it necessary or expedient' for the 'safety of the Republic to declare a place a key point. What that might encompass is obscure. A third thought is that he 'considers' it in the 'public interest' to declare a place a key point. This notion, curiously distinguishing the safety of the state from the public interests, perhaps a prescient piece of drafting in the era of 1980, leaves open a field of concerns without clear limits.

[23] What is the effect of a declaration? The object is to ensure that key points are appropriately secured against the threats mentioned in section 2. This is achieved by imposing an obligation on the owner of a key point, at the owner's own expense to put security measures in place to the satisfaction of the Minister (Section 3). If the owner fails to do so, the owner commits an offence. If the owner fails to comply the Minister could order the measures he deems appropriate to be put in place at state expense. When that is done, the Minister is empowered to recover the costs for which the owner was liable. (Section 5(b))

[24] Thus, in my view, it is plain that the purpose of the NKP Act is to ensure that certain places ought to are secured and their owners can be forced to put in place security measures through the use of criminal sanctions and by the recovery of money spent by the state to effect the measures as deemed necessary. A point of importance is that the gravamen of the NKP Act is the securing of areas, places and infrastructure, not the personal security of individuals who might frequent them.

[25] Is the identity of the key points to be kept secret? Nothing in the NKP Act provides for that idea. If that had been the purpose of the NKP Act, it would be startling that no mention was made, especially when express provisions exist to inhibit dissemination of information *about* the security measures in place. Disclosure of information about security is conduct criminalised by section 10 which provides:

10 Offences and penalties

(1) Any person who at, on, in connection with or in respect of any National Key Point performs any act which, if such act would have constituted an offence in terms of the Official Secrets Act, 1956 (Act 16 of 1956), if performed or executed at, on, in connection with or in respect of any prohibited place, as defined in section 1 of that Act, shall be guilty of an offence and liable to the penalties prescribed for that act in that Act.

(2) Any person who-

(a) hinders, obstructs or thwarts any owner in taking any steps required or ordered in terms of this Act in relation to the efficient security of any National Key Point;

(b) hinders, obstructs or thwarts any person in doing anything required to be done in terms of this Act;

(c) furnishes in any manner whatsoever *any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there,* without being legally obliged or entitled to do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister, or except as may be strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, or as may be necessary to protect, the place concerned, shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment. (Emphasis supplied)

[26] The section deals expressly with confidentiality of the security measures *per se,* not the secrecy of the status of the place as a key point. No offence is created to penalise the disclosure of the identity of a place as having been declared a national key point. Regulations made under section 11 of the NKP Act, despite creating more offences, also, do not address the idea that the status of the key points be a secret. (see: R1731, GG 8338, 13 August 1982)

[27] The reference to the Official Secrets Act is obsolete because that statute was repealed by the Protection of Information Act 84 of 1982 (as amended up to Act 11 of 2003). It too has a definition of 'prohibited place' which is confined to military establishments: ie:

> '(a) any work of defence belonging to or occupied or used by or on behalf of the Government, including-
>
> (i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft;
> (ii) any telegraph, telephone, radio or signal station or office; and
> (iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto;
>
> (b) any place where armaments or any model or document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the Government of the Government or of any foreign State;'

[28] If the Protection of Information Act is accepted as the successor statute, section 14(a) requires all 'prohibited places' to be gazetted, and accordingly, their identity to be published. The only offences relating to such a prohibited place is trespass (Section 2) and obstructing a guard (Section 6). Nothing in this Statute obliquely points to secrecy about the status of 'prohibited place' still less a key point. Might an argument be made about an inference to be drawn from the absence in section 2 of the NKP Act of a need to gazette the declarations? No contention to that effect was advanced. In my view the purely administrative procedure of a declaration and notice to the sole affected parties, ie the owners who had to expend money for security, illustrates the narrow focus and purpose

of the statute: to make lawful the compulsory expenditure of private funds on security when demands by the Minister are made and to recover state expenditure if such owners fail to comply.

The Applicants Rebuttal of the respondents' rationale

[29] The applicants' case is, first, that it is demonstrable that the case presented by the respondents is bereft of evidence to support it; secondly, even if there was a plausible basis to refuse disclosure, on the factual material and the related contentions presented to the court, section 46 trumps the respondents' refusal, and disclosure must follow.

Harm to individuals

[30] Other than the respondents' contentions *per se,* there is no foundation laid for the idea that individuals will or even may be harmed.

[31] The applicants are at pains to say that they are uninterested in the addresses of the places declared to be key points. In my view, the alleged anxiety about disclosure of addresses is misplaced. It may be correct that the only way to describe a particular key point is by reference to its address per se. The applicants have no interest in addresses per se, and where the key point can be identified without such reference, no obligation exists to do so. However, it is correctly surmised by the respondents that even without an address it is possible

for an inquisitive person to find out where a place is located. Sensitivity about personal information of individuals as contemplated in section 34 of PAIA is utterly unmotivated. Moreover, it is highly problematic that the fact of the status of a place as a national key point is capable of being understood to be personal information of a natural person, as contemplated in section 34 of the definition of 'personal information' in section 1 of PAIA.

[32] The answering affidavit hardly mentions the supposed plight of individuals, but is mentioned, baldly, in the initial refusal and the appeal decision.

The Defence and security of the Republic

[33] The remarks made about this aspect, might on a generous interpretation be encompassed by Section 41 of PAIA,(which deals with the defence, security and international relations interests) albeit not expressly referred to, and this theme dominates the answering affidavit.

[34] Again, no evidence is adduced to support the bald allegations.

What can be made of what the respondents do allege?

[35] The only 'fact' alluded to in the answering affidavit is the bombing of the mall in Nairobi, ostensibly by Somali Extremists irked by Kenya's involvement in

security operations in the Horn of Africa. This is, self- evidently, an ill chosen example; ie, to compare a shopping centre being exposed to politically inspired violence, where the public congregate *en masse*, with a key point, is inapposite. However, it may be supposed that, upon a generous interpretation of the remark, it was intended simply to illustrate the generic exposure to unexpected violence that everyone experiences. Nevertheless, to give voice to a bland truism contributes nothing to a justification under PAIA.

[36] A serious flaw in the efforts to justify non-disclosure is the absence of an argument to support the conclusion that the NKP Act objectives include keeping secret the status of places as key points. Moreover, as that prop is absent, it was incumbent upon the respondents to adduce evidence that, notwithstanding the absence of such an objective, to use the language of section 38, disclosure 'could reasonably be expected to endanger' anyone, or was 'likely to prejudice or impair' any security measure of a building or a person, or to use the language of section 41, disclosure 'could reasonably be expected to cause prejudice' to the state's security. All the respondents offer are platitudes and a recitation of the provisions of the statutes.

[37] The rationale offered by the respondents is spoilt by the conduct of the Government itself, because evidence was adduced of ministers having furnished details of key points to Parliament for the whole world to know, including, presumably, those dark forces that lurk in wait to disturb our tranquillity. A further

example of public disclosure of a key point adduced by the applicants includes the very public announcement that Nkandla, the private home of President Zuma, has been declared a key point. (The legitimacy of such declaration is not a question that needs to be decided in this matter.) Other examples given are a report on 5 August 2008 of a Government Official who explained the arrest of homeless people who deigned to sleep outside a Department of Justice Building in Cape Town on the grounds that it was a key point; a report on 15 November 2012 that a Police Brigadier had publically justified the arrest of protesters outside the Rustenburg Magistrates' Courts on the grounds that the court was a national key point; and a report on 30 August 2012 that the Chairman of the Parliamentary Portfolio Committee for Correctional Services justified the forcible destruction of photographs taken by journalists of a fatal thrashing administered by warders to a prisoner on the grounds that Groenpunt prison was a key point. These factual examples were adduced to rebut the rationale offered in the answering affidavit and have gone unanswered.

[38] The conclusion is inescapable that the rationale offered for the refusal fails to meet the threshold set by PAIA.

The Public Interest overide

[39] Relying on section 46 of PAIA the applicants address several issues to warrant its invocation. The Section provides:

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

[40] The unrebutted allegations of the applicant are addressed in turn.

[41] The question arises whether there has been an abuse of the power to make declarations of a places as key points, whether by the present incumbent, the first respondent, or any of his predecessors since 1980. Do all the places so declared measure up to the prescribed criteria in section 2 of the NKP Act?

[42] More specifically, the question is posed about what has been the public expenditure on security at key points, if any? The revelation that no special account was opened in terms of section 3B of the NKP Act gives rise to several troubling public concerns. First, why has a statutory injunction not been complied with; the NKP Act *per se* establishes the account? This failure looks very much like it might be the sort of failure described in section 46(a)(i) – a failure to comply with a law. Secondly, without the account, how has public expenditure being

managed, if at all? Have the provisions of the Public Finance Management Act 1 of 1999 (PFMA) been breached? Does the absence of an account mean that the Minister of Police, and his predecessors, have culpably failed to recover money due from owners of key points who, by law, were required to bear the cost of the security of key points? Are key points, in truth, not being properly secured? Does a lack of security threaten the public interest?

[43] Reference is made to the considerable media attention given to the issue of national key points, eg the widespread public debate about the immense expenditure on Nkandla, said to be a key point, and the disquiet about criminal sanctions and the like being applied for what are alleged to be transgressions peculiar to places said to be key points. The Citizenry would like to know.

[44] On a different tack, have the actions taken by organs of state to suppress reporting by the media, of which an example was the Groenpunt Prison photographing affair, described elsewhere in this judgment, been validly taken; ie were the places really declared key points? (I address this and the related issue of the clash with the principle of legality that arises from non-disclosure, discretely and more fully when I deal with the case advanced by the Amicus.)

[45] In my view, these considerations, all rooted in unrebutted fact, serve eminently to trigger the provisions of section 46. It is wholly unsatisfactory that political office bearers and senior civil servants should have to perform their

duties under a cloud of suspicion of incompetence or dishonesty. Transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed.

The case advanced by the Amicus: disclosure is essential to preserve adherence to the principle of legality.

[46] The amicus associates itself with the arguments advanced by the applicants and supports the relief sought by the applicant.

[47] In addition, in support of the contention that disclosure of all key points is necessary, it points to what is alleged to be a wholly unconstitutional practice committed by the respondents; ie despite the NKP Act prescribing criminal sanctions in section 10, and the regulations prescribing more criminal sanctions for various acts related to national key points, if the citizenry cannot know what places are key points how can they avoid transgressions? No counter argument was advanced save to suggest that as no crimes of strict liability were imposed by the NKP Act, the concern was misplaced. This is not an appropriate perspective. Indeed, if regard is had to the regulations it may not even be correct. In regulation 1(2)(a)(ii) which defines an 'act prejudicially affecting the security of a key point' it is provided that it such an act includes any act ' which otherwise, whether it is an offence in terms of any law, or is committed culpably, or not,

> One of the central tenets underlying the common-law understanding of legality is that of foreseeability - that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes.

[51] The unfortunate examples of the actions taken the somnambulant homeless folk, the protesters and the photo-journalists, alluded to elsewhere in the judgment, illustrate the practical and deleterious effects of the non-disclosure of key points. The implications of an allegation *ex post facto* that a crime was committed because the place where certain conduct occurred, which conduct may not be per se unlawful, is a crime because the place where it happened to occur enjoys a special status, despite the patent inability of the ignorant populace to know how to avoid committing such an offence, is problematic for our Constitutional values. Disclosure cannot be avoided; to have it any other way, is to embrace the ethos of the Star Chamber.

[52] In consequence it is contended by the amicus that to save the constitutionality of section 10 of the NKP Act, at very least, the key points must be publically known and no lawful reason compatible with the principle of legality can excuse a full disclosure. I agree.

Costs

[53] In the circumstances, the respondents will bear the costs of the applicants and of the amicus curiae.

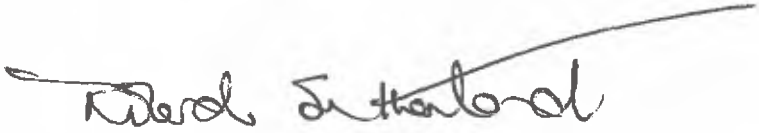
The Order

[54] It is declared that the decision of the First and Second Respondents to refuse the Applicants' request for the information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") is unlawful and unconstitutional.

[55] The decision by the First and Second Respondents to refuse the request is set aside.

[56] The First and Second Respondents shall supply to the Applicants, within 30 (thirty) days of the granting of this order, the records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980.

[57] The First and Second Respondents shall pay the costs of this application, including the costs of two counsel.



ROLAND SUTHERLAND

Judge of the High Court of South Africa,
Gauteng Local Division.

Hearing: 24 November 2014
Judgment Delivered: 3 December 2014.

For the First and Second Applicants:

Adv S Budlender, with him Adv J Bleazard
Instructed by Cliffe Dekker Hofmeyr
J Jesseman

For the First and Second Respondents:
Adv V Notshe SC
Instructed by the State attorney
N Govender

For the Amicus Curiae:
Adv B Lekoane
Instructed by Webber Wentzel
O. Ampofo- Anti.

IN THE NORTH GAUTENG HIGH COURT PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO. 38293/2012

11/8/2014

Reportable NO

Of interest to other judges NO.

Reviewed on 10/4/2014

JUDGE P.Z. EBERSOHN

In the matter between:

JEANNE VAN DER MERWE	**1St Applicant**
MEDIA 24 LIMITED	**2Nd Applicant**
and	
THE NATIONAL LOTTERIES BOARD	**Respondent**

CORAM EBERSOHN AJ

HEARD ON 1 AUGUST 2014

JUDGMENT HANDED DOWN ON 11 AUGUST 2014

JUDGMENT

EBERSOHN AJ.

[1] The application having been dismissed the applicants applied for leave to appeal. The application is opposed.

[2] There are two key issues arising from the application for leave to appeal, with the others being secondary. The two key issues are how records may validly be redacted under PAIA and the requirements that a party redacting portions of a record should meet.

[3] The applicants contended that the Court failed to assess the above issues on the basis of the facts set out in the NLB's answering affidavit. This contention has no merit.

[4] The Court assessed the above two issues and arrived at a just conclusion. The conclusion that the Court arrived at is underpinned by facts set out in the NLB's answering affidavit that the applicants failed to contradict or place in dispute, other than to resort to legal argument in their replying affidavit.

[5] The NLB provided sufficient grounds, founded on the provisions of PAIA, to justify the redactions without at the same time disclosing the contents of the redacted parts of the records. When properly and fairly construed, as the applicants plainly did in their replying affidavit (and repeated in their supplementary replying affidavit), and the NLB confirmed in its supplementary answering affidavit, it is

clear which specific subsections of section 36(1) of PAIA the NLB relied upon. It set out the facts that made this clear.

[6] In the light of the uncontested facts, there is no reasonable prospect that any appeal in the matter would have a reasonable prospect of success. Section 17 of The Superior Courts Act, No. 10 of 2013, reads as follows:

> "***17 Leave to appeal.—***
>
> *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*
>
> (a) (i) the appeal would have a reasonable prospect of success".

In the circumstances, leave to appeal should be refused with costs.

[7] The following order is made:

"The application for leave to appeal of the two applicants is refused with costs and the two applicants are to pay the costs of the application jointly and severally, payment by the one absolving the other one, which costs are to include the fees of two counsel."

P.Z. EBERSOHN AJ

ACTING JUDGE OF THE HIGH COURT

The applicant's counsel — Adv.N. Rajab-Budlender

The applicant's attorney — WILLEM DE KLERK ATTORNEYS
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Ref. I 24/N/0111

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CENTRE FOR SOCIAL ACCOUNTABILITY v SECRETARY OF PARLIAMENT AND OTHERS 2011 (5) SA 279 (ECG) D

2011 (5) SA p279

Citation	2011 (5) SA 279 (ECG)
Case No	298/2010
Court	Eastern Cape High Court, Grahamstown
Judge	Alkema J
Heard	October 21, 2010
Judgment	July 28, 2011
Counsel	*P Kennedy SC* (with *N Rajab-Budlender* and *I de Vos*) for the applicant. No appearance for the first respondent. *JC Heunis SC* (with *G Oliver*) for the second respondent.
Annotations	Link to Case Annotations

E

Flynote : Sleutelwoorde

Administrative law — Access to information — Access to information held by public body — Exempt information — Personal information — Protection of privacy — Objector to disclosure to show (1) subjective expectation of F privacy on part of individual concerned which (2) is recognised as reasonable by society in light of its legal, moral and ethical expectations — Information concerning official activities of members of public body not qualifying as protected personal information — Promotion of Access to Information Act 2 of 2000, s 34(2)(f)(iii).

Administrative law — Access to information — Access to information held by G public body — Mandatory disclosure in public interest — Disclosure of information regarding alleged unlawful conduct by members of Parliament — Such warranting disclosure in public interest — Not protected by right of privacy — Requester to show on balance of probabilities that disclosure would reveal evidence of substantial contravention of law — Speaker of H Parliament ordered to release records in question — Promotion of Access to Information Act 2 of 2000, s 46.

Parliament — Members — Benefits — Abuse of — Travel voucher system — Disclosure of information regarding abuse of system warranted in public interest — Speaker ordered to release records in question — Promotion of Access to Information Act 2 of 2000, s 46. I

Headnote : Kopnota

The instant case dealt with whether information regarding the abuse of the parliamentary travel voucher system was exempt from disclosure under the Promotion of Access to Information Act 2 of 2000. The information in question had come into possession of Parliament when it purchased (from its liquidators) the claims of one of the implicated travel agencies against J

2011 (5) SA p280

A similarly implicated members of Parliament. The parliamentarian information officer (the first respondent) refused to disclose the information requested (a copy of the debtor's book reflecting the claims purchased by Parliament and the identity of the respective debtors) on the ground that it constituted protected personal information as

intended in s 34 of PAIA. After the failure of an internal appeal the applicant, an NGO engaged in B public service accountability, approached the Grahamstown High Court for relief.

Held: The right to disclosure of information held by public bodies was generally limited by the right to privacy that protected the inner sphere of personal life (ie the freedom of identity). Objectors seeking the suppression of information on the ground that it was personal had to establish that disclosure was C unreasonable by showing (1) that the information sought to be disclosed fell within the legal and constitutional realm of privacy (ie was covered by the principle of freedom of identity); (2) that the individual concerned harboured a subjective expectation that the information would be protected; and (3) that this expectation was objectively reasonable in the eyes of society. The question as to when such information lost its protection had to D be answered in the light of the nature of the information requested. Thus, while the details of the personal life of members of Parliament were protected, information relating to their official activities was not, and claims in respect of travel vouchers issued to them in their official capacities clearly fell into the latter category. The respondents accordingly failed to show either that the information was covered by the principle of freedom of E identity; that their subjective expectations of protection were legitimate; or that society viewed such expectation as reasonable, and accordingly the application had to be granted. (Paragraphs [64], [71] – [76] and [80] – [84] at 295I – 296C, 298A – 299C and 299I – 300J.) The conduct in question was in any event of such a nature that it warranted disclosure in the public interest as intended in s 46 of PAIA. Although s 46 was couched in F restrictive language, it had to be read as requiring disclosure where it was shown that it would, on a balance of probabilities, reveal evidence of a substantial contravention of the law. The public-interest override in s 46 was triggered by the absence of an objective expectation of privacy on the part of society, and information regarding the irregular discharge of parliamentary duties carried no such expectation. (Paragraphs [85], [94], G [100], [103] and [107] at 300J – 301A, 302G, 303E, 304C – E and 305B.) The court accordingly ordered the respondents to furnish the applicant with the required information. (Paragraph [109] at 305G – I.)

Cases Considered

Annotations:

Reported cases

H Southern Africa

Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449): applied

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075): referred to

I *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) (1996 (1) SACR 587; 1996 (5) BCLR 609): compared

De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2004 (1) SA 406 (CC) (2003 (2) SACR 445; 2003 (12) BCLR 1333): referred to

J *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service*

Alkema J

2000 (2) SA 106 (E) (2000 (6) BCLR 571): referred to A

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079): dictum in para [16] applied

Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110 (SCA) ([2005] 1 All SA 559): dictum in para [16] applied B

Minister of Safety and Security v Sekhoto 2011 (2) SACR 315 (SCA) ([2011] 2 All SA 157): dictum in para [15] applied

National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347): dictum at 1212C applied

President of the Republic of South Africa and Others v M&G Media Ltd 2011 (2) SA 1 (SCA): applied C

Shabalala and Others v Attorney-General, Transvaal, and Another 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593): dictum in para [26] applied

Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) (2006 (4) BCLR 473; [2006] 1 All SA 352): referred to. D

England

Corporate Officer of the House of Commons v Information Commissioner and Others [2009] 3 All ER 403 (DC): applied.

Statutes Considered

Statutes E

The Promotion of Access to Information Act 2 of 2000, ss 34 and 46: see *Juta's Statutes of South Africa 2010/11* vol 5 at 1-236 and 1-239.

Case Information

Application under the Promotion of Access to Information Act 2 of 2000 for the reversal of the decision of the second respondent (the F speaker of Parliament) to deny the applicant access to records relating to the alleged abuse by members of Parliament of the parliamentary travel voucher system.

P Kennedy SC (with *N Rajab-Budlender* and *I de Vos*) for the applicant.

No appearance for the first respondent. G

JC Heunis SC (with *G Oliver*) for the second respondent.

Cur adv vult.

Postea (July 28).

Judgment

Alkema J: H

[1] This is an application in terms of s 78(2) read with s 82 of the Promotion of Access to Information Act 2 of 2000 ('PAIA' or 'the Act') against the refusal by the second respondent to grant the applicant access to records relating to the alleged abuse of the parliamentary travel voucher system during 2004 by individual members of Parliament (the I records). The abuse, as expected, attracted wide media attention and soon became known as the 'Travelgate' scandal or saga. I will continue to refer to these incidents collectively as the Travelgate saga.

[2] The applicant is an independent institution affiliated with Rhodes University in Grahamstown. The Public Service Accountability Monitor J

A (PSAM) is a programme within the applicant which has been engaged in social accountability monitoring since 1999. In this judgment any reference to the applicant includes a reference to PSAM. It gathers information on the management of public resources and the delivery of public services and attempts through various mechanisms to ensure that B public officials are held accountable for their conduct as

required by the Constitution. It professes to do so in an objective and politically impartial manner.

[3] Through accessing, considering and then publishing the information obtained, the applicant hopes to assist members of Parliament, civil C society organisations and ordinary citizens to hold duty-bearers accountable for their performance. The applicant identifies 'duty-bearers' as being all those who can be shown to be responsible, whether directly or indirectly, for the management of public resources. This includes not only government officials but also members of Parliament and members D of constitutionally appointed bodies responsible for exercising effective oversight over the management and use of public resources. It also includes private entities and individuals to whom the management of public resources may be outsourced or who render public functions.

[4] The first respondent is the secretary to Parliament and the 'information officer' of the National Assembly of Parliament (Parliament) as E defined in, and designated as such, in terms of the Act. He is cited in these proceedings in his official capacity.

[5] The second respondent is the speaker of Parliament (the speaker) appointed through the process prescribed by s 52 of the Constitution.

F [6] The third respondent is the chief whip of the African National Congress (ANC) in Parliament, and is the chosen representative of those members of Parliament who objected to the release of the records in question. The third respondent is cited by the applicant in this capacity.

[7] The court entertaining an application for access to a public record G under s 78(2) read with s 82 of PAIA is defined in the Act as, inter alia, a High Court within whose area of jurisdiction the requester concerned is domiciled or ordinarily resident. Thus, it is common cause that this court has jurisdiction to hear this application.

[8] The information furnished by Parliament to the applicant pursuant H to the initial request is relatively scant, but more about this later. For present purposes it suffices to say that relevant background to the Travelgate saga can be gleaned from a 'Briefing Document/Fact Sheet' issued by Parliament on 24 August 2004; a report of the task team of Parliament considering reports of Price Waterhouse Coopers and the I National Director of Public Prosecutions on the subject under discussion dated 18 March 2005; minutes of proceedings of the Parliament Oversight Authority dated respectively 22 February 2008, 10 September 2008, 8 April 2008, 23 September 2008 and 19 March 2009; and finally the affidavit by Kobus de Meyer Roelofse, the investigation officer in the South African Police Services attached to the Department of Priority J Crime in relation to the irregularities in the use of travel vouchers for

members of Parliament by the Bathong Travel Agency. The relevant A features of the Travelgate saga contained in the aforesaid documents may be summarised as follows.

[9] Members of Parliament are issued with a booklet containing either business or economy class warrants (depending on status) which may be B used for air travel, bus travel or rail travel anywhere in South Africa. Registered spouses and dependants of members, including their parents or parents-in-law, are also entitled to a limited number of warrants. In addition, a member also receives ten warrants for which a member has to pay 20% of the ticket value.

[10] Travel agents are required to submit monthly account statements to C Parliament accompanied by the original warrants duly signed and completed, together with invoices and copies of the air ticket issued to the member. It seems that a panel of travel agency firms situated throughout South Africa was appointed as approved agencies to implement the scheme. Since 2002 it came to light that many of these firms, D in ostensible collaboration with many of the members, became involved in fraudulent travel transactions whereby they were paid by Parliament for air travel in respect of warrants or air tickets which were either not used or were otherwise

fraudulently issued. Precisely how the fraudulent transactions were exercised or enforced is not explained in any document or affidavit before this court. E

[11] As at 18 March 2005 (the date of the report prepared by the task team of Parliament referred to in para [8] above), seven travel agents and 23 members and ex-members of Parliament had been arrested on criminal charges of fraud. Five members had been convicted of fraud in F respect of the abuse of travel vouchers and were sentenced to fines of varying magnitude and periods of suspended imprisonment. Many of the travel agency firms implicated in the Travelgate saga were liquidated — inter alia, ITC Travel (Pty) Ltd, Business and Executive Travel (Pty) Ltd, Star Travel (Pty) Ltd, Ilitha Travel (Pty) Ltd and Bathong Travel (Pty) Ltd. Civil action to recover losses by Parliament were instituted G against some other travel agencies.

[12] As will appear later in this judgment, this application relates specifically to the records of Bathong Travel (Pty) Ltd (in liquidation) (hereinafter referred to as Bathong). I will henceforth confine myself to those records, the content of which must be understood against the H background described above.

[13] According to Roelofse, the investigating officer referred to in para [8] above 'a number of members of Parliament were convicted of fraud' and entered into plea bargaining with the National Prosecuting Authority. I

[14] The liquidators of Bathong instituted action during 2007 against a number (it is not disclosed how many) of members of Parliament to recover moneys owing by them to the company. In its replying affidavit the applicant alleges that (as at 2008) the liquidators have recovered some R4,79 million from them in relation to Bathong only. The total J

A costs incurred in doing so amounted to some R1,87 million, resulting in a net recovery of some R2,9 million of which R2,7 million has been paid to creditors. Parliament's 'Briefing Document/Fact Sheet' referred in to in para [8] above contains the following remark in relation to the Bathong Agency:

> B 'Approximately 70 members utilised the services of this agency. There is evidence of complicity by certain members in possible fraudulent acts.'

The above remark is particularly relevant to the consideration of s 46 of the Act to which I will refer later in this judgment.

[15] The minutes of proceedings of the Parliament Oversight Authority C which pertain to the Travelgate saga in general and to Bathong in particular, show a distinct lack of enthusiasm on the part of Parliament to pursue the claims of the liquidators of Bathong against its members. For instance, the minutes of 8 April 2008 record that a meeting was held on 15 November 2007 in the speaker's boardroom (presumably by D certain members of parliament) and that it was resolved, inter alia, that:

> 'The actions issued out as against the various members of Parliament, based on the causes of action relating to the un-invoiced tickets and service by levy fees, were to be immediately withdrawn as against the members of Parliament.'

E [16] The members of Parliament laboured under the impression, quite erroneously, that the meeting had the legal force and effect of a creditors' meeting contemplated by the Insolvency Act because the minutes of 8 April 2008 proceed to record that:

> 'In the event of no written understanding to abide by the agreements (a reference to the above agreement by the members to withdraw the F claims) by 25 February 2008 the Liquidators conduct and breach of agreement will be reported to the Master of the High Court. An urgent order to request that the two liquidators be immediately removed as the liquidators of Bathong Travel (Pty) Ltd (will be applied for).'

Because the liquidators in all probability did not consider themselves G bound by the agreement reached between the members, they continued to pursue the claims against the members, thereby invoking the further ire of Parliament.

[17] Realising that the only effective way of preventing the claims being pursued was a resolution by creditors of Bathong to such effect during a H properly constituted creditors' meeting under the Insolvency Act, the members introduced a resolution to withdraw the claims from the agenda for the creditor's meeting scheduled for 29 August 2008. In response, two creditors of Bathong instituted application proceedings against, inter alia, the first respondent, claiming the removal of those I resolutions from the agenda. The litigation was however settled between the parties and they agreed to a consent order in terms of which the resolutions were removed from the agenda. The court order is dated 7 August 2008 and is attached to the applicant's replying affidavit before this court. It seems that at that stage 74 claims out of a total of 106 claims were still pending, and the settlement contained in the J consent order paved the way for the liquidators to proceed with the

recovery of the outstanding claims. That is until Parliament decided to A purchase the balance of the outstanding claims from the liquidators.

[18] As early as 21 May 2008 the members of the Parliamentary Oversight Authority meeting recognised the sensitivity of the Travelgate saga. At its meeting on that day the minutes record: B

> 'The speaker indicated that the Secretariat must consider whether Parliament needs a special Public Relations Unit to deal with this matter. The Secretary responded that the Public Communications Services skills base needs to be reviewed as the Travel Voucher matter is very complex.'

[19] On 10 September 2008, approximately one month after the consent C order referred to earlier, the members' legal team made a report to the oversight authority meeting which report was presented to it by senior counsel. It was recommended that Parliament purchase the claims from the liquidators. The full reasons for the recommendation are probably set out in such report, but it does not form part of the papers before this D court and was not discovered by Parliament to the applicant, presumably on the ground of legal privilege. The minutes of 10 September 2008 contain the following entries (I quote verbatim):

> 'Adv D Ntsebeza made a presentation on the report of the travel voucher matter. He indicated that it is important that this matter is E expedited preferably before the end of the term of the third Parliament. At the end of the report there were recommendations.
>
> . . .
>
> It was emphasised that either way Parliament as an institution will face a risk, this is especially so because if the claims are not bought members F will proceed with litigation and this will affect Parliament. However the biggest risk remains if a third party purchased the claim. This will mean that Parliament may become a party to defend the claim. To avoid this it was suggested Parliament should consider the safer alternative which is to purchase the claims.
>
> . . . G
>
> After deliberations it was then agreed that Parliament should solve this matter by buying the claim as per the recommendation of the report presented by Adv Ntsebeza. Ms Kaylan indicated that she will need to consult within her own party before she can endorse any proposal.
>
> . . . H
>
> As a way forward it was agreed that another meeting will be held on 23 September 2008. Ms Kaylan was allowed to consult her party on the recommendation made. Since this matter is very sensitive all the copies of the report will be returned to the lawyers. Members who need copies will receive such copies directly from the lawyers after certain information is removed from the report. In the meantime the lawyers were I mandated to table an offer for the settlement of the matter.'

[20] The above entries indicate a strong desire, for reasons not known but giving rise to wide speculation, on the part of Parliament to prevent those claims from being pursued. It was particularly anxious to protect those claims from public scrutiny in a court of law. The last-mentioned J

A entry relating to the report and the removal of information from such report is obviously a reference to the report presented by the legal team. Again, the relevance of these observations will appear later in this judgment when dealing with the legal issues, in particular the issue of public interest.

B [21] At the further meeting held on 23 September 2008 the members' legal team made certain proposals in regard to the terms and conditions under which the claims were to be purchased and the amounts to be paid. The resolution to purchase the claims was adopted and it was recorded:

> 'It was felt this will not only lead to the speedy resolution of the matter, C but will not damage the reputation of Parliament as an institution.'

[22] These events clearly demonstrate that Parliament appreciated the sensitivity of the issue and the public interest which it attracted. This is relevant to a consideration of the public interest override contained in s 46 of the Act, to which I shall later return in this judgment.

D [23] On 17 February 2009 a sale of claims agreement was concluded between the liquidators of Bathong as sellers, and Parliament, represented by the first respondent as purchaser, of all outstanding claims against certain members of Parliament. The 'claims' are defined as follows in the agreement —

> E 'means all the current, pending and contemplated claims against the Members relating to the travel warrants, air travel, car hire, accommodation, air travel levies, service fees including, but not limited to, court action which has been instituted by Bathong against certain members, as more fully set out in schedule 1 attached hereto; and all rights of action which Bathong may have against certain members, as more fully F set out in schedule 2 attached hereto'.

[24] The agreement records that Parliament is the major creditor of the liquidated estate of Bathong, holding approximately 80% of the value of the creditors' claims against Bathong. It further reads that since Parliament wishes to mitigate its risk and limit its exposure to the incurring of G legal costs for the recovery of the claims by the liquidators, Parliament agrees to purchase against cession and transfer from Bathong, all the claims as defined. The agreement contains all the other usual terms and conditions normally found in an agreement of this nature.

H [25] As the definition of 'claims' in the agreement indicates, schedule 1 to the agreement contains the names of those members of Parliament against whom the claims relate, and schedule 2 contains information of the nature, and presumably the quantum, of those claims. A perusal of the schedules will therefore show precisely what was sold and ceded to Parliament, and will describe the *merx* of the sale agreement.

I [26] The sale of shares agreement, as I said, was concluded on 17 February 2009. On 16 March 2009 the applicant formally made a request to first respondent in his capacity as information officer to be given access to the following records:

1. A signed copy of the sale of shares agreement dated 17 February J 2009.

2. A copy of the unabridged debtors' book referred to in the agreement. A (The particulars of the debtors, ie their identities and the amount of each claim purchased, are contained in the schedules to the agreement — there does not appear to exist a separate debtors' book.)

[27] In terms of s 25(1) of PAIA the first respondent was obliged to B decide whether or not to grant the request, and to notify the applicant of his decision within 30 days which period expired on 15 April 2009. It failed to do so.

[28] If an information officer fails to give the decision within the 30-day period, he is, in terms of s 27 and for the purposes of the Act, deemed to C have refused the request. By operation of law the applicant's request was accordingly refused on 15 April 2009.

[29] On 17 April 2009 the applicant duly lodged an internal appeal against the deemed refusal to second respondent in his capacity as the 'relevant authority' within the meaning of that expression in s 74(1), D which section deals with the right of internal appeals against a decision of an information officer.

[30] On 24 April 2009 the first respondent, notwithstanding the deemed refusal of the request and the pending internal appeal, nevertheless furnished the applicant with a signed copy of the sale of shares E agreement. However, he failed to attach the schedules to the agreement which describe the claims and disclose the names of the debtors. Not surprisingly, four days later, on 28 April 2009, the applicant requested first respondent to furnish it with the missing schedules.

[31] In terms of s 77(3) of the Act the time period within which to decide F the appeal expired on 18 May 2009. However, on that day the second respondent requested the applicant to extend the time period. The applicant agreed to extend the time period to 22 June 2009 to enable the first respondent to furnish it with the missing schedules, or for the second respondent to decide applicant's internal appeal against the G deemed refusal. I pause to point out, in passing, that PAIA neither makes provision for the extension of any time frames nor for condonation by the court of non-compliance with the prescribed time periods.

[32] On 26 May 2009 the second respondent advised the applicant that since the schedules requested contain the names of the third parties (the H members of Parliament against whom the claims were lodged), third party notices had to be sent by him to such third parties in terms of s 47 read with s 34(1) of the Act. The applicant disagreed that s 34 applied. The second respondent, however, notified the third parties on 12 June 2009 of the request, and invited them to make written representations within the 21-day statutory period. I

[33] In argument before me it was common cause that even if s 34(1) applies, the notices to the third parties were not given timeously by first respondent in terms of s 47(2). If s 34(1) does not apply, then the applicant's internal appeal lapsed on 22 June 2009 (the extended date by which second respondent had to give his decision on the applicant's J

A internal appeal). Therefore, and on such assumption, in terms of s 77(7) the second respondent is deemed to have dismissed the applicant's internal appeal on 22 June 2009.

[34] Mr *Kennedy SC*, assisted by Ms *Rajab-Budlender* and Ms *De Vos*, B acting on behalf of the applicant, convincingly argued that even if s 34(1) does apply and that the late notification to third parties may be condoned by the court, then ss 47 – 49 of PAIA which provide for the third party notification procedure, clearly empower the 'information officer' (namely the first respondent) and not the second respondent, to deal with such procedure. The evidence and correspondence, on the second C respondent's own version, clearly demonstrate that it was the second respondent and not first respondent who decided on the third party procedure; he did so after the applicant's request for the record was deemed to be refused and after the applicant had lodged an internal appeal against such deemed refusal; and he was actively involved in the D third party procedure. On this basis, Mr *Kennedy SC* submitted, his actions by usurping powers he did not have, are ultra vires the Act and must be disregarded.

[35] Be that as it may, it seems that subsequent events overtook all previous procedural steps because, on 21 July 2009, the second respondent E advised the applicant that 23 members (third parties) had objected to the release of the schedules, but only one of the twenty three had provided 'adequate reasons for objecting'. Second respondent proceeded to inform the applicant:

> 'Thus, with the exception of the one member, a decision has been taken (by the information officer, ie first respondent) to grant access to the F record.'

[36] The decision to release the schedules was taken by first respondent in terms of s 49(1) and the members (third parties) were informed accordingly. On 12 August 2009 the third respondent, representing the G third parties, lodged an internal appeal with second respondent against the decision to release the schedules. The ground of the appeal was that the schedules contain personal information about the members and that their rights to privacy would be invaded by the release. The applicant was invited to make representations on why the appeal should be H dismissed which it did on 8 September 2009.

[37] On 24 September 2009 the second respondent informed applicant that he had decided to uphold the appeal from the third parties and to overturn the information officer's decision to grant access to the schedules. It is against this decision that the present application was launched by the applicant.

I [38] Mr *Heunis SC*, assisted by Mr *Oliver*, who appeared on behalf of the second respondent, contended that the application may be disposed of on a procedural point without deciding the merits. The point taken by Mr *Heunis SC* must be evaluated against the above background. In essence, it is that the applicant has no locus standi to apply to this court J under the Act for the relief claimed. The argument is based on the

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provisions of s 78 of PAIA, which is contained in Ch 2 under the heading A 'Applications to court'. For the sake of easy reference I quote hereunder the section in full:

> **'78 Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.**
>
> (1) A requester or third party referred to in section 74 may only apply B to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.
>
> (2) A requester —
>
> *(a)* that has been unsuccessful in an internal appeal to the relevant C authority of a public body;
>
> *(b)* aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
>
> *(c)* aggrieved by a decision of the information officer of a public body referred to in paragraph *(b)* of the definition of public body in D section 1 —
>
> (i) to refuse a request to access; or
>
> (ii) taken in terms of section 22, 26(1) or 29(3); or
>
> *(d)* aggrieved by a decision of the head of a private body —
>
> (i) to refuse a request for access; or
>
> (ii) taken in terms of section 54, 57(1) or 60, E
>
> may, by way of an application within 30 days apply to a court for appropriate relief in terms of section 82.
>
> (3) A third party —
>
> *(a)* that has been unsuccessful in an internal appeal to the relevant authority of a public body;
>
> *(b)* aggrieved by a decision of the information officer of a public body F referred to in paragraph *(b)* of the definition of public body in section 1 to grant a request for access; or
>
> *(c)* aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,
>
> may by way of application, within 30 days apply to a court for appropriate relief in terms of section 82.' G

[39] Section 82 reads as follows:

> **'82 Decision on application**
>
> The court hearing an application may grant any order that is just and equitable, including orders —
>
> *(a)* confirming, amending or setting aside the decision which is the H subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation; or I

(d) as to costs.'

[40] If I understood Mr *Heunis SC* correctly, his argument proceeded as follows: s 78 (2)*(a)* must be read with s 74(1) and (2) which deal with internal appeals by a requester and a third party. To quote the relevant part of ss 74(1) and (2): J

A '(1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph *(a)* of the definition of public body in section 1 —

(a) to refuse a request for access; or

(b) taken in terms of section 22, 26(1) or 29(3),

in relation to that requester with the relevant authority.

B (2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph *(a)* of the definition of public body in section 1 to grant a request for access.'

[41] In terms of s 74(1)*(a)* therefore, a requester such as the applicant in C this case, may only lodge an appeal against a decision to *refuse* a request (and, under ss (2) a third party may only lodge an appeal against a decision to *grant* a request). It follows, so the argument goes, that the 'internal appeal' referred to in ss (2) of s 78, is intended to be a reference to the requester's own appeal, and not a reference to the appeal of the third party, and the same reasoning applies to a third party's appeal D under s 78(3).

[42] The argument then proceeds from the aforesaid premises to the (correct) reminder that the application under consideration was launched against the third party's appeal against the decision to make the E schedules available, and not against the applicant's appeal. The argument then concludes in the victory loop that the requester (applicant) was not 'unsuccessful in an internal appeal' within the meaning of those words in s 78(2)*(a)* and, accordingly, it lacks locus standi and it has no right to apply to this court under s 78(1). Mr *Heunis SC* submitted that, in these circumstances, the applicant must first exhaust its internal F appeal procedures as provided under s 78(1) read with s (74(1), before its right to an application to court arises under s 78(2).

[43] In response Mr *Kennedy SC* on behalf of the applicant submitted that since s 34 (1) does not apply to the facts of this case, the entire third party notification procedure under s 47(1) has no application and the G third parties (the members of parliament) should never have been parties to the request procedure and consideration. Their appeal and the decision taken pursuant thereto must, accordingly, be regarded as void and of no legal force and effect. In any event, he submitted, due to the respondents' non-compliance with the procedural third party notification H requirements under s 47 (2), the entire third party procedure falls to be set aside. He submitted that in any event, and for the reasons mentioned earlier in this judgment, the second respondent had no authority to institute the third party procedure. In the final alternative, he submitted that in the event of this court finding that s 34(1) does in fact not apply in whole or in part, and that all procedural irregularities I may be condoned and that the third party procedure followed was valid and legal, then the public override provision contained in s 46 applies as provided for in s 33(1).

[44] The allegations and counter-allegations relating to the procedural irregularities and the arguments on the legal implications, ramifications J and consequences thereof have opened a Pandora's box of such chaotic

proportions that the temptation is almost irresistible to simply put the lid A back and rather deal with the merits of the application, regardless of the procedural manipulations and shortcomings. Unfortunately, this is not possible. I am nevertheless constrained to remark that the conduct of the respondents in not observing the procedural requirements of the Act is yet another example of how rapidly the non-compliance with procedural B requirements can degenerate into a maze of inextricable and indissoluble legal deadlocks from which there is often no point of return. Such an exercise is time-consuming and an unnecessary legal expense to litigants, in this case the South African taxpayer. With these remarks in mind, I now turn to cross the procedural bridge which, as I will attempt to show, is a bridge too far (to repeat the concluding words of C Nugent JA quoting, in turn (at least by implication), the title of a non-fiction book by the author Cornelius Ryan, in *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) at para 54 (a judgment to which I shall shortly return)).

[45] There is much merit in many of Mr *Kennedy SC*'s submissions, but D in view of the conclusion at which I have arrived, I do not believe it is necessary to deal with his submissions. First, it is necessary to deal with Mr *Heunis SC*'s submission in regard to his interpretation of s 78(2) resulting in the conclusion that the applicant lacks locus standi and does not qualify to apply to the court for an order under s 74. E

[46] In the consideration of his argument I am prepared to accept in favour of the respondents, but only for purposes of this judgment and without making any finding in this regard, that this court has the power to condone all procedural irregularities and that all procedural requirements were correctly and timeously fulfilled. I am also prepared to accept, again F without making any finding but simply for purposes of this judgment, that all third party procedures are valid and not ultra vires the powers of the second respondent under the Act. The argument advanced by Mr *Heunis SC* will accordingly be assessed on the aforesaid hypothesis.

[47] The argument, with respect, is disingenuous and inappropriate. G While I agree with Mr *Heunis SC*'s interpretation of s 74, the attempt to extend such interpretation to ss 78(2) and (3) ignores the logical consequence that in any opposed appeal, whether judicial or internal, formal or informal, there is always an unsuccessful respondent (requester) for every successful appellant (third party). And to restrict H the wording of s 78(2) (and, by implication, also of ss (3)), to only one face of the coin, is to read words in the section which are simply not there. The words 'in an internal appeal' in both s 78(2) and (3) include by necessary implication an internal appeal lodged by either the requester or the third party, and the words 'requester (or third I party)' in both sections include, by necessary implication 'a requester (or third party) that has been unsuccessful in an internal appeal lodged by an opposing party'. And it is common cause that the applicant is a requester who was 'unsuccessful in an internal appeal' lodged by the third parties.

[48] To give the aforesaid words a restrictive meaning as contended for by Mr *Heunis SC* not only offends the plain meaning of those words, but J

A it also offends the spirit and purpose of both the Act and s 32(1)*(a)* read with s 39(2) of the Constitution. In this regard Mr *Heunis SC* was constrained to concede that such interpretation may render s 78(2) and (3) of PAIA unconstitutional, which interpretation must, as a rule of interpretation, be avoided if possible.

B [49] In these circumstances I hold that the applicant qualifies as a 'requester' in this application under s 78(2). Having lodged an internal appeal against the deemed refusal on 15 April 2009 (which appeal was subsequently overtaken by the decision of 21 July 2009 to grant access to the record, including the schedules), the applicant in my view had C exhausted all internal appeal procedures. To suggest, as Mr *Heunis SC* submitted — albeit somewhat faintly — that the applicant was obliged to lodge an appeal against the decision to uphold the appeal of the third parties, is therefore in my

respectful view ill-conceived. I therefore believe that the applicant has complied with s 78(1).

D [50] The above finding paves the way to now consider the merits of the application instituted under s 78(2).

[51] Since this exercise involves the interpretation of various sections of the Act, it is necessary to first remark generally on the structure and E purpose of the Act.

[52] The starting point is s 32(1) of the Constitution, which provides that:

> '(1) Everyone has the right of access to —
>
> *(a)* any information held by the State; and
>
> F *(b)* any information that is held by another person and that is required for the exercise or protection of any rights.'

[53] The distinction between the right to information held by the State, on the one hand, and information held by private institutions, on the G other hand, is significant. The former is unqualified; the latter is qualified by information that is required by the requester for the exercise or probation of any rights. Section 32(2) of the Constitution requires Parliament to enact national legislation to give effect to s 32(1).

[54] The Act, or PAIA, is the legislation born from the constitutional H demand contained in s 32(2). The opening words of the Act in its preamble state its purpose thus:

> 'To give effect to the constitutional right of access to any information held by the State. . . .'

I It recognises that:

> '(T)he system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations [and that] section 32(1)*(a)* of the Constitution provides that everyone has the right of access to any information held J by the State. . . .'

Alkema J

[55] It concludes that the purpose of the Act is to — A

> 'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information [and to] actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights'. B

[56] The escape from a secretive and closed system of government and the quest for an open, accountable and transparent system of government find expression in, inter alia, the right of access to 'any' information held by the State. It is now trite that such right must be interpreted to give effect to the new constitutional order of openness, accountability C and transparency. I need only to refer to two dicta in support. The first is the well-known passage in *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593) at para 26, where Mahomed DP said:

> 'There is a stark and dramatic contrast between the past in which D South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their E enactment.'

[57] The second is *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075) at para 62, where Ngcobo CJ held:

> 'The importance of this right . . . in a country which is founded on F values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate G information.'

[58] The provisions of PAIA must not only be interpreted to give effect to the values and principles mentioned in the above dicta, but its very structure is designed to give

effect thereto. Part 2 Ch 1 deals with access H to records of public bodies. The right is contained in s 11, which reads as follows:

> '**Right of access to records of public bodies**
>
> (1) A requester must be given access to a record of a public body if —
>
> *(a)* that requester complies with all the procedural requirements in this I Act relating to a request for access to that record; and
>
> *(b)* access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[59] Following the constitutional imperative in s 32(1) of the Constitution, s 11(1) of PAIA obliges a public body (provided that the procedural requirements relating to the request are complied with) to grant access to J

A the record. This is the point of departure. It may only refuse access under s 11(2) on a ground covered by Chapter 4 of PAIA. In terms of s 81(3)*(a)* of PAIA the onus is on the public body to prove that the refusal is covered by one of the grounds under Ch 4. The grant of access to State information is thus the rule, and the refusal the exception. This B principle is described as follows by Nugent JA in *President of the Republic of South Africa v M&G Media* supra at para 11:

> 'The culture of justification referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it, unless he or she can justify withholding it. And if he or she refuses a request then adequate C reasons for the refusal must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request). And in court proceedings under s 78(2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal.'

D See also *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) ([2005] 1 All SA 559) at para 16; Currie & Klaaren *PAIA Commentary* para 2.10.

[60] The ground for refusal by second respondent in this case in upholding the appeal of the third parties, is the reliance on s 33(1) read E with s 34 in Ch 4 of the Act. The relevant part of s 34 reads as follows:

> '**34 Mandatory protection of privacy of third party who is natural person**
>
> (1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure F would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.
>
> (2) A record may not be refused in terms of subsection (1) insofar as it consists of information —
>
> . . .
>
> *(f)* about an individual who is or was an official of a public body and G which relates to the position or functions of the individual, including, but not limited to —
>
> . . .
>
> (iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the H individual. . . .'

[61] Section 33(1) provides that if the request for access is one contemplated by s 34 (1), then the request 'must' be refused, 'unless the provisions of section 46 apply'. Before considering s 46 it must first be established if s 34(1) applies. Section 34(1), in essence, seeks to protect I the right to privacy under s 14 of the Constitution and, to some extent, the right to dignity under s 10. Section 34(1) must accordingly be interpreted having regard to the content of the constitutional rights to privacy and dignity bearing in mind the operation of the limitation of rights clause 36. Finally, clause 34(1) must be interpreted taking into account the definition of 'personal information' in clause 1. The J definition reads as follows:

'"**(P)ersonal information**" means information about an identifiable A individual including but not limited to —

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual; B

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual; C

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions, views of preferences of the individual, except where they are about another individual, or about a proposal for a grant, an award or a prize to be made to another individual;

(f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; D

(g) the views or opinions of another individual about the individual;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and E

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but excludes information about an individual who has been dead for more than 20 years. . . .'

[62] Having regard to the fact that PAIA merely gives 'effect to the F constitutional right of access to information held by the State (and private bodies)' as demanded by s 32 of the Constitution, no new constitutional rights are created by PAIA. The Act merely fleshes out and elaborates on the existing constitutional rights, and provides a structure for their operation. And to the extent that PAIA (or any other Act of Parliament) goes beyond or limits any of the constitutional rights under G the Bill of Rights, it is unconstitutional. The same principle applies to the right of privacy. Neither the definition section of 'personal information' nor s 34(1) of PAIA creates any rights of privacy — the content of the right of privacy remains vested in its constitutional setting under s 14 of the Constitution. Therefore, the categories of 'personal information' listed H under the definition of 'personal information' in s 1 of PAIA are not exhaustive, and neither are the categories under s 34(2).

[63] What, then, is the meaning of the words 'the unreasonable disclosure of personal information' as used in s 34(1) of PAIA? The starting point, I believe, is the determination of the contents of the constitutional I right to privacy.

[64] It is generally recognised that every person has an untouchable inner sphere of personal life where he or she has the sole autonomy to decide how and where to live his/her life, and where his/her decisions do not adversely affect other people. No interference by law is tolerated with J

A conduct within this sphere, either by the State or by other individuals or institutions. At the heart of this right is the freedom of identity of each individual, enclosed in an area of private intimacy. That privacy pertains to the freedom of individuality recognised by both the definition in s 1 of PAIA which deals with 'personal information' which may be refused, and B by s 34(2) which deals with information which may not be refused. The definition section defines 'personal information' as information 'about an identifiable individual', whereas s 34(2) categorises the classes of information about 'an individual' which may not be refused.

[65] Applying the principle of freedom of individuality to the facts of the C case before the court, Didcott J said in *Case and Another v Minister of Safety and Security and*

Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) (1996 (1) SACR 587; 1996 (5) BCLR 609) at para 91:

> 'What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but D mine. It is certainly not the business of society or the State.'

See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) (2003 (2) SACR 445; 2003 (12) BCLR 1333) at paras 51 – 53. In a different context Langa DP said E in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) at para 16 —

> 'when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain F conditions are satisfied'.

See also *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E) (2000 (6) BCLR 571).

G [66] The leading case on the subject seems to remain *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449). Ackermann J, writing for the majority, acknowledged the foundational role of identity in the concept of privacy. He stated as follows in para 65:

> H 'The scope of privacy has been closely related to the concept of identity and it has been stated that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity.'

[67] However, the learned judge recognised that in the South African I constitutional setting every right is limited, either by s 36 of the Constitution, or by another right. Accordingly, the second stage of the enquiry is to determine the limits when the right to privacy leaves the protection of the inner sanctum of a person and enters the public domain. In this regard he said in para 67:

> 'The truism that no right is to be considered absolute implies that from J the outset of interpretation each right is always already limited by every

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> other right accruing to another citizen. In the context of privacy this A would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of B individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'

[68] Referring to the German law on the subject, the learned judge C describes with approval how this process plays out in practice. He says the following in para 77:

> 'A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in D regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.' E

[69] A reading of South African judgments on the subject shows that the case law has adopted a very pragmatic approach on a case to case basis. Cases are decided on the particular facts, without attempting to define a general principle applicable to all cases. In the result, our case law contains examples of the nature of information considered on the facts of F that case to be protected by the right to privacy, rather than any attempt to define the underlying principle of limitation. In the same vein, the definition of 'personal information' in s 1 of PAIA contains an inconclusive list of the type of information which the legislation has decreed to constitute protectable 'personal information' and s 34(2) contains a similar list of personal information which is not regarded as protectable G under the right to privacy.

[70] In both the definition section and in s 34(2), the Act employs the freedom of identity principle referred to earlier. Whereas the nature of the protected information contained in the definition section are arguably H examples of the most intimate and personal aspects of an individual, the nature of the unprotected information contained in s 34(2) are examples where the inviolable core of personal information had been left behind and where the individual had entered into relationships with persons outside this closest intimate sphere. Nevertheless, it remains I unsatisfactory to merely provide examples, both in our legislation and in our case law, of the content and scope of the right to privacy, in the absence of an all-embracing universal principle applicable to all circumstances. It is therefore not surprising that courts and jurists, both in South Africa and abroad, are continuously searching for a general principle which limits the right to privacy. J

A [71] I believe, with respect, that Ackermann J in *Bernstein and Others* supra had in fact referred to such a principle. Referring to the United States constitutional law on the right to privacy (which principle seems to have been followed by the European and Canadian constitutional systems) the learned judge stated in para 75:

> B 'The party seeking suppression of the evidence must establish both that he or she has a subjective expectation of privacy and that the society has recognised that expectation as objectively reasonable. In determining whether the individual has lost his/her legitimate expectation of privacy, the Court will consider such factors as whether the item was exposed to the public, abandoned, or obtained by consent. It must of course be C remembered that the American constitutional interpretative approach poses only a single inquiry, and does not follow the two-stage approach of Canada and South Africa. Nevertheless it seems to be a sensible approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured.'

D [72] It is a two-part test. The first part is that the objector must establish a *subjective expectation* of privacy. In this regard I venture to suggest that the objector must first establish that the nature of the information is covered by the freedom of identity principle, ie that subjectively viewed it is part of the inner sanctum of the private and personal life of the E individual. The second part is that, objectively assessed, society must recognise such expectation as reasonable.

[73] In regard to the second part, I assume that what is meant by 'society' in this context are the legal, moral and ethical expectations of society. It is now accepted that these values are ever evolving and change F in time, space and even culture. However, it is the duty of the court to objectively interpret such expectations at the time the assessment is made. The expectations must be objectively reasonable; if not, they do not constitute the legal, moral and ethical expectations of society.

[74] If the reasonable expectation test referred to by Ackermann J in G *Bernstein* supra and followed by most other countries is used to determine the scope and content of the right to privacy, then the meaning of the words 'the unreasonable disclosure of personal information' as used in s 34(1) do not constitute any interpretational problems. The first step is to ask if the information said to be 'personal' is covered by the principle of freedom of identity. If so, does the individual subjectively H harbour a legitimate and reasonable expectation that such information will be protected by the right to privacy? If both questions are answered in the affirmative, then the enquiry proceeds to the second stage by determining whether or not society has a legitimate and reasonable expectation, objectively, that such information is protectable. If so, then I the disclosure of the information will be 'unreasonable' within the meaning of that expression in s 34(1). This is so because personal information which may be reasonably disclosed is not recognised by society as personal, and no longer enjoys the protection of the right to privacy under s 14 of the Constitution. In this sense, such information falls outside the scope of protectable information, notwithstanding that J such information may be personal in nature.

[75] The correct approach to s 34(1) is therefore, in my respectful view, A simply to determine, using the two-stage reasonable expectation test, whether or not the information is protected by the constitutional right to privacy. In the same manner, any type or category of information that is not listed under the definition section or under 34(2), may be determined to constitute personal information protected by the right to B privacy, or not so protected.

[76] So, the starting point of an enquiry of this nature must always be to first determine whether the information, which is sought to be protected by the right to privacy, falls within the legal and constitutional realm of privacy. If not, then *caedit quaestio*, and the further question as to what C stage it loses its protection does not arise. To answer this question, the nature of the information requested in this case warrants closer scrutiny.

[77] It will be recalled that the information requested, and refused on appeal by the third parties, relates to the furnishing of the two schedules to the sale of shares agreement. The first schedule reflects the names of D the members of Parliament and the second the amount and nature of the claims against them by Parliament. The claims are in respect of the unauthorised or irregular issue of travel vouchers. According to the papers before me, respected senior counsel from the Cape bar gave legal opinion that the claims are good in law and enforceable. These are the claims purchased by Parliament from the liquidators of Bathong Travel E Pty Ltd (in liquidation). Does the information contained in the schedules relate to the inner sanctum of privacy of a person covered by the principle of freedom of identity? The answer is 'No'.

[78] The inner sanctum of a person which is shielded from public F scrutiny concerns his/her intimate family life, sexual preference, ethnic or social origin, colour, physical or mental health, religion, conscience, belief and culture, and all those other categories mentioned in the definition of 'personal information' under s 1 of PAIA.

[79] It is information about and concerning the person of an 'identifiable G individual' as stated in both the definition section and in s 34(2) of the Act. It is, in essence, personal information, protected by the principle of freedom of identity. It specifically excludes information about an individual who is an official of a public body (such as Parliament) and which relates to the function of that individual in such capacity (s 34 (2)*(b)*). It also excludes information concerning the responsibilities H of the position held or services performed by an official of a public body in the execution of his duties (s 34(2)*(f)*(iii)). On my reading of both s 1 and s 34(2), the legislative provisions are in harmony with the constitutional concept of privacy entrenched by s 14 of the Constitution. In *Deutschmann NO* supra the court held that the concept of privacy does not extend to a person's business affairs. I

[80] The personal life of a member of Parliament, his or her personal preferences and beliefs, how he or she chooses to live his or her personal life, what they do on vacation in the privacy of their holiday homes — even if they travel there on State expense — how they spend their money and how much money they have to spend, all of this is of no concern to J

A the State. It is their business, not that of the State. Such information is covered by the principle of freedom of identity. But how they execute their duties as members of Parliament, under what circumstances they claim payment in respect of travel vouchers, and whether or not they obey the rules of Parliament and act in accordance with the code of B conduct which society expects from its members of Parliament — all of this is the business of the State. The State has the right to know, and through the State, the members of society who have elected the members of Parliament in an open and democratic society. The information sought is in relation to claims in respect of travel vouchers issued to members of Parliament in their official capacities as members of a public C body. Such information does not concern their private lives and is specifically excluded by s 34(2)*(f)*(iii).

[81] I am accordingly of the view that the respondents have neither shown that the information is covered by the principle of freedom of identity, nor that their subjective expectations of protection are legitimate D or reasonable. Secondly, they have failed to show that objectively, society reasonably and legitimately harbours an expectation that such information should be protected by a right to privacy. It follows that they have failed to discharge the onus of proving that the information is either 'personal information' or that its disclosure would be 'unreasonable' E within the meaning of these expressions in s 34(1).

[82] The argument that some of the members may be innocent of fraudulent conduct and that the disclosure of their identities may reflect negatively on their reputation and integrity, is equally disingenuous and without substance. The information requested does not relate to criminal F investigations or proceedings. It relates to civil claims for money wrongly expended. It concerns the terms of the sale agreement and describes the *merx* sold and delivered. It is sought in an application under s 78 of the Act and the provisions of rule 6 of the High Court Rules apply. (It is thus not even a review or an appeal from the decision of an information officer or the second respondent). See *President of the RSA* supra para 12.

G [83] In terms of s 81(1) and (2) of PAIA these proceedings are civil proceedings and the rules of evidence applicable in civil proceedings apply. The criminal presumption of innocence and the right to remain silent under s 35 of the Constitution do not apply.

[84] It is accordingly not the applicant's case that some members are H guilty of criminal conduct and other members may be innocent. These are allegations contained in the investigation report emanating from the respondents themselves and not from the applicant. As far as the applicant is concerned, proof that a record has been requested from the State and was declined is enough to oblige the respondents to justify its refusal. For the reasons mentioned, they have failed to justify the I refusal (s 81(3)*(a)* and *President of the RSA* supra para 11). The respondents have in my view failed to discharge the onus of proving justification of the refusal and, subject to my remarks below, I believe the application should be granted.

[85] For the sake of completion, I should add that even if I am wrong in J the above regard, and even if it is held that the information sought to be

protected by the respondents is in the nature of 'personal information', A and accordingly that s 34(1) applies, then the public interest override in s 46 is in my view applicable in terms of s 33*(a)*.

[86] Section 46 reads as follows:

> **'Mandatory disclosure in public interest** B
>
> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)*(a)* or *(b)*, 38 *(a)* or *(b)*, 39(1)*(a)* or *(b)*, 40, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if —
>
> *(a)* the disclosure of the record would reveal evidence of — C
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) an imminent and serious public safety or environmental risk; and
>
> *(b)* the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.' D

[87] Since it is common cause that ss *(a)*(ii) does not apply to the facts of this case, the two requirements of s 46 for present purposes are:

(1) The disclosure of the schedules would reveal evidence of a substantial contravention of, or failure to comply with, the law; and

(2) it is in the public interest that the disclosure of the schedules clearly outweighs the harm (breach of the right to privacy). E

[88] I deal first with the requirement that the disclosure would (not may) reveal evidence of a substantial contravention or failure.

[89] As Klaaren & Penfold in *Constitutional Law of South Africa* 2 ed (edited by Woolman, Roux & Bishop) at 62-24 supra point out, of some F concern is the emphatic (and, may I add, the stringent and restrictive) language used in the section. The adverbs and adjectives used ('substantial contravention . . . or failure to comply'; 'imminent and serious'; 'public safety or environmental risk'; and 'clearly outweighs') could all have the effect that the public interest override will seldom apply. G

[90] I may add to the above examples the requirement that disclosure 'would' reveal evidence of contraventions or failure to comply with the law. Bearing in mind that a requester of information invariably has no, or very little, information at his or her disposal concerning the information requested (since such information resides with the State), it may very well be impossible to prove that disclosure 'would' reveal legal H contraventions. The restrictive language used may have the effect of undermining the constitutional right of access to information and may call into question the constitutionality of the entire structure of PAIA or, at least, of the section.

[91] I nevertheless believe that on the particular facts of this case the I section may be saved from unconstitutionality by reading it in accordance with the Constitution.

[92] In order to give effect to the constitutional right of access to information held by the State, qualified only by the limitation clause 36 of the Constitution and other rights, the restrictive wording used by J

Alkema J

A s 46 of PAIA must be read subject to s 81 of PAIA. Section 81 stipulates that the rules of evidence applicable in civil proceedings apply to the proceedings on application in terms of s 78. This is an application under s 78 and the civil onus for the discharging of the burden of proof referred to in s 81(2) is proof on a balance of probabilities. It follows that the B applicant in this case must prove on a balance of probabilities that the disclosure of the schedules would reveal evidence of a substantial contravention of, or failure to comply with, the law.

[93] As I explained at the outset of this judgment, the respondents' own investigations, and also that of Roelofse, the investigating officer, C revealed 'complicity by certain members in possible fraudulent acts'. It is also common cause that many members had already pleaded guilty and been convicted of fraud in relation to the misuse of travel vouchers. In my respectful view the commission of fraud in respect of the State-issued travel vouchers by members of Parliament, and the failure D to observe the code of conduct required from members of Parliament, on a balance of probability constitutes a substantial contravention of, or failure to comply with, the law. I do not believe that the emphatic language and adjectives used by the legislature detracts in any way from the test of the onus on balance of probability as provided for in s 81(2) of PAIA. See also the remarks of Howie P writing on behalf of a E unanimous Supreme Court of Appeal in *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) (2006 (4) BCLR 473; [2006] 1 All SA 352) at para 30. In my view, therefore, the words 'substantial' and 'would' in s 46*(a)* do not require any heavier onus than the accepted standards of civil procedure. In any event, I have some F difficulty in understanding how a contravention or failure can change in character by either a minor or substantial breach. It remains a contravention or failure.

[94] In these circumstances a requester is called upon to show on a balance of probability that the disclosure would reveal evidence of the G required contravention or failure — not that the disclosure would, as a fact, show such contravention or failure. I believe that on the facts of this case such onus has been discharged.

[95] I now turn to consider whether the disclosure of such contravention, in the public interest, clearly outweighs the harm relied upon by the H respondents.

[96] For the reasons alluded to earlier in this judgment, the constitutional concept of, inter alia, the right to privacy was not created by PAIA and must therefore retain its constitutional meaning, ie the meaning assigned to it under s 14 of the Constitution. It is now settled that where a I legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. See *Minister of Safety and Security v Sekhoto* 2011 (2) SACR 315 (SCA) ([2011] 2 All SA 157) at para 15. I believe this is the proper approach to a reading of s 46.

[97] The section provides for a 'public interest' override of all the J grounds for non-disclosure included in the Act (save for s 35(1) which

relates to records of the South African Revenue Service). I will confine A myself to the override of s 34(1) which relates to 'personal information' protected by the right to privacy.

[98] For the reasons which follow, I am of the respectful view that s 46 is merely a restatement of the constitutional law in regard to the circumstances under which personal information sheds the right to B protection under s 14 of the Constitution and, in the interest of the right of access to information, must be disclosed.

[99] As I said earlier, the bounds of the protection are exceeded when, on the second stage of the principle of legitimate expectation of privacy, C society no longer recognises the expectation of privacy to be reasonable. This happens when, as explained by Ackermann J in *Bernstein and Others* supra para 67, the individual moves into 'communal relations and activities such as business and social interaction'. Does the public interest override in s 46*(b)* mean anything else? I do not think so.

[100] It is difficult to conceive of a situation where the legitimate D expectation of society, based on its legal, moral and ethical convictions, cannot be in the public interest. The converse is equally true: it cannot be in the public interest unless the information embraces the legitimate expectations of society. The 'public interest' which triggers the override in s 46*(b)* should therefore, in my respectful view, be interpreted to E accord with the test of society's legitimate expectation as to when and under what circumstances private information protected by the right to privacy loses its constitutional protection under s 14 of the Constitution. The 'public interest' test is also used in English law. See, for instance, the judgment on appeal in *Corporate Officer of the House of Commons v Information Commissioner and Others* [2009] 3 All ER 403 (DC). The F appeal was concerned with the right of access to information under the equivalent English legislation.

[101] The facts were these. Certain members of Parliament in the House of Commons were entitled to an allowance known as 'additional costs G allowance (ACA)'. The applicants requested information relating to the ACA paid to 14 members of Parliament. The request was granted by the Information Commissioner. The third parties appealed to the Information Tribunal on the grounds of an alleged breach of their privacy. The Information Tribunal dismissed the appeal and the aggrieved parties took the decision on further appeal to the Divisional Court. The H Divisional Court, presided over by Their Lordships Judge P, Latham LJ and Blake J, dismissed the appeal.

[102] Dealing with the requirement of public interest, Judge P, writing on behalf of the full court, stated in para 15:

> 'We have no doubt that the public interest is at stake. We are not here I dealing with idle gossip, or public curiosity about what in truth are trivialities. The expenditure of public money through the payment of MPs' salaries and allowances is a matter of *direct and reasonable interest* to taxpayers. They are obliged to pay their taxes at whatever level and on whatever basis the legislature may decide, in part at least to fund the legislative process. Their interest is reinforced by the absence of a J

A coherent system for the exercise of control over and the lack of a clear understanding of the arrangements which govern the payment of ACA. Although the relevant rules are made by the House itself, questions whether the payments have in fact been made within the rules, and even when made within them, whether the rules are appropriate in contemporary society, have a wide resonance throughout the body politic. In B the end they bear on public confidence in the operation of our democratic system at its very pinnacle, the House of Commons itself. *The nature of the legitimate public interest engaged by these applications is obvious.*' [My emphasis.]

[103] So, the legitimate expectations of society are given effect to, and C are expressed in, the 'public interest' as contemplated in s 46. In this sense neither the legitimate expectations of society nor the public interest is concerned with trivial group interests, idle gossip or immaterial issues of public interest. As was stated by Hefer JA in *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; D [1998] 4 All SA 347) at 1212C (albeit in different context). The 'public interest' is 'material in which the public has an interest', as opposed to 'material which is interesting to the public'. The 'public interest' contemplated by s 46 therefore, as does the legitimate expectation test, embraces all those interests necessary for a structured and orderly society. I therefore hold that the 'public interest' test contemplated by s 46 is to be assessed in E accordance with the principle of legitimate expectation in the context of *Bernstein* supra.

[104] As I pointed out at the outset of this judgment, Parliament was acutely aware of the public interest in the matter, and even considered the appointment of a public relations officer to deal specifically with the F Travelgate saga. It went to some lengths to prevent the publication of the information contained in the schedules in order to protect it against adverse public opinion — even purchasing the claims. This is all borne out by the minutes of the Oversight Authority meetings referred to earlier. But public opinion is not the same as public interest. Public G interest is at stake when the structure of institutional democracy is threatened by a culture of 'secretive and unresponsive' government.

[105] Therefore, and having regard to the particular facts and circumstances of each case, the court must weigh the public interest in protecting the right to privacy against the public interest to disclose the H information. This exercise will involve the distance travelled by the individual from his or her inner sanctums of private life to public interaction and engagement with society in general.

[106] I have little doubt that, for the reasons already referred to, members of Parliament who engage in their parliamentarian functions I and privileges have moved away from the inner sanctums of their private lives, and their engagement in these activities places their conduct in the realm of material in which the public has an interest. Any conduct by members of Parliament which on balance of probability would disclose unlawful or irregular conduct in the exercise of their parliamentary duties, constitutes a threat to South Africa's institutional democratic J order and warrants disclosure in the public interest under s 46. I am

therefore also, and in any event, of the respectful view that even if s 34(1) A does not apply to the facts of this case, then the public interest override provided in s 46 finds application.

[107] It follows from all of the aforesaid that the expressions 'unreasonable disclosure' in s 34(1) and 'public interest' in s 46 are all expressions B of the same constitutional principle, namely the second stage of the legitimate expectation principle, which requires, objectively, society to reasonably and legitimately expect the information to be protectable. This is so because if a different meaning and content are given to the same constitutional right in different sections of the same Act, then the constitutionality of those sections may very well be questioned. C

[108] Klaaren & Penfold in *Constitutional Law* supra at 62-24 suggest with reference to the words 'clearly outweigh' that the 'public interest' contemplated by s 46 is a particularly serious type of public interest — an interest which is of serious concern or benefit to the public. With respect, I cannot agree. If the bar is raised only in s 46 from

the constitutional D level of the doctrine of legitimate expectation of society, then s 46 has the effect of both enlarging the right to privacy, and limiting at the same time the constitutional content and scope of the right to access to information. This may very well call into question the constitutionality of s 46, and it falls foul of the obligation to interpret a legislative provision in accordance with the spirit and purport of the Constitution where such E interpretation is reasonably possible. For the reasons mentioned earlier, the public interest requirement defines or limits the inner sanctum of the personal life of an individual, and is assessed in accordance with the legitimate expectation principle. In my respectful view the word 'clearly' means no more than 'clear evidence' whilst retaining the civil standard of onus on a balance of probability. F

[109] For all the above reasons, and acting within my powers under s 82 of the PAIA referred to above, I make the following order:

1. The decision of the second respondent upholding the appeal by the third parties is hereby set aside. G
2. The first and second respondents are hereby ordered, within 10 days of the service of this order upon them, to furnish to the applicant the schedules 1 and 2 attached to the sale of claims agreement dated 17 February 2009 between the liquidators of Bathong as seller, and the National Assembly of Parliament of South Africa represented by the first respondent as purchaser. H
3. To the extent that the debtors' book of Bathong Travel (Pty) Ltd (in liquidation) is not contained in the aforesaid schedules, the first and second respondents are ordered within 10 days of the service of this order upon them, to furnish to the applicant a copy of such debtors' book. I
4. The respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of this application, such costs to include the employment of two counsel.

Applicant's Attorneys: *Whitesides*, Grahamstown.

Second Respondent's Attorneys: *NN Dullabh & Co*, Grahamstown. J

BERNSTEIN AND OTHERS v BESTER AND OTHERS NNO 1996 (2) SA 751 (CC)

Citation	1996 (2) SA 751 (CC)
Case No	CCT 23/95
Court	Constitutional Court
Judge	Chaskalson P, MAHOMED DP, ACKERMANN J, DIDCOTT J, KRIEGLER J, LANGA J, MADALA J, MOKGORO J, NGOEPE AJ, O'REGAN J and SACHS J
Heard	September 19, 1995
Judgment	March 27, 1996
Counsel	G J Marcus (with him O L Rogers) for the applicants. J J Gauntlett SC (with him G W Woodland) for the respondents.
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

H Company - Winding-up - Enquiry in terms of s 417 or s 418 of Companies Act 61 of 1973 - Constitutionality of - Apart from portion of s 417(2)*(b)* previously declared invalid, provisions of ss 417 and 418 not inconsistent with s 8, s 11(1), s 13 and s 24 of Constitution of the Republic of South Africa Act 200 of 1993, as amended.

Constitutional practice - Courts - Constitutional Court - Referral to I Constitutional Court in terms of s 102(1) of Constitution of the Republic of South Africa Act 200 of 1993 - Section 102(1) not empowering Provincial or Local Division of Supreme Court to refer matter by agreement to Constitutional Court - Requirements of s 102(1) have to be met - Impression to be avoided that J referrals can take place simply by agreement between parties.

A *Constitutional law - Human rights - Right to freedom and security of the person in terms of s 11(1) in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Whether ss 417 and 418 of Companies Act 61 of 1973 inconsistent with s 11(1) of Constitution - Provisions of s 11 of Constitution not impaired by* B *ss 417 and 418 of Companies Act - Sanctions of ss 417 and 418 necessary to enforce the legislation and comply with s 11(1), read with s 33, of Constitution - Provisions of ss 417 and 418 of Companies Act absolutely essential and necessary to achieve important public policy objectives - Supreme Court having* C *power to control examination under ss 417 and 418 and prevent it from being vexatious, oppressive or unfair - Sections 417 and 418 not inconsistent with s 11(1) of Constitution.*

Constitutional law - Human rights - Right to personal privacy in terms of s 13 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Whether D *ss 417 and 418 of Companies Act 61 of 1973 inconsistent with s 13 of Constitution - Examinee at enquiry under s 417 or s 418 not compelled to answer question or produce books or papers resulting in unjustified infringement of any of examinee's rights under chap 3 of Constitution - If answer to any question would infringe or threaten to infringe any of examinee's chap 3 rights, it would* E *constitute 'sufficient cause' for purposes of s 418(5)(b)* (iii)(aa) of Companies Act for refusing to answer question - Question would likewise not have been 'lawfully put' as intended in s 418(5)*(b)*(iii)(aa) - Likewise, if production of books or papers would infringe producer's right in terms of s 13 of Constitution not to F be subject

to seizure of private possessions, it would be 'sufficient cause' for purposes of s 418(5)*(b)* (*iii*)(bb) *of Companies Act for refusing to produce such books or papers - Sections 417 and 418 not inconsistent with s 13 of Constitution.*

Constitutional law - Human rights - Right to administrative justice in terms of s 24 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - G *Whether ss 417 and 418 of Companies Act 61 of 1973 inconsistent with right to procedural fairness in terms of s 24(b)* of Constitution - Assuming examinee in enquiry under s 417 or s 418 entitled to procedural fairness in terms of s 24*(b) of Constitution, his or her remedy, if not accorded such fairness, is to enforce such* H *right through ordinary courts - Nothing in s 417 or s 418 preventing enforcement of such remedy through ordinary courts - And nothing in ss 417 and 418 which was inconsistent with s 24(b) or (c) of Constitution.*

Constitutional law - Human rights - Right to equality before the law in terms of s I 8 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Whether ss 417 and 418 of Companies Act 61 of 1973 inconsistent with right to procedural fairness in terms of s 24*(b)* of Constitution - Purpose of ss 417 and 418 of Companies Act not to put company in better position than its debtors or creditors but to put company in liquidation (because of its disabilities) on J footing to enable it to litigate on equal terms with its debtors and creditors - Sections not resulting in examinee

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A being denied s 8(1) right to equality or equal protection of the law or s 8(2) right not to be unfairly discriminated against - Where summonsing or interrogation of examinee oppressive, vexatious or unfair, remedy is to approach Supreme Court for relief - Sections 417 and 418 not inconsistent with s 8 of Constitution. B

Headnote : Kopnota

Section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 does not empower a Provincial or Local Division of the Supreme Court to refer a matter by agreement to the Constitutional Court, but only when the requirements set forth in the subsection are met. (Paragraph [2] at 759B.) The impression should be avoided in judgments referring matters to the Constitutional Court in terms of s 102(1) that referrals can take place simply because parties have agreed thereto. C (Paragraph [2] at 759C-D.)

The Court held in the present case that the issues referred to it in terms of s 102(1) of the Constitution had been properly referred. The issue referred to the Court for determination was the constitutionality of ss 417 and 418 of the Companies Act 61 of 1973 (providing for the examination of persons and the disclosure of documents as to the affairs of a company). It was contended that ss 417 and 418 were unconstitutional on the following grounds: (1) That the whole mechanism created under ss 417 and 418 violated a cluster of inter-related and overlapping D constitutional rights, namely *(a)* the right to freedom and security of the person (s 11(1) of the Constitution); *(b)* the general right to personal privacy (s 13 of the Constitution); and *(c)* the particular aspect of the right to personal privacy not to be subject to seizure of private possessions or the violation of private communications. (2) The mechanism violated s 24 of the Constitution in that it permitted an administrative interrogation in violation of the provision of that E section. (3) Insofar as the mechanism permitted the liquidator and the creditors of the company in liquidation to gain an unfair advantage over their adversaries in civil litigation that they would not have enjoyed but for the liquidation of the company, it violated the guarantee of equality in terms of s 8 of the Constitution. (Paragraph [12] at 765C.)

As to (1)*(a)*:

F (*Per* Ackermann J; Chaskalson P, Mahomed DP, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, Ngoepe AJ and Sachs J concurring; O'Regan J concurring in the order of the Court but for different reasons insofar as the attack based on s 11(1) of the Constitution was concerned): The Courts in South Africa have developed a considerable body of case law the design of which is to prevent the mechanism of ss 417 and 418 of the Companies Act being used oppressively, vexatiously or unfairly towards the examinee. There is no doubt that the Supreme Court will continue to develop that body of law having due regard to the spirit, purport and G object of the Constitution's chapter on fundamental rights (chap 3). It is accordingly not open to argue that, because the provisions of ss 417 and 418 are general in terms and contain no express limitations as to their application, the constitutionality of these sections has

to be adjudicated on the basis that they permit anything which is not expressly excluded. It is trite law that a statutory power may only be used for a valid statutory purpose. The constitutionality of ss 417 and 418 of the Companies Act has to be assessed in the light of the control which the H Supreme Court exercises over their implementation. There is nothing in these sections which mandates that such an examination be conducted in an oppressive, vexatious or unfair manner. In respect of complaints of the examination being conducted in this way, the examinee's correct remedy is to approach the Supreme Court for relief on the basis that the examination was being conducted in an oppressive, vexatious or unfair manner. The Supreme Court has jurisdiction to deal I iwith complaints of this nature. It is a jurisdiction which, on such complaints, should first be exhausted before any approach is made to the Constitutional Court. (Paragraphs [46] and [47] at 780E-781B/C.)
The sanction of imprisonment for ignoring, or failing without sufficient cause to give effect to, a subpoena issued under s 417 or s 418 of the Companies Act is a reasonable and necessary sanction. So too is the power to cause a person in breach of such a subpoena to be arrested and brought before the Master or other person appointed to conduct the enquiry. Imprisonment follows in accordance with the J normal

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A procedural safeguards: therefore neither s 11(1) nor s 25 of the Constitution is impaired; and it is not a sanction which is disproportionate to the offence; therefore s 11(1) and (2) are not impaired. The sanctions are necessary to enforce the legislation and, insofar as they have to comply with s 11(1) read with s 33 of the Constitution, they clearly do so. (Paragraph [55] at 784C/D-E.) The mechanism provided by ss 417 and 418 is absolutely essential, and therefore necessary, to achieve these important public policy objectives. They cannot be achieved in any B other way which would impinge less on an examinee's right of freedom, particularly when regard is had to the Supreme Court's power to control an examination and prevent it from being vexatious, oppressive or unfair. The limitation of the examinee's right of freedom (under s 11(1) of the Constitution) is also clearly reasonable and justifiable in an open and democratic society based on freedom and equality.
The duty to testify is well recognised in such societies, whether it be in the context C of a criminal or civil trial or in investigatory proceedings such as inquests or bankruptcy enquiries. (Paragraph [55] at 784F-H.)
As to (1)*(b)*:
(*Per* Ackermann J; Chaskalson P, Mahomed DP, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, Ngoepe AJ, O'Regan J and Sachs J concurring): Apart from that part of s 417(2)*(b)* of the Companies Act which was declared invalid in D *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1), there is no other provision in s 417 or s 418, or in any other provision of the Companies Act, which expressly or by necessary implication compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's rights. It must follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the E unjustified infringement of any of the examinee's chap 3 rights. Fidelity to s 35(2) of the Constitution requires such a construction and fidelity to s 35(3) read with s 7(4) of the Constitution requires an appropriate remedy, namely that the examinee should not be compelled to answer a question which would result in the F infringement of a chap 3 right. In this context the provisions of s 418(5)*(b)*(iii)(*aa*) of the Companies Act are important. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's chap 3 rights, this would constitute 'sufficient cause', for the purposes of s 418(5)*(b)*(iii)(*aa*), for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token, the question itself would not be one 'lawfully put' (as intended in s 418(5)*(b)*(iii)(*aa*)) and the examinee would not, in terms of this very provision, be obliged to answer it. On a proper construction of these sections, and in the light of the Court's order in *Ferreira v Levin NO and Others; Vryenhoek and Others v* G *Powell NO and Others (supra)*, there is no provision in s 417 or s 418 of the Companies Act which, when properly construed in the light of s 35(2) and (3) of the Constitution, is inconsistent

with the examinee's right to privacy in terms of s 13 of the Constitution. (Paragraphs [60] and [61] at 786B-787B, read with para [64] at 787H-I.)

As to (1)*(c)*:

As to the production of books or papers, ss 417 and 418, and in particular s H 418(5) *(b)*(iii)(*bb*), are capable of being read down, and must be read down, in such a way that they do not compel a person to produce books or papers which would result in an infringement of such person's s 13 right 'not to be subject to . . . the seizure of private possessions . . .'. Similarly, nothing could be clearer than that, if the production of any book or paper would infringe the producer's right not to be subject to the seizure of private possessions, this would for the purpose of s I 418(5)*(b)*(iii)(*bb*), constitute 'sufficient cause' for refusing to produce books or papers unless such right of the producer is subject to limitation under s 33(1) of the Constitution. (Paragraph [88] at 797F-H.) It is notionally possible that under ss 417(3) and 418(2) of the Companies Act the production of documents which are not company documents or records in the strict sense might be compelled. Nevertheless, provided the documents were relevant to any legitimate enquiry under s 417, their compelled production would be justified for the very same J reasons that the compelled answers to similarly relevant questions at an enquiry

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A under s 417 or s 418 would be justified. Sections 417 and 418 of the Act are accordingly not inconsistent with any of the rights under s 13 of the Constitution. (Paragraph [92] at 799B-D.)

As to (2):

Assuming that an examinee in an enquiry in terms of s 417 or s 418 of the Companies Act is entitled to procedural fairness in terms of s 24*(b)* of the Constitution (which provides that '*(e)*very person shall have the right to - . . . *(b)* B procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened'), there is nothing in any of the provisions of s 417 or s 418 which is inconsistent (either expressly or by implication) with such claim. If an examinee is entitled to procedural fairness and has not been accorded such fairness by the person conducting the enquiry, his or her remedy is to enforce C this claim through the ordinary courts. (Paragraph [100] at 802D.)

In the present case the applicants, who were examinees at such an enquiry, contended that they should have been afforded: *(a)* disclosure in terms of s 24*(b)* and *(c)* of the Constitution of the reasons why they were being summonsed to be interrogated at the enquiry to have enabled them to make meaningful representations to the Court, the Master or the commissioner conducting the enquiry to dispense with their evidence or to test the decision to summons them by appeal or review, if D need be; and *(b)* disclosure in terms of s 24*(b)* of the information required from them to enable them to avoid interrogation by furnishing the requested information or to prepare for their interrogation, if need be.

Held, that there was nothing in the provisions of s 417 or s 418 which stood in the way of such a claim (assuming the applicants to be entitled to this demand) which they could not have sought to enforce through the ordinary courts: the position was simply that there was nothing in these sections which was inconsistent with s 24*(b)* E or *(c)* of the Constitution or the applicants' claims; if the applicants had a remedy (the Court expressing no opinion on that question), it lay along another course and in other courts, and did not lie in striking down ss 417 and 418 in the Constitutional Court. (Paragraph [101] at 802E-H.)

As to (3):

F The applicants contended further that the mechanism under s 417 of the Companies Act, and, in particular, that part of s 417(2)*(b)* which provided that any answer given to any question at an enquiry might thereafter be used against the examinee, violated the Constitution to the extent that it enabled the liquidator and creditors of a company in liquidation to gain an unfair advantage over their adversaries in civil litigation in violation of the right to equality in terms of s 8 of the Constitution (see G para [107] at 805E-F).

Held, that, having regard to principle and the application of s 8(1) of the Constitution, the applicants' contention could not be upheld: the very purpose of proceedings under

ss 417 and 418 of the Act was to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it could not get from its erstwhile 'brain' and other 'sensory organs' or other persons who had a public duty to furnish such information but were unwilling or H reluctant to do so fully and frankly. (Paragraph [121] at 808C-E.)
Held, further, that, if it was oppressive or vexatious or unfair to summons or interrogate the applicants in the way they had been (on the basis of their allegation that they, as the erstwhile auditors of the company in liquidation, had co-operated fully with the liquidators and were prepared to supply all relevant information required), their remedy was to approach the Supreme Court: their alleged harassment and unfair treatment would not be in consequence of the substantive content of the provisions of ss 417 and 418 of the Act, but the result of their I improper application. (Paragraph [121] at 808E-F/G.)
Held, further, that neither the purpose nor the effect of s 417 or s 418 was to place the company in a better position than its debtors or creditors - the purpose was the opposite, namely to place the company in liquidation (because of its resulting disabilities) on such a footing that it could litigate on equal terms with its debtors J and creditors: ss 417 and 418 did not result in the applicants having been denied the

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A s 8(1) right to equality or equal protection of the law or the s 8(2) right not to be unfairly discriminated against. (Paragraph [122] at 808G-H.)
Held, accordingly, that ss 417 and 418 were not inconsistent with s 8 and that the attack on this ground could not succeed. (Paragraph [122] *in fine* at 808H.)
The Court held that, apart from that part of s 417(2)*(b)* of the Companies Act which had been declared invalid in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1), the B provisions of ss 417 and 418 of the Act were not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, as amended. (Paragraph [125] at 809D/E-F.)
The following decided cases were cited in the judgment of the Court:
Abel v United States 362 US 217 (1960)
Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd Intervening) 1985 (1) SA 93 (N)
C *Re Arrows Ltd (No 4); Hamilton v Naviede* [1994] 3 All ER 814 (HL)
Ashwander et al v Tennessee Valley Authority et al 297 US 288 (1936)
Bishopsgate Investment Management Ltd (in Provisional Liquidation) v Maxwell and Another; Cooper v Maxwell; Mirror Group Newspapers plc and Another v Maxwell and Others [1993] Ch 1 (CA) ([1992] 2 All ER 856)
Blunt v Park Lane Hotel Ltd and Briscoe [1942] 2 KB 253 (CA) ([1942] 2 All ER 187)
Botha v Strydom and Others 1992 (2) SA 155 (N)
D *British and Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a Firm)* [1992] Ch 342 (CA) ([1992] 2 All ER 801)
British and Commonwealth Holdings plc (Joint Administrators) v Spicer and Oppenheim (a Firm) [1992] 4 All ER 876 (HL)
Re British Building Stone Company Ltd [1908] 2 Ch 450
Ex parte Brivik 1950 (3) SA 790 (W)
2 *BVerfGE* 266
E 6 *BVerfGE* 32
6 *BVerfGE* 389
18 *BVerfGE* 97
27 *BVerfGE* 344
34 *BVerfGE* 238
53 *BVerfGE* 135
F 54 *BVerfGE* 148
56 *BVerfGE* 37
80 *BVerfGE* 367
Re Castle New Homes Ltd [1979] 2 All ER 775 (Ch)
Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA [1991] Ch 90 (CA) ([1991] 1 All ER 894)

Coetzee v Government of the Republic of South Africa; Matiso and Others v G *Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382)
Corporate Finance Ltd and Another v Liquidator Two Plus (Pvt) Ltd (in Liq) and Another 1978 (4) SA 42 (R)
Dombo Beheer BV v Netherlands 18 EHRR 213
Douglas-Brown (the Official Liquidator of Woomera Holdings Pty Ltd) (rec and mgr apptd) v Furzer (1994) 13 ACSR 184 (WA SC)
H *Duke Group Ltd, The v Arthur Young (Reg) and Another* (1991) 9 ACLC 49 (SA SC)
Re Embassy Art Products Ltd [1987] 3 BCC 292
Epstein v Epstein 1906 TH 87
Fayed v The United Kingdom Series A No 294; Application No 17101/90 ((1994) 18 EHRR 393)
Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1995 (2) SA 813 (W)
I *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1)
Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC)
Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A)
J *Fisher et al v United States et al* 425 US 391 (1976)

A *Foot NO v Alloyex (Pty) Ltd and Others* 1982 (3) SA 378 (D)
Friedland and Others v The Master and Others 1992 (2) SA 370 (W)
Re Gold Co (1879) 12 ChD 77 (CA)
Griswold v Connecticut 381 US 479 (1965)
Hale v Henkel 201 US 43 (1906)
Hamilton v Oades (1988) 15 ACLR 123 (HC)
Hong Kong Bank of Australia and Others v Murphy and Others (1992) 8 ACSR B 736 (NSW SC CA)
Hunter et al v Southam Inc (1984) 11 DLR 4th 641 (SCC)
Re Imperial Continental Water Corp (1886) 33 ChD 314
James v Magistrate, Wynberg, and Others 1995 (1) SA 1 (C)
Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others 1995 (2) SA 433 (SE)
C *Re Jeffrey S Levitt Ltd* [1992] 2 All ER 509 (Ch)
Kastigar et al v United States 406 US 441 (1972)
Katz v United States 389 US 347 (1967)
Re Kimberley Carpet Mills (Aust) Pty Ltd (in Liq) (1979) 4 ACLR 50
Levin v Ensor NO and Others 1975 (2) SA 118 (D)
Ex parte Liquidators Ismail Suliman & Co (Pty) Ltd 1941 WLD 33
Lok and Others v Venter NO and Others 1982 (1) SA 53 (W)
D *Lombard Nash International Pty Ltd v Berentsen* (1990) 3 ACSR 343 (NSW SC Eq D)
Re London & Globe Finance Corpn Ltd [1902] Weekly Notes 16
Re London and Northern Bank Ltd, Haddock's Case, Hoyle's Case [1902] 2 Ch 73 (CA)
McKinley Transport Ltd et al v The Queen (1990) 68 DLR (4th) 568
Minister of the Interior v Harris 1952 (4) SA 769 (A)
E *Mortimer v Brown* (1970) 122 CLR 493
Mortimer v Brown (1972) ALR 723
In re North Australian Territory Company (1890) 45 ChD 87
O'Keeffe v Argus Printing and Publishing Co Ltd and Another 1954 (3) SA 244 (C)
Olmstead v United States 277 US 438 (1928)
Palvie v Motale Bus Service (Pty) Ltd 1993 (4) SA 742 (A)
Re Pergamon Press Ltd [1971] Ch 388 (CA) ([1970] 3 All ER 535)
F *Pretorius and Others v Marais and Others* 1981 (1) SA 1051 (A)
R v Kansal [1992] 3 All ER 844 (CA)
R v Parker 1966 (2) SA 56 (RA)
R v Wong (1987) 41 CCC (3d) 163 (Ont CA)

Rees v Kratzmann (1965) 114 CLR 63
Rees v Kratzmann (1966) ALR 3
G *Reid-Daly v Hickman and Others* 1981 (2) SA 315 (ZA)
Rennie NO v Gordon and Another NNO 1988 (1) SA 1 (A)
Re J T Rhodes Ltd [1987] BCLC 77
Re Rolls Razor Ltd (No 2) [1970] 1 Ch 576 ([1969] 3 All ER 1386 (Ch))
Re Rothwells Ltd (Prov Liq Apptd) (1989) 15 ACLR 168 (WA SC)
S v A and Another 1971 (2) SA 293 (T)
S v Boshoff and Others 1981 (1) SA 393 (T)
H *S v I and Another* 1976 (1) SA 781 (RA)
S v Matisonn 1981 (3) SA 302 (A)
S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793)
S v Naudé 1975 (1) SA 681 (A)
S v Ntuli 1996 (1) SA 1207 (CC) (1996 (1) SACR 94; 1996 (1) BCLR 141)
S v Vermaas; S v Du Plessis 1995 (3) SA 292 (CC) (1995 (2) SACR 125; 1995 (7) I BCLR 851)
Schmerber v California 384 US 757 (1966)
Sher and Others v Sadowitz 1970 (1) SA 193 (C)
Spedley Securities v Bond Corporation Holdings Ltd (1990) 1 ACSR 726 (NSW SC Com D)
Re Spedley Securities Ltd: Ex parte Potts & Gardiner (1990) 2 ACSR 152 (NSW J SC)

A *United States v Dionisio* 420 US 1 (1975)
United States v Mara 410 US 19 (1973)
United States v White 322 US 694 (1944)
Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979 (1) SA 441 (A)
Van der Berg v Schulte 1990 (1) SA 500 (C)
Van Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A)
Venter v Williams and Another 1982 (2) SA 310 (N)
B *Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (No 2)* [1977] 3 All ER 717 (CA)
Whelan v Australian Securities Commission (1993) 12 ACSR 239 (Fed Ct)
Woodley v Guardian Assurance Co of SA Ltd 1976 (1) SA 758 (W)
X and Y v Belgium D & R 28 (1982) 112
Yiannoulis v Grobler and Others 1963 (1) SA 599 (T).
The following statutes were considered by the Court:
C
The Companies Act 61 of 1973, ss 417, 418: see *Juta's Statutes of South Africa 1994* vol 2 at 1 - 216 - 1 - 217
The Constitution of the Republic of South Africa Act 200 of 1993, ss 7(4), 8, 11, 13, 24, 25, 33, 35 102(1): see *Juta's Statutes of South Africa 1994* vol 5 at 1 - 268 - 1 - 271, 1 - 284.

Case Information

D Adjudication of constitutional issues referred to the Constitutional Court in terms of s 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 by the Cape Provincial Division (Fagan DJP). The facts and the nature of the issues referred appear from the judgment of Ackermann J.

G J Marcus (with him *O L Rogers*) for the applicants.

E

J J Gauntlett SC (with him *G W Woodland*) for the respondents.

Cur adv vult.

Postea (March 27).

Judgment

Ackermann J:

F

[1] The issues

The case before us is a referral pursuant to the provisions of s 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 ('the Constitution') and arose from a dispute between Mr Bernstein and other partners and employees G of Kessel Feinstein, a partnership of chartered accountants ('the applicants') and Mr Bester and other liquidators of Tollgate Holdings Ltd ('the respondents'). The essence of the dispute between the parties is whether the respondents are precluded by the Constitution from continuing with the examination of the applicants in terms H of ss 417 and 418 of the Companies Act 61 of 1973 (as amended) ('the Act'). The parties agreed before Fagan DJP in the Cape Provincial Division of the Supreme Court to have the issue whether these sections of the Act are inconsistent with the Constitution referred to this Court. On 28 April 1995 Fagan DJP granted a referral order 'by agreement' as follows:

I '1. The issue whether ss 417 and 418 of the Companies Act 61 of 1973 (as amended) are inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, and are consequently invalid and of no force and effect, is referred to the Constitutional Court for determination, in terms of s 102(1) of the Constitution.

2. The agreed material facts relevant to such determination are those set J out in annexure "X" hereto.

ACKERMANN J

A 3. The costs of such referral shall be costs in the proceedings in the Constitutional Court.

4. Pending the determination of the above proceedings, the application and all other issues are to stand over.'

[2] Section 102(1) of the Constitution does not empower a Provincial or Local B Division of the Supreme Court to refer a matter by agreement to the Constitutional Court, but only when the requirements set forth in the subsection are met. I am not suggesting that in the present case Fagan DJP in fact referred the matter simply by agreement without applying his mind to these requirements. It is clear from the reasons furnished by the learned Deputy Judge President pursuant to the provisions C of Constitutional Court Rule 22(2) and (3)*(a)* that he did so apply his mind and, therefore, the presence of the words 'by agreement' in the referral order is perhaps unfortunate. The impression should be avoided that referrals can take place simply because parties have agreed thereto. In certain referrals to this Court, the D conclusion is difficult to avoid that this is in fact what has happened. Problems which had arisen in connection with such referrals were commented on in *S v Vermaas; S v Du Plessis*[1] and in *Ferreira v Levin this Court pointed out that the power and the duty to refer only arises when three conditions are fulfilled:*

(a) there is an issue in the matter before the Court in question which may be E decisive for the case;

(b) such issue falls within the exclusive jurisdiction of the Constitutional Court; and

(c) the Court in question considers it to be in the interests of justice to refer such issue to the Constitutional Court.

F This Court has further held that it is implicit in s 102(1) that there should be a reasonable prospect that the relevant law or provision will be held to be invalid and while this is a *sine qua non* of a referral it is not in itself a sufficient ground, because it is not always in the interests of justice to make a referral as soon as the relevant issue has been raised.[3] I hasten to point out that when Fagan DJP made G the referral in the present matter the judgments in the above cases had not yet been delivered. In

the present referral these conditions are all fulfilled and the referral is a proper one in terms of s 102(1), despite purporting to be by agreement. While Provincial and Local Divisions might initially have been hesitant to grapple with the implications and application of the new Constitution and might have preferred to H refer constitutional issues to this Court, it must be stressed that, for the proper development of our law under the Constitution, it is essential that these Courts and indeed all other courts empowered to do so, play their full role in developing our post-constitutional law. It would greatly assist the task of the Provincial and I

A Local Divisions of the Supreme Court, and in so doing ultimately the task of this Court, if counsel were called upon to justify rigorously why it was contended that the particular provision of the Constitution relied upon renders the law or provision in question invalid and why it is necessary or advisable to refer the issue in question to the Constitutional Court at that particular juncture. This would lead to B narrower and more closely focused referrals and enable the Provincial and Local Divisions to furnish more comprehensive reasons for any particular referral, which would in turn assist the task of this Court and the development of our constitutional jurisprudence. Such an approach would also decrease the risk of wrong referrals C and avoid the unsatisfactory expedient in such cases of having to try to invoke, at the last moment, in a forced manner and in unsatisfactory circumstances, the direct access procedure provided for in Constitutional Court Rule 17.

[3] Sections 417 and 418 of the Act provide as follows:

> '417. Summoning and examination of persons as to affairs of company

D (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or E property of the company.

> (1A) Any person summoned under ss (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.
>
> (2)*(a)* The Master or the Court may examine any person summoned under ss (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to F writing and require him to sign them.
>
> *(b)* Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.
>
> (3) The Master or the Court may require any such person to produce any G books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.
>
> (4) If any person who has been duly summoned under ss (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the H Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.
>
> (5) Any person summoned by the Master under ss (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil I proceedings in a magistrate's court.
>
> (6) Any person who applies for an examination or enquiry in terms of this section or s 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

J (7) Any examination or enquiry under this section or s 418 and any application

A therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

418. Examination by commissioners

(1)*(a)* Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.

B

(b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.

(c) The Master, if he has not himself been appointed under para *(a)*, the C liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness: provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(d) The provisions of s 417(1A), (2)*(b)* and (5) shall apply *mutatis mutandis* in respect of such an examination or enquiry.

D

(2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred E to in s 417.

(3) If a commissioner -

(a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or

(b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court,

F on any examination or enquiry referred to him.

(4) Any witness who has given evidence before the Master or the Court under s 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.

(5) Any person who -

(a) has been duly summoned under this section by a commissioner who is not G a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or

(b) has been duly summoned under s 417(1) by the Master or under this section by a commissioner who is not a magistrate and who -

(i) fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from H further attendance;

(ii) refuses to be sworn or to affirm as a witness; or

(iii) fails, without sufficient cause -

(aa) to answer fully and satisfactorily any question lawfully put to him in terms of s 417(2) or this section; or

(bb) to produce books or papers in his custody or under his control which he was required to produce in terms of s I 417(3) or this section,

shall be guilty of an offence.'

[4] In *Ferreira v Levin* this Court considered the constitutional validity of s J 417(2)*(b)* of the Act and declared the provisions of s 417(2)*(b)* to be invalid,

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'to the extent only that the words "and any answer given to any such question may thereafter be used in evidence against him" in s 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such

person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions or answers or a failure to answer lawful questions fully and satisfactorily'.Supra, n 2 at para [157].4

This disposes of an important part of the applicants' argument, but inasmuch as the attack in this case went broader than in *Ferreira v Levin* and sought the striking C down of ss 417 and 418 in their entirety, a number of additional grounds of invalidity have to be considered.

[5] As appears from the order of Fagan DJP, the parties also agreed upon certain facts as being relevant to the enquiry into the constitutional validity of ss 417 and 418 of the Companies Act. For present purposes the following are the salient agreed facts.

D [6] Tollgate Holdings Ltd ('the company') was a public investment company listed on both the Johannesburg and London Stock Exchanges. The company was placed under final liquidation on 13 January 1993. This led to one of the largest corporate collapses in South African history as the principal subsidiary companies, indeed most companies forming part of the Tollgate Group (the company and its E subsidiaries), were also placed under provisional winding-up orders by the Cape Provincial Division of the Supreme Court. The collapse of the Tollgate Group left unpaid debts to creditors of almost R400 million. The market capitalisation of Tollgate Holdings as at December 1991 was R222 million comprising 40,5 million shares of R5,50 each. These shares are now worthless.

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[7] The demise of the company seems to have started in February 1988 when the Duros Group Ltd, of which Messrs M Key and G Mackintosh were controlling members and directors, acquired control over the Tollgate Group. For the roughly 140 years before the take-over the company was essentially owned and controlled G by a Cape Town family. The first published financial statements of the Tollgate Group after the take-over indicated a loss of R45 million for the 18-month period ending 31 December 1989. At this stage Mr J Claasen held the position of chairman of the Duros Group and had become its largest single shareholder. Mr H Diedericks H was also a director of the Duros Group as well as managing director and chief executive of Tollgate Holdings. Shortly afterwards, in March of 1990, the Duros Group was in turn acquired by a consortium led by Messrs J Askin and H Bierman and including Messrs Key and Mackintosh. On 21 January 1991 the Duros Group changed its name to Tollgate Holdings Ltd, with the company originally bearing that I name also changing its name. Tollgate Holdings was controlled by this consortium until it was placed under provisional liquidation in December 1992. Warrants for the arrest of both Messrs Askin and Mackintosh have been issued in connection with charges of fraud and theft and Mr Key is presently facing various criminal charges

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A relating to the collapse of the Tollgate Group. The respondents are satisfied that both Messrs Diedericks and Claasen are indebted to the liquidators of the Tollgate Group for substantial sums arising from unlawful acts. An application for the sequestration of Mr Diedericks' estate has been made and a settlement was reached between Mr Claasen and the liquidators of Tollgate Holdings.

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[8] Kessel Feinstein were the auditors of the Duros Group when it acquired control of Tollgate Holdings in February 1988, but only became the main auditors of the Tollgate Group after the Askin-led consortium took control in 1990. As the auditors of the Tollgate Group, Kessel Feinstein certified, without qualification, that the C consolidated annual financial statements of the Tollgate Holdings and its subsidiary companies fairly

presented the financial affairs of the group for the years ended 1990 and 1991. Investigations have satisfied the respondents that large-scale irregularities by the directors and other officials of the Tollgate Group had taken place prior to the group's collapse causing losses of a very substantial nature to the D group.

[9] In March 1993, shortly after Tollgate Holdings was placed under final liquidation and following an application by the liquidators of Tollgate Holdings and other companies in the Tollgate Group, the Cape Provincial Division of the Supreme Court ordered that a commission of enquiry be held into the affairs of E certain companies in the group. Advocate B Hoberman SC, of the Cape Bar, was appointed commissioner. The commission has been in session ever since and some 55 witnesses have thus far appeared before the commission. The respond-ents are satisfied by the evidence that the affairs of the Tollgate Group were mismanaged and manipulated by certain directors under two successive corporate F administrations. During May of 1993 the commissioner issued summonses requiring Messrs H Bernstein, R Klotz and D Nicola (the first to third applicants) to appear before him and to produce documentation in terms of ss 417 and 418 of the Companies Act. Prior to the commencement of Mr Bernstein's examination, the G respondents' attorneys sent the applicants' attorneys a memorandum with a list of issues which were anticipated to be canvassed with the Kessel Feinstein witnesses. However, the respondents did not inform the applicants that they considered Kessel Feinstein to be civilly liable in consequence of the manner in which the firm had performed its professional duties as auditors for the companies in the Tollgate H Group, or that the examination would be aimed at gathering evidence to support such a claim against Kessel Feinstein. A material object in the examination of Mr Bernstein turned out to be an exploration of this potential liability. This was done by calling for explanations and interrogating Mr Bernstein with a view to obtaining concessions and admissions concerning the applicants' alleged negligence in the I performance of their duties. On the third day of Mr Bernstein's examination his legal representatives objected to the constitutionality of the proceedings. The examination was then deferred by agreement.

[10] On 31 March 1995 the applicants approached the Cape Provincial Division of J the Supreme Court seeking relief by way of notice of motion.

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A The applicants sought to rescind the order given by the Supreme Court two years earlier for the holding of the enquiry to the extent that it authorised the partners and employees of Kessel Feinstein to be summoned before the commission pursuant to ss 417 and 418 of the Companies Act. The applicants further sought, upon such B rescission, an order to set aside the summonses served on Mr Bernstein and other partners and employees of Kessel Feinstein and an order to interdict the respondents and the commissioner, Adv Hoberman SC, from using or disposing of or in any way disclosing to others any evidence given or documents obtained from C the applicants. In the alternative the applicants sought an order interdicting the respondents from proceeding with the examination of Messrs Bernstein, Klotz and Nicola (the first to third applicants) or any partners or employees of Kessel Feinstein, an order interdicting the respondents or the commissioner from using or in any way disposing of or disclosing to others evidence given or documents D obtained from the applicants and, with a view to these prayers, an order referring to the Constitutional Court pursuant to s 102(1) of the Constitution the issue whether or not ss 417 and 418 of the Companies Act are inconsistent with the Constitution or whether the manner in which the rights and powers conferred by these sections have been exercised, violates the applicants' fundamental rights. Finally, the E applicants sought an interim interdict to prevent the respondents from proceeding with the examination of the Kessel Feinstein partners or employees, pending the final determination of the relief sought.

[11] The parties then agreed that the Cape Provincial Division of the Supreme F Court should refer the issue whether ss 417 and 418 of the Companies Act are consistent with the Constitution to the Constitutional Court in terms of s 102(1) of the Constitution. This agreement resulted in the order of Fagan DJP referred to above.

[12] The applicants have attacked the constitutionality of ss 417 and 418 of the Act G on four different bases, contending that they are wholly or in part inconsistent with various rights in chap 3 of the Constitution and that such violations cannot be justified in terms of s 33(1) of the Constitution or cured by interpretation in terms of s 35(2) or (3). The attack is advanced on the following grounds:

H 1. The whole mechanism created under ss 417 and 418 violates a cluster of inter-related and overlapping constitutional rights, namely,

(a) the right to freedom and security of the person (s 11(1));

(b) the general right to personal privacy (s 13);

(c) the particular aspect of the right to personal privacy not to be I subject to seizure of private possessions or the violation of private communications.

2. The mechanism violates s 24 in that it permits an administrative interrogation in violation of the provisions of that section.

3. Insofar as s 417(2)*(b)* deprives witnesses of their privilege against J self-incrimination and renders their self-incriminating evidence

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A admissible against them in subsequent criminal proceedings, it violates both the general as well as particular rights to a fair trial in terms of s 25(3).

4. Insofar as the mechanism permits the liquidator and the creditors of the company in liquidation to gain an unfair advantage over their B adversaries in civil litigation that they would not have enjoyed but for the liquidation of the company, it violates:

(a) an implied constitutional right to fairness in civil litigation, and,

(b) the guarantee of equality in terms of s 8.

C [13] The third basis of unconstitutionality has, in effect, already been decided in the applicants' favour (at least partially) in *Ferreira v Levin* where this Court declared s 417(2)*(b)* to be inconsistent with the Constitution to the extent indicated in para 4 above. Two of the Judges found that the provision was unconstitutional because of its inconsistency with s 11(1) of the Constitution[5] and eight of the Judges D found it unconstitutional because of its inconsistency with s 25(3) of the Constitution.[6]

[14] Before dealing with the remaining bases of the attack on the constitutionality of the sections of the Act in question, it is necessary to examine the legislative setting in which the attack must be evaluated, the purpose of the enquiries and the E examination of persons provided for in ss 417 and 418 of the Act and the extent of the control, both constitutional and non-constitutional, which the commissioner and the Provincial and Local Divisions are competent to exercise over the conduct of such enquiries and examinations. Many of these matters were extensively dealt with F in *Ferreira v Levin* and it is unnecessary to traverse the same ground here. What follows is a summary of the conclusions reached in *Ferreira v Levin*.[7]

[15] Some of the major statutory duties of the liquidator in any winding-up are:

G *(a)* to proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable;

(b) to give the Master such information and generally such aid as may be requisite for enabling that officer to perform his or her duties under the Act;

H *(c)* to examine the affairs and transactions of the company before its winding-up in order to ascertain -

(i) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have

contravened any provision of the Act or have committed or I appear to have committed any other offence; and J

A (ii) in respect of any of the persons referred to in subpara (i), whether there are or appear to be any grounds for an order by the Court under s 219 of the Act disqualifying a director from office as such;

B *(d)* except in the case of a member's voluntary winding-up, to report to the general meeting of creditors and contributories of the company the causes of the company's failure, if it has failed;

(e) if the liquidator's report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the grounds mentioned in *(c)* above, the Master must transmit a copy of the report to the Attorney-General.[8] C

[16] The enquiry under ss 417 and 418 has many objectives.

(a) It is undoubtedly meant to assist liquidators in discharging these abovementioned duties so that they can determine the most advantageous course to adopt in regard to the liquidation of the company.

D *(b)* In particular it is aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way which will best serve the interests of the company's creditors.

E *(c)* Liquidators have a duty to enquire into the company's affairs.

(d) This is as much one of their functions as reducing the assets of the company into their possession and dealing with them in the prescribed manner, and is an ancillary power in order to recover properly the company's assets.

(e) It is only by conducting such enquiries that liquidators can:

F (i) determine what the assets and who the creditors and contributories of the company are;

(ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.

G *(f)* It is permissible for the interrogation to be directed exclusively at the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound up.

(g) Not infrequently the very persons who are responsible for the H mismanagement of and depradations on the company are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, I reluctant to assist the liquidator voluntarily. In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.

(h) The interrogation is essential to enable the liquidator, who most frequently comes into the company with no previous knowledge J

A and finds that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the

company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the B company alone.

(i) The liquidator must, in such circumstances, be enabled to put the affairs of the company in order and to carry out the liquidation in all its varying aspects.

(j) The interrogation may be necessary in order to enable the liquidator, who thinks that he may be under a duty to recover something from an C officer or employee of a company, or even from an outsider concerned with the company's affairs, to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claim.[9]

(k) There is a responsibility on those who use companies to raise money D from the public and to conduct business on the basis of limited liability to account to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at a s 417 enquiry is part of this responsibility. This responsibility is not limited to officers of the company, in the strict sense, but extends also to the auditors of the company.[10]

E [17] Courts in many foreign jurisdictions have recognised the (potentially) oppressive nature of a s 417 type enquiry, while at the same time pointing out that there is a need for a speedy process through which the liquidator is enabled to obtain the necessary information about the company's affairs and dealings, and to trace the whereabouts of assets and possibly recover some assets for the financial F benefit of creditors. Courts normally exercise control over the enquiry in two ways. First, courts have scrutinised applications to hold the enquiry. It has been held that an application for a private examination ought not to be granted if it would be oppressive, vexatious or unfair.[11] Second, Courts have intervened to prevent G the oppressive or unfair conduct of proceedings in the enquiry itself.

[18] More than a century ago the Court of Appeal in England came to the assistance of an examinee and held that, in the circumstances of the case, he could not be summoned to be examined and was not obliged to answer questions. In *In re North Australian Territory Company* Bowen LJ, commenting on the powers under s 115 H of the Companies Act 1862, gave the following warning:

> 'It is an extraordinary power; it is a power of an inquisitorial kind which enables the Court to direct to be examined - not merely before itself, but before the examiner appointed by the Court - some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a I section ought to be used with the greatest care, so as not unnecessarily to put in motion the

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A machinery of justice where it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.'[12]

B [19] In *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* the Court of Appeal outlined the following criteria for the exercise of the Court's discretion whether to order an examination:

> 'It is clear that in exercising the discretion the Court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the C importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment of whether or not there is a cause of action and the degree of oppression is small (for example in the case of ordering the premature discovery of documents) the balance will manifestly come down in favour of making the order. Conversely, if the D liquidator is seeking merely to dot the i's and cross the t's of a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order.

> Of course, few cases will be so clear: it will be for the Judge in each case to reach his own conclusion.'[13]

E [20] The Court went on in *Cloverbay* to mention a number of considerations which should specifically be taken into account in exercising the discretion. The first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge of the company in order to make informed decisions. The purpose is not to place the company in a stronger position in civil litigation than it would have enjoyed in the absence of liquidation. Second, the F appropriate standard is not to require proof of the absolute need for information before an order for examination will be granted, but proof of the reasonable requirement of the information. Third, the case for examination is usually much stronger against officers or former officers of the company, who owe the company G a fiduciary duty, than it is against third parties. Fourth, an order for oral examination is much more likely to operate oppressively against an examinee than an order for the production of documents.[14] The Court is also likely to treat an application for a holding of a s 417 enquiry from an office holder, such as the liquidator, with more sympathy than it would treat a similar request from a H contributor.[15]

[21] In *British and Commonwealth Holdings plc (Joint Administrators) v*

A *Spicer & Oppenheim (a firm)*[16] the House of Lords had occasion to comment on the approach laid down in the *Cloverbay* case. Hoffmann J had construed the judgment of Browne-Wilkinson V-C in *Cloverbay* as restricting the availability of an order under s 236 to enable a liquidator or an administrator 'to get sufficient information to reconstitute the state of knowledge that the company should possess'.[17] The House of Lords did not consider that 'reading the judgment (in B *Cloverbay*) overall such a limitation to "reconstituting the company's knowledge" was intended to be laid down in the *Cloverbay* case' and in any event did not think that such a limitation existed.[18]

[22] In this connection Lord Slynn also referred with approval to the following C observations of Jessel MR in *Re Gold Co* (1879) 12 ChD 77 (CA) at 85 in a case under s 115 of the Companies Act 1862:

> '(T)he whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they D brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.'[19]

The following remarks of Chitty J in *Re Imperial Continental Water Corp* (1886) 33 ChD 314 at 316 were also quoted with approval:'Those extensive powers are conferred upon the Court for the beneficial winding-up of the company, for sometimes it happens that the liquidator is unable to obtain from unwilling persons the information which he requires.'Id at 883f.20

[23] It was also pointed out by Lord Slynn that an application such as the one in G question was not necessarily unreasonable

> 'because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others'.[21]

The extent and complexity of the company's failure is not an irrelevant consideration. In this regard Lord Slynn said the following:

> 'This may well be an exceptional order. The size of the financial crash, however, gives rise to an exceptional case. Creditors and investors stood to lose vast sums. It was the administrator's task to investigate "what was the true

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A financial position of Atlantic at the time of its acquisition and, if it was different from the way it was represented, how and why the truth was concealed" (see [1992] BCLC 314 at 317 *per* Hoffmann J). They need in this very complex situation to check the accuracy of the various financial documents and to know not only what representations were made but how accurate they were.'[22]

B The following remarks of Hoffmann J in *Re J T Rhodes Ltd* are also apposite to the present case:

> 'The Victorian cases on . . . (the English equivalent of s 417) contain emotive language which invokes the images of the Inquisition and the Court of Star Chamber. This language was used against the background of a company law which required very little public disclosure and placed a much higher value than C today on the protection of the privacy of business transactions and a lower value on the protection of creditors and shareholders. Today we have no difficulty with the proposition that persons who have had what was perhaps no more than the misfortune to be involved in the affairs of an insolvent company owe a public duty to assist the liquidator to investigate the affairs of that company in the interests of the creditors.'[23]

D [24] Moreover, judicial control over the manner in which the examination is conducted complements the control which the Court exercises over whether the examination should take place in the first place. Courts have long recognised that the examination is open to abuse and that the proceedings ought to be watched E carefully.[24] It has been held that the judiciary is to ensure that the 'examination is not made an instrument of oppression, injustice or of needless injury to the individual'.[25] In one Australian case, *Mortimer v Brown*,[26] the Court held that even though a witness could rarely be excused from answering a question on the basis that an answer might incriminate him, there may be questions so remotely F relevant that the harm done to the individual in compelling him to answer outweighs any benefit that the answer may afford.

[25] As Mr *Gauntlett*, on behalf of the respondents, pointed out, the Courts in England have, in determining the permissible bounds of investigation by liquidators or administrators under s 236 of the 1986 Insolvency Act, been influenced by the G recent pattern of massive and unparalleled corporate collapses and the heavy duty which this places on the liquidators to unravel the complex affairs of companies which often form part of large groups or conglomerates with extensive cross-border activities. As appears from the discussion in paras [17]-[24] above, the Courts have responded with a flexible approach in which the reasonable H

A requirements of liquidators in carrying out their duties are carefully balanced against the hardship which the order might cause to the person concerned. The scale of the financial collapse may well give rise to an exceptional case which shifts the balance in favour of the liquidator.[27]

[26] In *Bishopsgate Investment Management Ltd (in Provisional Liquidation) v* B *Maxwell and Another; Cooper v Maxwell; Mirror Group Newspapers plc and Another v Maxwell and Others*[28] the Court of Appeal held that a director was not entitled to rely on the privilege against self-incrimination in refusing to answer questions put to him under ss 235 and 236 of the Insolvency Act 1986. In the course of his judgment Dillon LJ stressed that this was justified by the public policy considerations that the law should be able to deal adequately with dishonesty or C malpractice on the part of company directors:

> 'It is plain to my mind - and not least from the Cork Report - that part of the mischief in the old law before the Insolvency Act 1985 was the apparent inability of the law to deal adequately with dishonesty or malpractice on the D part of bankrupts or company directors. (I take the words gratefully from the judgment of Vinelott J.[29]) That was a matter of public concern, and there is a public interest in putting it right. As steps to that end, Parliament has, by the 1986 Act, greatly extended the investigative powers available to office-holders, with the assistance of the Court, and has expressly placed the officers of the company, and others listed in s 235(3), under a duty to assist the office-holder. That is a direct parallel of the duty owed by a bankrupt which is E relied on by Lord Eldon LC in *Ex p Cossets, re Worrell* (1820) Buck 531 for his conclusion that the bankrupt could not rely on the privilege against self-incrimination so as to refuse to answer questions put to him in his bankruptcy.

A company cannot act except by individuals, and, in the particular field of law with which the Bishopsgate appeals are concerned, it is illogical that the F directors of a company should be entitled to rely on the privilege against self-incrimination on a private examination under s 236, whereas the individual insolvent is not so entitled on a private examination under s 366.'[30]

[27] In *Re Arrows Ltd (No 4); Hamilton v Naviede*[31] the public interest in successfully pursuing and recovering the fruits of company fraud was highlighted. G Lord Browne-Wilkinson commented as follows:

'The inevitable effect of a witness in civil proceedings claiming the privilege against self-incrimination is to deprive the opposite party and the Court of evidence relevant to the dispute under consideration. Until recently, this has not given rise to much litigation. But the recent upsurge of financial fraud, particularly in relation to companies, has raised in an acute form the conflict H between the witness's basic right to rely on the privilege on the one hand and the public interest in successfully pursuing and recovering the fruits of such fraud.

Thus in relation to claims for *Mareva* injunctions and *Anton Piller* orders, the defendant relies on the privilege to refuse disclosure or discovery of documents which would enable the assets to be traced. He is entitled to claim the

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A privilege. . . . The serious consequences flowing from a successful claim to the privilege has lead Parliament in certain cases to override the privilege but to substitute an alternative protection. . . .

The primary purpose of an inspection under s 432 of the Companies Act 1985 or an examination by liquidators under s 236 of the 1986 Act is to enable the true facts to be elicited from those who know them. Frequently it is suspected B fraud which has given rise to the investigation or examination. If witnesses in such proceedings were able to rely on the privilege against self-incrimination, the whole investigation could be frustrated by a refusal to answer sensitive questions. Although the statutes establishing such inquisitorial rights for the purpose of discovering the true facts about the conduct of a company are silent on the question whether the privilege is to apply, the Courts have been ready C in recent years to hold that Parliament has impliedly overridden the ancient privilege against self-incrimination. . . .

This recent erosion of the privilege against self-incrimination in the interests of aiding the tracing and recovery of property extracted from companies by fraud is taken one stage further in this case.'[32]

D In even more trenchant terms Lord Nolan said the following in the same case:

'The type of fraud which lead to the passing of the Criminal Justice Act 1987 is an exceptionally pernicious form of crime, and those who commit it tend to be as devious as they are wicked. It is not in the least surprising or regrettable E that Parliament should have entrusted the Serious Fraud Office with the power to call upon a suspected person to come into the open, and to disclose information which may incriminate him.'[33]

[28] Because South African and Australian company law share a common ancestry F it is instructive to consider the approach of the Australian Courts to comparable problems arising out of Australian companies legislation which makes provision for the examination by a liquidator or administrator of persons who have knowledge of the affairs of a company.

G [29] The comparable Australian legislation is the Corporations Amendment Act 1990. It has features which are similar to the mechanism created by ss 417 and 418 of the South African Act. Examination provisions are embodied, *inter alia*, in ss 596 and 597. Section 597(12)[34] excludes the privilege against self-incrimination and s 597(12)(A) provides only a direct use immunity. Express provision is made H for the use of the examination record against the examinee in civil proceedings.[35]

[30] The judicial development of Australian law relating to examinations is also to be seen in the context of the large corporate collapses in that country and a growing view that directors and others concerned with the management and affairs of a failed company owe a duty of accounting to I

A creditors and shareholders. In *Spedley Securities v Bond Corporation Holdings Ltd*[36] Rogers CJ said the following:

> 'I can see considerable justification for an argument that, in particular, directors, but also others, concerned with the management and affairs of a failed company owe a duty to creditors and shareholders to provide a candid, full and truthful account of their stewardship. This question was not debated, B but I would ask why, with the number and magnitude of company collapses we are seeing daily, the generally uninformative statement of affairs should be all that is required to be provided? Has the time come when it should be an implied contractual term in the appointment of directors and executives of public companies that in the event of the company going into liquidation they should provide, within a limited time, a full and proper account of such matters C as are customarily extracted, at considerable expense to the creditors, in the course of s 541 examinations?'[37]

In *Lombard Nash International Pty Ltd v Berentsen*[38] Bryson J, after quoting with approval from the passage just quoted, added the following:

> 'In my view there is such a duty and as well as being owed to creditors and D shareholders it is owed to the whole community which has an interest, not only in attaining civil justice in particular pieces of litigation, but also in the emergence to public knowledge of information relating to the affairs of companies which fail although clothed in privileges by the law, including the limited liability of their members.
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> In relation to litigation between companies in liquidation and their former E officers there is another significant matter, that is, that the company has no mind or brain but its officers, nowhere to resort to for knowledge in human minds but to them, or to whatever records they may have left behind; that the company in a fair sense ought to be thought of as the owner of the knowledge in their minds, which should not be available solely to such persons to the exclusion of the company merely because they are engaged in litigation with the company.'[39]

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[31] The Australian High Court has held that one of the important public purposes that the examination procedure under the Corporations Act is designed to serve is to enable liquidators to gather information which will assist them in the winding-up; that involves protecting the interests of creditors.[40]

G [32] The Australian Courts draw no distinction in principle between the stages at which the liquidator is entitled to seek information; whether it is sought in relation to proceedings merely contemplated or proceedings which the liquidator has definitely decided to commence. The relevance of the commencement of litigation or a decision to embark upon it is that it 'requires the Court to approach the H assessment of the liquidator's purpose with greater caution'.[41]

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A In *Hamilton v Oades*[42] Mason CJ pointed out that the very purpose of the section was to create a system of discovery which may cause defences to be disclosed and that to hold otherwise would, adopting the language of Kitto J in *Mortimer v Brown*,[43] 'render the provision relatively valueless in the very cases which call most loudly for investigation'.

B [33] In *The Duke Group Ltd v Arthur Young (Reg) and Another* Perry J, dealing with analogous examinations under s 541 of the Companies (South Australia) Code, pointed out that these examinations

> 'are designed to enable interested parties to elicit the facts concerning, among other things, the circumstances giving rise to the liquidation of a company, in C order to provide a proper basis for consideration of other consequential legal remedies which thereafter may be sought'.[44]

And in *Hong Kong Bank of Australia and Others v Murphy and Others*[45] Gleason CJ pointed out that

> '*(w)*hile the Court would not permit a liquidator, or other eligible person, to D abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection, on the other hand, the possibility that a forensic advantage will be gained does not mean that the making of an order will not advance a purpose intended to be secured by the legislation'.[46]

E The liquidator is entitled to obtain information, not only to ascertain whether she/he has a cause of action, but also in order to assess whether the case is sufficiently strong

to justify spending the creditors' money in pursuit of it, and, conversely, whether there is an adequate defence to a claim against the company.[47]

F [34] The Courts in Australia will come to the assistance of an examinee to ensure that the provisions of the statute compelling the testimony are not used for purposes of oppression or vexation and will use their powers to control and supervise examinations and to prevent injustice.[48] This power is not restricted to G defined and closed categories.[49] It is important to note, in the context of the present case, that in relation to an examination under s 597(3) of the Australian corporations law, it has been held that an examination of a company's auditor was permissible even though it could lead to the institution of proceedings against the auditor as a consequence of information thus obtained.[50] The powers in H

A s 597 may be used to enable a creditor to sue a stranger to a company, that is a person who is neither an officer nor an employee.[51]

[35] In South Africa the control which Courts normally exercise over the application for the holding of the enquiry has been effected by the amendment of the Companies Act in 1985. Earlier, Judges in several Divisions of the Supreme Court B pointed out that the s 417 enquiry is 'the Court's enquiry'.[52] Since the amendment, however, the Court does not necessarily entertain the application for the holding of the enquiry. As explained in *Van der Berg v Schulte*:

> 'While it may have been correct to describe the enquiry as the Court's enquiry C prior to the amendment to the Act in 1985 I am of the view that that is not the case where the inquiry is ordered by the Master. Prior to the amendment an application for an inquiry had to be made to the Court. That is no longer necessary. . . .
>
> The Court may not come into the picture at all where the Master acts in terms of s 417. This is made quite clear by the provisions of s 418(3) which provide that if a commissioner has been appointed by the Master he must report to the D Master and not to the Court. . . .
>
> The Legislature has made a clear distinction between an inquiry ordered by the Master on the one hand and one ordered by the Court on the other and even if the Master be regarded as an officer of the Court, he is, in my view, in an inquiry ordered by him and in which he appoints a commissioner to conduct it on his behalf, acting independently of the Court.'[53]

E It is important to point out, however, that *Van der Berg's* case was concerned with the question whether a commissioner, who is not a magistrate, has any power apart from that contained in s 418(5) of the Act to deal with a recalcitrant witness. The Court held that he did not and, further, that the Court's powers to deal with such F recalcitrant witness other than on the basis of contempt *in facie curiae* were to be found in ss 30 and 31 of the Supreme Court Act. The latter sections are only applicable to 'civil proceedings' and not to the type of enquiry envisaged by ss 417 and 418 of the Companies Act. It was therefore not for the Court to deal with such recalcitrant witnesses. The judgment is not authority for the proposition that, merely G because the Master of the Supreme Court orders such an enquiry, the Supreme Court loses its power to prevent oppressive or otherwise improper enquiries being instituted or to prevent enquiries from being conducted in an oppressive or otherwise improper manner. This cannot be the consequence of the amendment.[54] Whether the order is made by the Master or by a Judge, H

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A it is still an order issuing from the Supreme Court.[55] Our Supreme Courts have over many years taken the view, based on the English and other authorities, that they have the power to prevent s 417 type enquiries which would result in oppression[56] or intervene where enquiries are conducted in an oppressive or vexatious B manner[57] or result in hardship to the examinee or where unusual, special or exceptional circumstances are present.[58] In *James v Magistrate, Wynberg, and Others*[59] Thring J, relying, *inter alia*, on the relevant English and Australian authorities, pointed to various ways in which an examinee could be improperly interrogated in terms of s 415 of the Act and in respect whereof a Court would have the power to intervene:

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> 'An examinee might be improperly interrogated by a creditor for the purpose of investigating an issue which did not relate to the winding-up or to the financial interests of the creditors of the company in liquidation, but solely for the improper purpose of obtaining ammunition for use by that particular creditor in litigation which the creditor proposed to bring against the examinee. D See *Simon's* case *supra* at 718C-H, *Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (N) at 111F-H, and the *Hugh J Roberts* case *supra*.
>
> In short, an examinee might be compelled to submit to an examination which was oppressive or vexatious, inasmuch as the proceedings might be "seriously and unfairly burdensome, prejudicial and damaging" or "productive of serious E and unjustified trouble and harassment" (*Spedley Securities Ltd (in Liq) v Bond Corporation Holdings Ltd (supra* at 732, 733)). Where this may happen, the Court has a discretion to intervene to prevent it: see *Re Imperial Continental Water Corporation* (1886) 33 ChD 314 (CA) at 320-1.'[60]

F Although these remarks were made in the context of an enquiry held in terms of s 415 of the Act, there is no reason why the Court's approach should be any different in regard to a s 417 enquiry.

[36] The purpose of this brief survey is not to lay down or develop the legal principles which the Supreme Court in this country should apply in controlling s G 417 enquiries. It is not the function of this Court, but that of the Supreme Court, to do so. The purpose is to point out that the Supreme Court has the power to prevent the oppressive, vexatious and unfair use of s 417 proceedings, for it is against the background of such power that the applicants' remaining attack on the unconstitutionality of ss 417 and 418 of the Act must be considered.

[37] As a prelude to the first basis of attack Mr *Marcus*, on behalf of the

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A applicants, analysed in his written argument the nature and effect of the ss 417 and 418 mechanisms as applied to the conduct of the enquiry in the present case, highlighting the secret nature of the enquiry, the examinee's lack of information and general inability to prepare for the interrogation. Before analysing these criticisms further it must be pointed out that, for purposes of the present case, the ss 417 and B 418 mechanisms must be evaluated in the light of this Court's judgment in *Ferreira v Levin* and in particular para 2 of its order to the effect that:

> 'As from the date of this order, no incriminating answer given pursuant to the provisions of s 417(2) *(b)* of the Companies Act on or after 27 April 1994 shall be used against the person who gave such answer, in criminal proceedings C against such person, other than proceedings excepted in 1 above.'[61]

[38] Mr *Marcus* pointed to the fact that the mechanisms constituted an extraordinary and secret mode of obtaining information. The examinee is not entitled as of right to know what the topics of interrogation will be, whose conduct is to be the focus of interrogation, whether allegations or suspicions of civil or criminal liability are to D be investigated and if so, what they are. The examinee is not entitled as of right to access to evidence or exhibits of the commission and often enters the witness stand wholly unprepared for interrogation.

E [39] Inasmuch as the subject-matter of the enquiry is the affairs of the company taken in the very widest sense,[62] the examinee may be interrogated on a very wide range of matters and may be compelled to disclose any of his books or papers, however confidential or incriminating they might be. The mechanism is available, not only against the directors, officers, employees or agents of the failed company F and against those suspected of being responsible for its failure, but also against innocent third parties whose 'misfortune' it is to know something about the trade, dealings, affairs or property of the company.

[40] Relying on decisions such as *Cloverbay*[63] and *Spicer & Oppenheim*,[64] Mr *Marcus* submitted that, whereas English Courts generally do not permit a liquidator G to invoke this mechanism when a firm decision has been taken to institute proceedings or once

they are pending, the position in South Africa[65] is that a person who might be a witness in a pending civil trial relating to the subject-matter of the proposed interrogation is not exempt from interrogation and that the interrogation might even be conducted at a very late stage in the proceedings when H the trial was ripe for hearing. The distinction is not, in my view, as marked as Mr *Marcus* suggested. In *Re Castle New Homes Ltd*[66] Slade J, in dealing with

A the exercise of a Court's discretion to order an examination and with the balancing of the requirements of the liquidator or administrator to obtain information on the one hand against the possible oppression to the person sought to be examined on the other, had stated a rather more detailed rule to the effect, *inter alia*, that'(i)f the evidence shows that the purpose of a liquidator in seeking the examination is to achieve an advantage beyond that available to the ordinary litigant, in litigation which he has already commenced or which he has definitely decided to commence, the predisposition of the Court may well be to refuse an immediate order for examination, unless the liquidator can show special grounds to the contrary'.Id at 789a.67

C In *Cloverbay*,[68] Browne-Wilkinson V-C, commenting on the importance attached by Slade J to the question whether or not the applicant had reached a firm decision to sue, said the following:

> 'The more information there is as to the facts and possible defences to a claim the better informed will be any decision and the greater the likelihood of such D decision being correct. It is the function of a liquidator or administrator to do his best for the creditors. True he is an officer of the Court and must not act in any improper way but, like the Judge, I can see nothing improper in a liquidator or administrator seeking to obtain as much information as possible before committing himself to proceedings. Moreover a test based on the subjective state of mind of the liquidator or administrator inevitably leads to undesirable E disputes of fact, such as have arisen in this case, as to what is his state of mind. In my judgment therefore the test propounded in *Re Castle New Homes Ltd* [1979] 1 WLR 1075 has not proved to be satisfactory and should not in future be applied.
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> Nor do I think that there is any other simple test that can be substituted. The words of the Insolvency Act 1986 do not fetter the Court's discretion in any way. Circumstances may vary infinitely. It is clear that in exercising the F discretion the Court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other.'[69]

This approach was confirmed in the *Spicer & Oppenheim* case.[70]

G [41] It was also pointed out in argument that the liquidator had the additional benefit of the transcript of the interrogation which could be used as evidence against and for purposes of cross-examining the examinee in a subsequent criminal or civil trial. This submission must of course now be read subject to the judgment in H *Ferreira v Levin*[71] as must the submission regarding the duty imposed on a liquidator by s 400 (1) of the Companies Act to ascertain whether the company's directors and officers have been guilty of any criminal offence.

[42] In regard to the particular circumstances of the present case (as embodied in the agreed statement of facts) Mr *Marcus* highlighted a number of features. Since December 1992 the applicants have

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A co-operated fully with and rendered assistance to the liquidators and their attorneys and the investigating accountants. The applicants have furnished them with all their working papers and such explanations and further information as they required. At no stage prior to the commencement of Mr Bernstein's examination on 2 August 1994 (the first of the applicants to be examined) did the respondents B inform the applicants that they considered Kessel Feinstein to be civilly liable in consequence of the manner in which the firm had performed its professional duties as auditors of the companies in

the Tollgate Group or that the examination would be aimed, *inter alia*, at gathering evidence to support a possible claim against Kessel Feinstein. The liquidators addressed a memorandum to the applicants of issues C which would be canvassed in their interrogation. Although they were warned that the list was not exhaustive, there was no intimation from the liquidators that the civil liability of Kessel Feinstein would in any way be canvassed. Yet the liquidators had, prior to Mr Bernstein's examination, instructed their investigative D accountants to conduct an investigation into the potential liability of Kessel Feinstein and had decided that one of the objects of the interrogation was to explore their potential liability and to obtain concessions and admissions concerning their alleged negligence in the performance of their duties. When Mr Bernstein came to be questioned, his interrogation was indeed designed to elicit concessions and E admissions regarding his and the firm's civil liability. The liquidators were assisted in the interrogation by the very attorneys and investigative accountants with whom the applicants had so closely co-operated since 1992. As a result of rulings by the commissioner which deny Mr Bernstein access to his legal representatives during his interrogation and to documentation relevant to his interrogation, it is F contended that the applicants could not meaningfully prepare or have the benefit of legal advice on the surprise attack on themselves.

[43] The mechanism of ss 417 and 418 and its employment in the present case was accordingly characterised by the applicants as one whereby innocent outsiders, who G played no part in the management of the company or its demise, are forced to go to a place where they do not want to be; are forced to give evidence by their own oral testimony and by the production of documents by which they incriminate themselves and which can then be used to vest them with civil or criminal liability; are forced to reveal confidential information that they want to keep private; are forced to H produce their private books and documents, that they want to keep confidential; are forced to do so without being heard on the decision to subject them to the mechanism; are forced to do so in circumstances which render meaningful and effective legal representation all but impossible; and are exposed to criminal I conviction or civil liability on their own evidence extracted under legal compulsion in a process devoid of the normal checks and balances built into criminal or civil litigation.

[44] It was against this general background that Mr *Marcus* submitted that the whole mechanism of ss 417 and 418 violates the cluster of rights comprising the J right to freedom and security of the person in terms of

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A s 11(1); the right to personal privacy in terms of s 13; and the right not to be subject to the seizure of private possessions or the violation of private communications, as a component of the right to personal privacy in terms of s 13.

The attack based on s 11(1)

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[45] It is to be borne in mind that the applicants' third basis of attack is focused on s 417(2)*(b)* of the Act and its inconsistency with the fair criminal trial rights embodied in s 25(3) of the Constitution. The present attack based on s 11(1) is accordingly a much narrower attack than the s 11(1) attack in *Ferreira v Levin*,[72] for C in that case the s 11(1) attack was also directed at s 417(2)*(b)* and in particular the ouster of the privilege against self-incrimination. Moreover, the present attack must be considered in the light of the effect which the judgment and order in *Ferreira v Levin* has on the mechanism of ss 417 and 418, namely that answers D which tend to incriminate the examinee may not be used against the examinee in subsequent criminal proceedings (except in those special cases exempted in the order and which are not relevant to the present proceedings).

[46] Mr *Marcus'* attack based on s 11(1) (and indeed his attack based on the other E provisions of the Constitution) ignores the fact that the provisions of ss 417 and 418 are not, in their application, completely open-ended. As already indicated, the Courts

in this country have (as have the Courts in other countries) developed a considerable body of case law the design of which is to prevent the mechanism of ss 417 and 418 (and the mechanisms of comparable statutory provisions in foreign jurisdictions) being used oppressively, vexatiously or unfairly towards the F examinee. I have no doubt that our Supreme Courts will continue to develop that body of law having due regard to the spirit, purport and objects of the Constitution's chapter of fundamental rights.[73] It is accordingly not open to argue that, because the provisions of ss 417 and 418 are general in terms and contain no express G limitations as to their application, the constitutionality of these sections is to be adjudicated on the basis that they permit anything which is not expressly excluded. It is trite law that a statutory power may only be used for a valid statutory purpose.[74] The constitutionality of ss 417 and 418 must therefore be assessed in the light of the control which the Supreme Court exercises over their implementation. H

[47] A large number of Mr *Marcus'* complaints (particularly in regard to Mr Bernstein's actual examination and the circumstances surrounding it, the alleged trap that was laid for him, his inability to prepare and the various other limitations to which he was subjected) relate to the manner in which the examination was I conducted by the commissioner and not to any provision in the sections of the Act under attack. There is nothing in

A the sections which mandates that the examination be conducted in this way. In respect of all these complaints the applicants' correct remedy was to approach the Supreme Court for relief on the basis that the exam-i-nation was being conducted in an oppressive, vexatious or unfair manner. I deliberately refrain from expressing any view as to the validity of any of the complaints on this score. The only point I make is that the Supreme Court has jurisdiction to deal with complaints of this B nature. It is a jurisdiction which (on the facts and circumstances of this case and in relation to these specific complaints) should first have been exhausted before any approach was made to this Court. It is unnecessary for purposes of this case to express any view as to how this Court would deal with an ultimate complaint that C the Supreme Court's interpretation of a statute or its enunciation or development of the common law is unconstitutional.

[48] There is accordingly little left of the attack based on s 11(1) of the Constitution to deal with. In *Ferreira v Levin*,[75] it was only myself and Sachs J who based our D judgments on an infringement of s 11(1).[76] The President and five members of the Court decided the case on the basis of an infringement of s 25(3) but also disagreed with my broad construction of the s 11(1) residual right to freedom.[77] They expressed the view that the 'primary, though not necessarily the only, purpose of s 11(1) of the Constitution is to ensure that the physical integrity of every person is E protected',[78] but added that they could

> 'see no objection to accepting provisionally that s 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under chap 3'.[79] F

[49] The order in *Ferreira v Levin*, and the view of the majority who found s 417(2)*(b)* of the Act to be inconsistent with s 25(3) of the Constitution, does not assist the applicants in their broader attack on ss 417 and 418 which goes beyond an objection to the use of self-incriminating answers in subsequent criminal proceedings against the examinee. It is an attack based, in the first instance, on the s G 11(1) freedom rights.

[50] It is unnecessary to elaborate any further on what I have already said concerning the objectives sought to be achieved by the mechanism embodied in ss 417 and 418. They are all very important public policy

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A objectives. I would endorse the following observation of Windeyer J in *Rees v Kratzmann*,[80] as quoted with approval by Mason CJ in *Hamilton v Oades*:

> 'The honest conduct of the affairs of companies is a matter of great public concern today.'[81]

B This is particularly the case in South Africa at present. Such honest conduct cannot be ensured unless dishonest conduct, when it occurs, is exposed and punished and ill-gotten gains restored to the company. Such exposure cannot, in its turn, effectively take place unless the affairs of companies which fail are thoroughly investigated and reconstructed, an objective which is difficult, and often C impossible, to achieve without the full co-operation of the directors, office-bearers and auditors of the company who are, after all, the brains, eyes and ears of the company. On the obligations resting on such persons, I said the following in *Ferreira v Levin*:

> 'Companies are used to raise money from the public and to conduct business on D the basis of limited liability. There are obvious advantages to doing so. But there are responsibilities which go with it. Part of the responsibility is to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business. These responsibilities are well known to all who participate in the running of public companies. . . . Although it has been held E that an auditor is not an officer of the company within the meaning of that expression in s 184(1) of the 1926 Act (corresponding to s 423(1) of the present Act) and it has been suggested that there is no basis for regarding an auditor as being an officer of the company for any purpose of the Act, in my view the same public policy considerations apply to the use of derivative evidence of an auditor of the company compelled to testify under s 417(2)*(b)* of the Act. The F auditor has, *inter alia*, many statutory duties under the Companies Act and the Public Account-ants' and Auditors' Act, the purpose of which duties is, *inter alia*, to protect shareholders and creditors. The knowledge and expertise of the auditor is of particular importance in reconstructing the affairs of the company in liquidation and in achieving the other aims of the s 417 enquiry. An auditor is not obliged to become the auditor of a particular company nor to G discharge the attendant duties without remuneration. In accepting appointment as an auditor of any particular company the auditor is aware of these duties.'[82]

It is clear from the authorities cited earlier in this judgment[83] that there are occasions when these mechanisms are essential in order to obtain information from H complete outsiders. The examinee in the s 417 enquiry is not so differently situated from witnesses in any other proceedings, especially in the light of this Court's judgment in *Ferreira v Levin*, which in effect established a direct use immunity in criminal proceedings in respect of self-incriminating testimony.

I [51] Against this background I proceed to deal with the attack based on s 11(1) of the Constitution. I do so on the basis of the views expressed by the majority of the Court in *Ferreira v Levin* on the construction of

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A s 11(1), referred to in para [48] above. No good purpose would be served, so soon after that judgment, by repeating my arguments for giving s 11(1) a wider construction. The obligation to respond to a subpoena and to be present at the appointed time and place would not, on the majority view, compromise the physical integrity of the sub-poenaed witness. In all democratic societies the State has the B duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons charged with having committed crimes. In a constitutional State that obligation is of fundamental importance and it is clearly recognised as such in our Constitution. Our Constitution is the supreme law of the land and makes provision in chap 7 for the judicial authority to vest in the courts. The use of C subpoenas to require witnesses to attend courts, to produce documents and where necessary to give evidence is essential to the functioning of the court system. It is no doubt possible for the rule governing the issuing of subpoenas to be misused. The courts have the power to set aside subpoenas which have been issued for an D improper purpose, or which are vexatious in other respects, but in its practical application that power is limited, and the possibility of the process of the court being abused in particular cases cannot be excluded.[84]

[52] The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the E power should, for this reason, be characterised as infringing s 11(1) of the Constitution. The

law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena. Absent such proof it is the duty of persons who F are sub-poenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so. The fact that the present case is concerned with enquiries under ss 417 and 418 of the Companies Act, and not with a trial, does not affect the characterisation of the obligation to honour a subpoena to attend the enquiry. It is a civic obligation recognised in all G open and democratic societies and not an invasion of freedom.

[53] Witnesses who ignore subpoenas or who refuse to answer questions put to them may be subjected to the sanction of imprisonment. That is true of all persons who contravene legislation that has been lawfully passed. The execution of the H sanction implicates the physical integrity of the person who is imprisoned for the breach of the law. Section 11(1), which pointedly refers to detention without trial, does not include within its scope imprisonment consequent upon the sentence of a court. Legislation invariably makes provision for sanctions, including the possibility of imprisonment, and it could never have been the intention of the I framers of the Constitution to require all laws which contain such a sanction to meet the test of necessity prescribed by s 33(1) for any limitation of a s 11(1) right.

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A [54] It is perfectly clear that the sanction of imprisonment properly imposed by a court in respect of legislation which is otherwise constitutional, is justifiable in an open and democratic society. Sanctions are necessary to make legislation effective, for without them laws could be broken with impunity. Thus, even if s 11(1) was to B be construed as applying to a statutory provision authorising a court to impose a sentence of imprisonment upon a person convicted of contravening the law, such a provision would almost always be justifiable under s 33. There may be cases in which the sanction authorised or required by the statute is out of proportion to the offence. But even then it is doubtful whether s 11(1) would be implicated. Such C cases would more properly be dealt with under s 11(2) of the Constitution, which is concerned with excessive punishments, than under s 11(1). That question does not, however, arise in the present case.

[55] The sanction of imprisonment for ignoring, or failing without sufficient cause D to give effect to a subpoena issued under s 417 or s 418 of the Companies Act is a reasonable and necessary sanction. So too is the power to cause a person in breach of such a subpoena to be arrested and brought before the Master or other person appointed to conduct the enquiry. Imprisonment follows in accordance with the normal pro-cedural safeguards, therefore neither s 11(1) nor s 25 is impaired; and it E is not a sanction which is disproportionate to the offence, therefore s 11(1) and (2) are not impaired. The sanctions are necessary to enforce the legislation and insofar as they have to comply with s 11(1) read with s 33, they clearly do so. The same conclusion, regarding justification under s 33(1), would be reached on the broad interpretation I placed on the right to freedom under s 11(1) in *Ferreira v Levin*. F The mechanism provided by ss 417 and 418 is absolutely essential, and therefore necessary, to achieve these important public policy objectives. They cannot be achieved in any other way which would impinge less on an examinee's right of freedom, particularly when regard is had to the Supreme Court's power to control G an examination and prevent it from being vexatious, oppressive or unfair. The limitation of the examinee's right of freedom is also clearly reasonable and justifiable in an open and democratic society based on freedom and equality. The duty to testify is well recognised in such societies, whether it be in the context of a criminal or civil trial or in investigatory proceedings such as inquests or bankruptcy H enquiries. (On the approach favoured by me in *Ferreira v Levin* I would have found that the statutory compulsion to obey a subpoena infringed s 11(1) but that this was a limitation manifestly justified under s 33(1).)

I The attack based on the s 13 right to personal privacy and the right not to be subject to the seizure of private possessions or the violation of private communications

[56] As part of their attack on the constitutionality of ss 417 and 418 of the Act the applicants submit that 'a witness's privacy is clearly invaded when he is forced to J disclose his books and documents that he wants to keep confidential and to reveal information that he wants to keep to

A himself'. In addition, the applicants contend that the 'compulsory production of documents under s 417(3) constitutes a "seizure" within the meaning of the right not to be subject to the "seizure of private possessions" in terms of s 13 of the Constitution'. These are different attacks and will be dealt with separately.

B [57] Section 13 of the Constitution entrenches the right to privacy as follows:

> 'Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

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[58] A distinction must be drawn between the compulsion to respond to a subpoena and the compulsion to answer particular questions at a s 417 enquiry in consequence of responding to the subpoena. The mere compulsion to be physically present at a particular place at a particular time in response to a subpoena cannot in itself be regarded as an intrusion on a person's privacy, however widely that D concept is defined. It could be examined in relation to concepts such as freedom or perhaps even dignity, but it cannot notionally be categorised as interfering with one's privacy. It may of course be that, in particular circumstances, the disclosure of the person's identity might constitute a breach of the right to privacy, but that does E not arise in this case. It is the compulsion to respond to particular questions about oneself and one's activities, for example, which could lead to an infringement of one's right to personal privacy. Before this stage is reached a person's privacy is not compromised.

[59] Before considering whether and to what extent the answering of particular F questions at a s 417 enquiry could constitute an infringement of an examinee's s 13 right to personal privacy, it is essential to consider and analyse the source of such compulsion. This must be done, however, in the light of two relevant and interrelated provisions of the Constitution. Section 35(2) provides for the 'reading G down'[85] of a statute[86] in the following terms:

> 'No law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in H accordance with the said more restricted interpretation.'[87]

Section 35(3) moreover provides that in the interpretation of any

A statute[88] and the application and development of the common law 'a court shall have due regard to the spirit, purport and objects of this chapter'. One of the objects of chap 3, apart from entrenching the fundamental rights it does, is to ensure through s 7(4) that any person whose chap 3 rights are infringed or threatened with infringement will have an 'appropriate' remedy, without specifying or limiting the B nature of such remedy.

[60] I return to the significance of the source of the compulsion to answer specific questions at the s 417 enquiry. Section 417(2)*(b)*, before it was declared invalid to the extent indicated in the order of this Court in *Ferreira v Levin*, in express and C unequivocal terms compelled an examinee to answer a question even though this might tend to incriminate the examinee and further provided that such incriminating answer could be used thereafter in evidence against the examinee, *inter alia* in criminal proceedings. On the clear wording the provision could simply not be read D

down so as not to exceed the examinee's chap 3 rights. Accordingly, the Court could not avoid declaring the provision in question invalid to the extent indicated in its order. There is no other provision in s 417 or s 418, or for that matter in any other provision of the Act which expressly or by necessary implication compels the examinee to answer a specific question which, if answered, would threaten any of E the examinee's chap 3 rights. It must, in my view, follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's chap 3 rights. Fidelity to s 35(2) of F the Constitution requires such a construction and fidelity to s 35(3) read with s 7(4) of the Constitution requires an appropriate remedy; in the present case that the examinee should not be compelled to answer a question which would result in the infringement of a chap 3 right.

[61] In this context the provisions of s 418(5)*(b)*(iii)(*aa*) of the Act are important. G The subparagraph in question provides that a person who, having been duly summoned under s 417 or s 418 to the examination

> 'fails, *without sufficient cause* . . . to answer fully and satisfactorily any question *lawfully* put to him in terms of s 417(2) or this section . . . shall be guilty of an offence'.

(Emphasis supplied.) Nothing could be clearer, in my view, than this. If the answer H to any question put at such examination would infringe or threaten to infringe any of the examinee's chap 3 rights, this would constitute 'sufficient cause', for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token

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A the question itself would not be one 'lawfully put' and the examinee would not, in terms of this very provision, be obliged to answer it. The answer to this leg of Mr *Marcus'* argument is that there is, on a proper construction of these sections, and in the light of this Court's order in *Ferreira v Levin*, no provision in s 417 or s 418 of the Act which is inconsistent with the examinee's right to privacy in terms of s 13 of B the Constitution now under consideration.

[62] The Constitution has in principle brought about a fundamental change to the way in which the evidential privileges of a witness or those of an examinee at any statutory enquiry (for purposes of the present case it is unnecessary to go further than this) should be approached. It is not, however, in the first instance, the task of C this Court to determine what effect such approach will have on the law of evidence relating to privilege, save in those cases (of which s 417(2)*(b)* is an example) where there is an explicit statutory provision which cannot be read down as required by s 35(2) of the Constitution.

D [63] In the case of common-law privilege which has not been limited by statute it is the function of all the courts which are empowered to do so, and in particular that of the Supreme Court, in execution of the duty imposed on them by s 35(3) of the Constitution, to 'have due regard to the spirit, purport and objects of' chap 3 in the 'development of the common law' of privilege. Such development can consist of the E extension or the limitation of a privilege.

[64] The present attack is in the vaguest terms, namely an assertion that the privacy of witnesses is invaded when they are forced to disclose their books and documents that they want to keep confidential and to reveal information that they want to keep F to themselves. No real information is furnished as to the nature or content of the documents or information in respect whereof the claim to privacy is being made. In the present context a claim to privacy can surely only be founded on the content of the information which the examinee is being forced to disclose, not on his desire not to disclose it. It is simply not possible to pronounce on the issue of privacy unless G the content of the document or information in respect whereof privacy is claimed is disclosed. Under these circumstances it would be most inadvisable, if not in fact

impossible, to give a detailed exposition on the constitutional right to privacy at s 417 proceedings, quite apart from the fact that I am of the view that this is, in the first instance, an exercise which the Supreme Courts ought to work out on a case to H case basis. It is sufficient for the disposition of this part of the case to repeat that there is no provision in s 417 or s 418 which, when properly construed in the light of s 35(2) and (3) of the Constitution, is inconsistent with such right.

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[65] The aforegoing conclusion renders it unnecessary, strictly speaking, to consider whether the compulsion to answer the questions which the applicants complain of do infringe their constitutional right to privacy. It would nonetheless be appropriate, I believe, to venture some preliminary observations on the scope of this right. The concept of privacy is an amorphous and elusive one which has been J the subject of much scholarly

A debate.[89] The scope of privacy has been closely related to the concept of identity and it has been stated that 'rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity'.[90]

B [66] In expanding upon this notion *Forst*[91] acknowledges that communal bonds are not to be substituted with abstract relations, but argues beyond this for a multi-levelled recognition of identity. Besides the concrete and abstract realms, this thirdly also pertains to societal membership[92] and fourthly to the community of humanity[93] itself.

C [67] The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. D In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member E

A of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

[68] In South African common law the 'right to privacy is recognised as an B independent personality right which the Courts have included within the concept of *dignitas*'.[94]

> 'Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.'[95]

In *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another*[96] it C was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged 'in the light of contemporary *boni mores* and the general sense of justice D of the community as perceived by the Court'.[97]

[69] Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence,[98] the reading of private documents,[99] listening in to private conversations,[100] the shadowing of a person,[101] the disclosure

of private facts which have been acquired by a wrongful act of intrusion,[102] and the disclosure of private E facts contrary to the existence of a confidential relationship.[103]

These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities.

[70] In *S v Naudé*[104] Corbett JA said with regard to the inquisitorial F power of a commission of inquiry that the exercise thereof 'makes an important inroad upon the right of the individual to "the tranquil

A enjoyment of his peace of mind". . . and such privacy as the law allows him'. The learned Judge of Appeal defined the risk inherent in such proceedings as that of 'having aspects of (one's) *private* (life) exposed'.[105] (Emphasis added.) It is clear that these *dicta* do not provide any authority for the notion that the right to privacy B extends beyond the private sphere of an individual's existence. By qualifying the right as 'such privacy *as the law allows him*' (emphasis added), Corbett JA acknowledges that the law as it stands embodies a quantification of diverse interests, ranging from that of the individual, to those of his fellow community C members. Such an interpretation would accord with the conceptual analysis advanced *supra*. Such an approach is also supported by *O'Keeffe's* case.[106]

Similarly the statement of MacDonald JA in *R v Parker*[107] that '*(t)*he procedure laid down in s 102 is exceptional . . . and constitutes an inroad into the right of privacy possessed by every member of the public', should be read in the light of his D subsequent statement qualifying the scope thereof to the 'reasonable and proper limits of privacy'.[108]

[71] Caution must be exercised when attempting to project common-law principles onto the interpretation of fundamental rights and their limitation; it is important to keep in mind that at common law the determination of whether an invasion of E privacy has taken place constitutes a single enquiry, including an assessment of its unlawfulness. As in the case of other *iniuriae*, the presence of a ground of justification excludes the wrongfulness of an invasion of privacy.[109] In constitutional adjudication under the Constitution, by contrast, a two-stage approach must be employed in deciding constitutionality of a statute.

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[72] Article 8(1) of the European Convention on Human Rights provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. This right is limited by art 8(2) on the basis that interference may only occur in accordance with the law, and must be necessary in a democratic G society. It is difficult to distinguish clearly between the right to private life on the one hand, and the rights belonging to the private sphere on the other. The Commission has however held that such a clear delimitation was unnecessary since a complaint concerning violation of the private sphere could be based on

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A the provision as a whole. The difficulty that remains is the determination of the scope of 'the provision as a whole' or, as it is commonly called, 'the right to privacy'.[110]

[73] Use of this term has not been unproblematic, since in terms of a resolution of the Consultative Assembly of the Council of Europe this right has been defined as follows:

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> 'The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and

reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information C given or received by the individual confidentially.'

And in the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967 the following additional elements of the right to privacy are listed: the prohibition to use a person's name, identity or photograph without his/her consent, the prohibition to spy on a person, respect for correspondence and the D *prohibition to disclose official information*. The Commission has connected the right to privacy of art 8 also with the right to freedom of expression of art 10 by stating that 'the concept of privacy in art 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the fulfilment of one's personality'.[111] This expansion of the concept by the European Commission is E strongly reminiscent of *Forst's* explanation *supra* as to his use of the concept of 'identity', namely that it refers to the ability of a person to relate to him- or herself and to be able to relate to others in a meaningful way.

[74] In *Fayed v The United Kingdom*[112] the investigation into the affairs of a F public company and the subsequent publication of the inspectors' report by the Secretary of State for Trade and Industry in terms of ss 432(2) and 437(3) of the English Companies Act was considered by the European Court of Human Rights in the light of arts 6(1) and 8 of the European Convention. Article 6(1) embodies the right to a fair and public hearing, while art 8 guarantees the right to respect for G private life. The final report of the inspectors, containing findings to the effect that the Fayeds had made dishonest representations in the course of a takeover bid and in the investigation itself, was widely reported in the communication media. The Fayeds were never prosecuted. One of the claims brought to the European Court by the applicants was that publication of the inspectors' report had unjustifiably H interfered with their honour and reputation, protected as part of their right to respect for private life under art 8 of the Convention. Although not directly in point, the judgment of the Court dismissing the complaint contains instructive *dicta* on privacy and public policy. The Court gave little attention to whether there had I been a facial infringement of any of the

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A rights and proceeded almost directly to the second leg of the enquiry, and, holding that the result would be the same regardless of whether the complaint was construed as an infringement of art 6(1) or the art 8 right to privacy, tested the legitimacy and proportionality of the infringement. In this context the Court found that'(t)he underlying aim of this system is clearly the furtherance of the public interest in the proper conduct of the affairs of public companies whose owners benefit from limited liability. . . . The system contributes to safeguarding the interests of various parties concerned in the affairs of public companies such as investors, shareholders, especially small shareholders, creditors, customers, trading partners and employees, as well as ensuring the structures.'Id para 69.113

C Regarding the right to a good reputation, the Court remarked that '*(t)*he individual's interest in full protection of his or her reputation' must, to varying extents, 'yield to the requirements of the community's interest in independent investigation of the affairs of large public companies'[114] and, more pertinently for present purposes, that'. . . the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals. . . . Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest. . . .'Id para 75.115

E As will be seen in the following paragraphs, this echoes to some extent the approach of the United States Courts in determining the existence of a 'reasonable expectation of privacy', but it must of course be noted that the above comment was in regard to the limitation and not the scope of the right in question.

F [75] The question corresponding to determining the 'scope of the right to privacy' in United States constitutional inquiry, is whether a search or seizure has occurred. The US Supreme Court has defined 'search' to mean a 'governmental invasion of a person's privacy' and it has constructed a two-part test to determine whether such an G invasion has occurred. The party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has recognised that expectation as *objectively reasonable*. In determining whether the individual has lost his/her legitimate expectation of privacy, the Court will consider such factors as whether the item was exposed to the public, H abandoned, or obtained by consent.[116] It must of course be remembered that the American constitutional interpretative approach poses only a single inquiry, and does not follow the two-stage approach of Canada and South Africa. Nevertheless it seems to be a sensible approach to say that the scope of a person's privacy I extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.

A [76] The Canadian Charter of Rights and Freedoms does not specifically provide for the protection of personal privacy. As in the United States, the issue arises in connection with the protection of persons against unreasonable search and seizure, which in Canada is afforded by s 8 of the Charter. In defining the scope of this protection the Canadian Courts have adopted an approach similar to that followed in United States jurisprudence. In *McKinley Transport Ltd et al v The Queen*[117] B Wilson J quoted with approval the following exposition of Dickson J in *Hunter et al v Southam Inc*:[118]

> 'The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s 8, C whether it is expressed negatively as freedom from "unreasonable" search or seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest to be left alone by government must give way to government's interest in intruding on the individual's privacy in D order to advance its goals, notably those of law enforcement.'

Wilson J pointed out[119] that one of the purposes underlying the s 8 right is the 'protection of the individual's reasonable expectation of privacy'. Since an enquiry into privacy constitutes an important component in determining the scope of an unreasonable search or seizure, the Courts have had to develop a test to determine the scope and content of the right to privacy. The 'reasonable expectation of E privacy' test comprises two questions. First, there must at least be a subjective expectation of privacy[120] and, secondly, the expectation must be recognised as reasonable by society.[121]

[77] The German Basic Law does not in express terms entrench a general right to F privacy although isolated aspects of privacy are protected in, for example, art 4 (freedom of belief), art 10 (protection of postal communications) and art 13 (inviolability of the home). The protection of a general right to privacy has been developed by the Federal Constitutional Court (FCC) on a case to case basis.[122] It has held that the constitutional obligation to respect the sphere of G intimacy of individuals is based on the right to the unfettered development of personality embodied in art 2 (1) of the Basic Law[123] and in determining the content and ambit of this fundamental right, regard must be had to the inviolability of dignity in terms of art 1(1), which must be respected and protected by the judicial system.[124] Privacy is also protected out of respect for dignity and H this linking up of art 2(1) and art 1 results in the limitation provisions of art 2(1) being applied more strictly in the case of

A infringement of the right to privacy.[125] A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond

interference from any public authority.[126] So much so that, in regard to this B most intimate core of privacy, no justifiable limitation thereof can take place.[127] But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.[128]

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[78] In 34 *BVerfGE* 238 the FCC was concerned with the objection to the admissibility of secretly made tape recordings indicating that the complainant was guilty of fraud and tax evasion. While upholding the objection, the FCC pointed out that there were circumstances in which a tape recording made without the D knowledge of the speaker would fall outside the area of protection afforded by art 2(1) read with art 1(1) -

> '*(b)*ecause in these cases it is the general *consensus* that the right to one's own words no longer enters the question. For example, insofar as it has become common practice in commercial dealings to keep a record of telephone messages, orders or stock-exchange reports by means of a tape recording, the E right of the speaker to the unfettered development of the personality will, generally speaking, not be affected. In communications of this sort the objective content of the statement is so much in the foreground that the personality of the speaker is almost completely obscured by it and the spoken word thereby loses its private character.'[129]

F In principle this approach resembles the 'reasonable expectation of privacy' test, referred to above. In German law when insolvents[130] are examined on the causes of their insolvency, they are obliged to answer all questions put, even though the questions might tend to incriminate them, but the FCC has however, in its judgments, crafted a use immunity in respect of such answers if they are sought to be used against

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A insolvents in subsequent criminal proceedings against them.[131] The justification for the compulsion is instructive. The nature and extent of the art 2(1) right

> 'also depends on whether and to what extent other people depend on the information provided by the person in question; in particular whether the information belongs to a sphere of duties which the person in question has B taken up voluntarily'.[132]

The insolvent is regarded as having specific duties towards the creditors, who have been harmed by his actions;[133] there are not only state or public interests at stake but those of third parties, who have suffered damage and demand information.[134]

C [79] The German, European and American approach seems to accord with the analysis attempted above, namely that the nature of privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience. The two-stage approach requires, as the first step, a definition of the scope of the relevant right. At D this stage already, in defining the right to privacy, it is necessary to recognise that the content of the right is crystallised by mutual limitation. Its scope is already delimited by the rights of the community as a whole (including its members).

E [80] The facts operative in the present case concern neither the invasion of private living space, nor any specific protected relationship. Against the background of the approach alluded to above, the relevant core to be considered appears to be the one defining privacy as inhering in the person, suggested above.[135]

[81] The present judgment has been at pains to point out, in the light of *Ferreira v* F *Levin*, that directors, officers of the company generally, auditors of the company and certain outsiders have a duty to assist a s 417 enquiry achieve its objects. This duty has been voluntarily assumed by such persons entering into their respective relationships with the company.

G [82] Section 417(2) permits interrogation concerning any matter referred to in s 417(1). The latter section refers to

> 'any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company'.

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In effect the section permits questions to be asked in connection with property, claims or the 'trade, dealings, affairs or property of the company'. The scope of the interrogation in terms of s 417(2) of the Act

A must, however, be informed by the purpose of the enquiry. Insofar as the purpose is concerned with the discovery of information which may be to the financial benefit of the company and relates to the proper winding-up of the company, as more fully analysed above, the scope of the questioning is limited to this purpose.

B [83] Although the phrase 'information concerning the . . . affairs . . . of the company' appears to be quite broad facially, it must be construed in conformity with the aforementioned purpose of the enquiry. It is difficult to see how any information which an individual possesses which is relevant to the purpose of the enquiry can truly be said to be private. One is after all concerned here with the affairs of an C artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities. In the words of Rogers CJ in *Spedley Securities v Bond Corporation Holdings Ltd*, directors and others concerned with the management and affairs of a failed company (in D which category of persons I would certainly include the auditors) 'owe a duty to creditors and shareholders to provide a candid, full and truthful account of their stewardship'.[136] This duty arises from the very fact that the company has no mental or sensory capacities of its own.

E [84] In this regard I find the following observation of Bryson J in *Lombard Nash International Pty Ltd v Berentsen*, when made in relation to precisely this corporate deficiency, acute, sound and relevant:

> '(T)he company in a fair sense ought to be thought of as the owner of the knowledge in their (the officers' of the company) minds.'[137]

F If that is so, and I agree that it is for purposes of present analysis, then it can hardly be said that the knowledge of the director, official or auditor bearing relevantly on the affairs of the company that has failed can be said to fall within such person's domain of personal privacy. I would hold the same in relation to a mere debtor or creditor of the company. If such knowledge is relevant, it is relevant because of some legal relationship between such person and the company, which G can hardly be said to be private.

[85] The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds H belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere cannot rightly be I held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and the

A debtors of the company. On the facts of this case the conclusion seems to be unavoidable that no threat to or infringement of any of the applicants' right to privacy

as protected by s 13 of the Constitution has been established. The application of the Constitution to the issue of 'sufficient cause' in the present context would operate as follows. The first part of the enquiry is whether answering the B particular question would infringe the applicant's right to privacy. If it would, this would constitute 'sufficient cause' for declining to answer the question unless the s 418(5)*(b)*(iii)(*aa*) compulsion to answer the question would, in all the circumstances, constitute a limitation on the right to privacy which is justified under s 33(1) of the Constitution.

C [86] The applicants further contended that the compulsion to produce documents in terms of s 417(3) of the Act constitutes a 'seizure of private possessions' within the meaning of s 13 of the Constitution. For the sake of convenience s 417(3) of the Act is repeated here:

> 'The Master or the Court may require any such person to produce any books D or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.'

[87] Reference should in this regard also be made to s 418(5)*(b)*(iii)(*bb*), which provides that any person who has been duly summoned under s 417 or s 418 to an enquiry and who

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> 'fails, without *sufficient cause* . . . to produce books or papers in his custody or under his control which he was required to produce in terms of s 417(3) or this section, shall be guilty of an offence'.

(Emphasis added.)

[88] It seems to me that this part of the argument must be disposed of in exactly the F same way as the previous argument based on the general right to personal freedom in s 13. Sections 417 and 418, and in par-ticular s 418(5)*(b)*(iii)(*bb*), are capable of being read down, and must be read down, in such a way that they do not compel a person to produce books or papers which would result in an infringement of such person's s 13 right 'not to be subject to . . . the seizure of private possessions . . .'. G Similarly, nothing could be clearer, in my view, than that, if the production of any book or paper would infringe the producer's right not to be subject to the seizure of private possessions, this would, for purposes of the above provision, constitute 'sufficient cause' for refusing to produce such books or papers unless such right of H the producer is subject to limitation under s 33(1) of the Constitution. In this regard it is also in my opinion the task of the Supreme Court, in the first instance, to develop the concept of the right not be subject to the seizure of private possessions, its content and limits.

[89] A few general observations may not, however, be out of place. In the normal I course, the section would hardly be used to compel examinees to produce 'private possessions' since such possessions would hardly relate to company affairs. But, insofar as private books and papers might relate to the company, the section is open to an interpretation which would permit the Master or the Court to compel the production of such documents. The compulsion to produce such private J documentation

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A would also constitute a 'seizure' within the meaning of s 13 of the Constitution. As pointed out by some of the Canadian Judges referred to below, no sound distinction can be made in theory or practice between compelling a person to produce documentation and the physical removal of such documentation from a person. B Again the infringement of s 13 would result as an incidental effect rather than the purpose of employing ss 417 and 418. Moreover, examinees could also approach the Courts to control oppressive, vexatious or unfair use of the section. It is likewise difficult to see how a document which was truly relevant to the matters legitimately being examined, could be said to be a private document.

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[90] Even if it could be established that, in certain circumstances, and despite a proper construction of ss 417 and 418 of the Act and proper control of their implementation by the Supreme Court, the production of private possessions or D private communications could be compelled under s 417(3) or s 418(2) of the Act, and in particular that they were relevant to the enquiry and the achievement of its objects, in the sense that I have outlined in this judgment, such production would clearly be justifiable in terms of s 33 of the Constitution. In South Africa, the right not to be subjected to seizure of private possessions forms part of every person's E right to personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy. So much is also clear from the qualification of the right, ie the right against seizure of *private* possessions. I have repeatedly emphasised that privacy concerns are only remotely implicated through F the use of the enquiry. The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributors' financial interests in the recovery of company assets must be weighed against this, peripheral, G infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have no doubt that ss 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of s 33 of the Constitution.

[91] The US Supreme Court has held that corporate officers cannot invoke the H protection which the Fourth Amendment affords against searches and seizures. In *Hale v Henkel* the Court stated:

> 'Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no I contract not authorised by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, J could not in the exercise of its sovereignty inquire how these franchises had

A been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.'[138]

The Court also held as follows:

> 'We think it quite clear that the search and seizure of the Fourth Amendment was not intended to interfere with the power of the court to compel, through a B *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence.'[139]

[92] It is, as already indicated, notionally possible that under ss 417(3) and 418(2) of the South African Companies Act the production of documents which are not company documents or records in the strict sense might be compelled. Nevertheless, provided the documents were relevant to any legitimate enquiry C under s 417, their compelled production would be justified for the very same reason that the compelled answers to similarly relevant questions would be justified. Sections 417 and 418 of the Act are accordingly not inconsistent with any of the s 13 rights. D

The alleged violation of s 24 of the Constitution

[93] Section 24 of the Constitution reads:'Every person shall have the right to -

> *(a)* lawful administrative action where any of his or her rights or interests is E affected or threatened;
>
> *(b)* procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
>
> *(c)* be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
>
> F *(d)* administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

It was submitted in this regard that the whole mechanism set up by ss 417 and 418 of the Act violates s 24 in that it permits an inquiry in violation of paras *(b)* and *(c)* of s

24. Both paragraphs are triggered when someone's 'rights' are 'affected' by 'administrative action'. Paragraph *(b)* is also triggered whenever someone's 'rights' G are 'threatened' or 'legitimate expectations' are 'affected or threatened'. Paragraph *(c)* is also triggered whenever someone's 'interests' are 'affected'.

[94] There is certainly an argument to be made for the proposition that enquiries conducted pursuant to the provisions of ss 417 and 418 of the Act and the H performance by commissioners of their duties to report thereunder constitute administrative action within the meaning of s 24 of the Constitution. The Court of Appeal in England in the *Pergamon Press* case,[140] a decision relied upon by Mr *Marcus*, held that enquiries of this kind, although merely investigative in nature, do adversely impact on the I

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A rights and interests of the witness and accordingly have to be conducted in accordance with the principles of natural justice. Lord Denning said the following in this regard:

> 'It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see *Re Grosvenor & West End* B *Railway Terminus Hotel Co Ltd* (1897) 76 LT 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see *Hearts of Oak Assurance Co Ltd v Attorney-General* [1932] AC 392. They do not even decide whether there is a *prima facie* case, as was done in *Wiseman v Borneman* [1971] AC 297.

C But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding D up: see *Re SBA Properties Ltd* [1967] 1 WLR 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see s 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.

E Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *Reg v Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417.'[141]

Sachs LJ expressed himself as follows:'The nature of the proceeding, the purposes for which the reports may be used, the matter which may be found in them and the extent of the publication being respectively as described, it seems to me, as well as to Lord Denning MR, very clear that in the conduct of the proceedings there must be displayed that measure of natural justice which Lord Reid in Ridge v Baldwin [1964] AC 40 at 65, described as "insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances . . .". To come to that conclusion it is, as recent decisions have shown, not necessary to label the proceedings "judicial", "quasi-judicial", "administrative" or "investigatory": it is the characteristics of the proceeding that matter, not the precise compartment or compartments into which it falls - and one of the principal characteristics of the proceedings under consideration is to be found in the inspectors' duty, in their statutory fact-finding capacity, to produce a report which may be made public and may thus cause severe injury to an individual by its findings.'Id at 402G-403A (Ch) and 541h-542b (All ER).142

[95] I have no quarrel with the judgment, as far as it goes. But the problem which faced the Court of Appeal in the *Pergamon Press* case differs from the problem I confronting us. In that case the issue was whether, at common law, the inspectors

conducting the enquiry had to act in accordance with the principles of procedural fairness. For this reason it was unnecessary for the *Pergamon* Court to characterise the

A nature of the proceedings. On Mr *Marcus'* argument it is essential for us to do so, for the issue before us is not the common-law one, but the constitutional question as to whether paras *(b)* and *(c)* of s 24 of the Constitution apply to an enquiry under ss 417 and 418 of the Act. They only apply if the nature of the enquiry is characterised B as being 'administrative action' because it is only in relation to 'administrative action' that s 24 rights arise.

[96] I have difficulty in seeing how the enquiry in question can be characterised as administrative action. It forms an intrinsic part of the liquidation of a company, in the present case the liquidation of a company unable to pay its debts. Cilliers, C Benade *et al* succinctly describe the role of winding-up or liquidation as follows:

> 'The existence of a company as a separate legal entity, which commences upon its incorporation, is terminated by dissolution of the company. In the course of its existence, however short, the company may have acquired rights and incurred liabilities which have to be dealt with before the company's existence D can be terminated by dissolution. The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company.'[143]

E (Footnotes omitted.) In *Woodley v Guardian Assurance Co of SA Ltd*[144] Colman J, commenting on the similarity between insolvency and liquidation, said the following:

> 'I would go further and suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those (of) the insolvency of an individual. . . . The F winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual.'[145]

[97] The enquiry in question is an integral part of the liquidation process pursuant to a Court order and in particular that part of the process aimed at ascertaining and realising assets of the company. Creditors have an interest in their claims being G paid and the enquiry can thus, at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how s 24*(c)* of the Constitution can be applied to the enquiry, because it is hard to envisage an 'administrative action' taken by the H commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others.

[98] Section 7(1) of the Constitution provides that chap 3 (and thus also s 24) binds 'all legislative and executive organs of State at all levels of government'. I again I have difficulty in seeing how a commissioner, appointed to conduct a s 417 enquiry, can be described as an executive

A organ of State. This observation does not, and is not intended to, anticipate the issue of the so-called 'horizontal' application of chap 3 in legal proceedings between individuals, an issue which is currently under consideration by this Court.

B [99] It is in my view unnecessary, however, in the circumstances of this case, to provide an answer to the question and to decide whether s 24, or any part thereof, applies to ss 417 and 418 enquiries and whether it applies to all such enquiries, whether conducted by the Court, the Master or the commissioner.[146] It is unnecessary, in my view, because, even assuming that the enquiry constitutes administrative action, this does not assist the applicants in establishing that the provisions of ss C 417 and 418 are inconsistent with s 24*(b)* or *(c)* of the Constitution.

[100] The applicants say they are entitled to procedural fairness in terms of s 24*(b)* of the Constitution. Assuming that to be so, I can see nothing in any of the provisions of s 417 or s 418 which is inconsistent (either expressly or by implication) with D such claim. If the applicants are entitled to procedural fairness and were not accorded such fairness by the commissioner, their remedy was to enforce this claim through the ordinary courts.

[101] The applicants also contend that they should at least have been afforded:

E *(a)* Disclosure in terms of s 24*(b)* and *(c)* of the reasons why they were being summonsed, to have enabled them to make meaningful representations to the Court, the Master or the commissioner to dispense with their evidence or to test the decision to summons them by appeal or review, if need be; and

F *(b)* disclosure in terms of s 24*(b)* of the information required from them, to enable them to avoid interrogation by furnishing the requested information, or to prepare for their interrogation, if need be.

Once again I see nothing in the provisions of s 417 or s 418 which stands in the way G of this claim (assuming the applicants to be entitled to this demand) which they could not have sought to enforce through the ordinary courts. The position, as I see it, is simply this: there is nothing in these sections which is inconsistent with s 24*(b)* or *(c)* of the Constitution or the applicants' claims. If applicants have a remedy, and I express no opinion on that question, it lies along another course and H in other courts; it does not lie in striking down these sections in this Court.

The attack based on the right to fairness in civil litigation

[102] The applicants contend that the mechanism under s 417, and particularly the I second part of s 417(2)*(b)*, violates the Constitution to the extent that it enables the liquidator and creditors of a company in

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A liquidation to gain an unfair advantage over their adversaries in civil litigation, in violation of an implied constitutional right to fairness in civil litigation.

[103] The appellants' argument proceeds as follows. The right of access to the courts is constitutionally entrenched. In terms of s 22 of the Constitution, every B person has the right 'to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum'. Where an infringement of or threat to any entrenched right is alleged, the victim is moreover entitled in terms of s 7(4)*(a)* 'to apply to a competent court of law for appropriate relief . . .'. These provisions do not expressly provide for a fair trial, but imply it. C The right of access to court cannot mean simply the right to formally engage in a judicial process, however unfair it might be. In order to have substance and be meaningful, the right of access to court must imply the right of access to a fair judicial process. Because the parties in civil litigation usually seek to enforce claims for payment of money or delivery of some other form of property, the civil D judicial process is used to deprive an adversary of property despite its protection by s 28 of the Constitution. Other civil claims requiring the defendant to do or refrain from doing something will invariably bring into play other constitutionally entrenched rights. Consequently, because civil litigation is almost invariably E directed at intrusion upon the parties' constitutionally protected rights, they are entitled to demand that the process by which it is done, be procedurally fair. If not, the deprivation of the entrenched right is unconstitutional. The need for civil judicial process to be fair is emphasised by the Constitution's insistence that the Judiciary be independent and impartial,[147] the prescribed oath of office,[148] and the F endorsement by the General Assembly of the United Nations of the principle that the Judiciary should be independent and impartial.[149]

[104] These submissions seem to rest on the far-reaching assumption (to which, perhaps not surprisingly, no argument was addressed) that all the rights entrenched G

in the Constitution operate directly and immediately on all legal relationships between private individuals. This is certainly not the case in which to pronounce on this contention. I shall assume, purely hypothetically, in the applicants' favour, that this assumption is sound.

[105] The applicants' attack in this regard fails to address the really crucial issue, H namely whether the Constitution has constitutionalised civil procedure, wholly or in part. No one would dispute that civil procedure ought to aim at fairness between contending parties. That is,

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A however, not the issue. The question is whether the Constitution enacts such a norm as an entrenched right. Over the years our Courts

> 'have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'.[150]

B It must be necessary in order 'to realise the ostensible legislative intention or to make the Act workable'.[151] It is also necessary to bear in mind that we are not construing a Constitution which was framed centuries ago, but one which came into force on 27 April 1994. The Constitution as a whole, and s 22 in particular, appears to be workable and to realise the ostensible legislative intention, without C the implication the appellants seek to rely upon. When s 22 is read with s 96(2), which provides that '*(t)*he Judiciary shall be independent, impartial and subject only to this Constitution and the law', the purpose of s 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the D individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning E themselves by acts of legerdemain into 'courts'. One recent notorious example of this was the High Court of Parliament Act.[152] By constitutionalising the requirements of independence and impartiality the section places the *nature* of the courts or other adjudicating *fora* beyond debate and avoids the dangers alluded to by Van den Heever JA in the *Harris* case.[153]

F [106] A provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising

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A rules of procedural law and justice is evident from the detailed criminal fair trial provisions in s 25(3). The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section 6 of the European Convention on Human Rights explicitly confers the right to a fair and public B hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations.[154] Nearer home, art 12(1)*(a)* of the Namibian Constitution expressly provides that '(i)n the determination of their civil rights and obligations . . . all persons shall be entitled to a fair and public hearing by an independent, C impartial and competent court or tribunal established by law . . .'. In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial. It is, however, unnecessary for purposes of deciding the present case to decide this issue. The only complaint that the applicants have raised on the fair trial issue is that the provisions of ss 417 and D 418 result in their being treated unequally in respect of subsequent litigation between themselves and the company. This in substance raises an equality issue which is best dealt with as such.

The attack based on the right to equality in terms of s 8

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[107] The applicants submit that the mechanism under s 417 of the Act, and, in particular, that part of s 417(2)*(b)* which provides that any answer given to any question at an enquiry may thereafter be used against the examinee, violates the Constitution to the extent that it enables the liquidator and creditors of a company in liquidation to gain an unfair advantage over their adversaries in civil litigation in F violation of the right to equality in terms of s 8.

[108] In *Ferreira v Levin*[155] the abovementioned part of s 417(2)*(b)* was declared invalid to the extent that it provided that an incriminatory answer could be used in criminal proceedings against the examinee,[156] but the constitutionality of the use of G such answer in civil proceedings against the examinee was left open.[157]

[109] It was submitted on behalf of the applicants that ss 417 and 418 of the Act permit the liquidator and creditors of the company in liquidation to invoke the inquiry mechanism with a view to civil litigation which is contemplated or even H pending and that they are entitled to do so in order to decide whether to institute or continue with the litigation. Thus far the submission is unexceptionable.

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A [110] It continues, however, by propounding that the impugned sections enable the liquidator and creditors to get a complete preview of their opponent's case and to ensnare the latter's witnesses in a procedure devoid of the normal mechanisms designed to identify and define issues, prepare for trial and receive meaningful B legal advice on all stages of the process. In this way, so the argument continues, the liquidator and creditors are afforded an overwhelming advantage in civil litigation, that they would never have enjoyed but for the company's liquidation, which inequality offends s 8 of the Constitution.

[111] I would, by way of preliminary observation, point out once again that the C latter part of the submission ignores the supervisory role of the Supreme Court to ensure that the examination is not conducted oppressively, vexatiously or unfairly to which I have made reference more than once in this judgment.

[112] Nevertheless it is true to say that liquidators are, by means of this mechanism, D entitled to examine their opponents in civil litigation (actual or prospective) or their opponents' witnesses or recalcitrant potential witnesses and to obtain discovery of documents from such persons at a time and in a way not open to their opponents or prospective opponents. The question is whether this consequence offends s 8 of the Constitution.

E [113] In my opinion the enquiry is concerned with investigating whether the 'right to equality before the law' in s 8(1) is compromised by the statutory mechanisms in question. Adopting an approach similar to that of Didcott J in giving judgment for this Court in *S v Ntuli*,[158] I consider it unnecessary for present purposes to consider F the question whether ss (1) and (2) of s 8 embody separate rights, or to look at the prohibition against unfair discrimination which ss (2) pronounces or to consider whether the latter is an independent provision or a corollary or concretisation of the former. I also consider it unnecessary to consider the relationship between the right to equality before the law and the right to equal protection of the law in s 8(1).

G [114] No example, foreign or otherwise, was cited to us where, by way of legislation or judicial pronouncement, the use in civil proceedings of compelled testimony in interrogation proceedings analogous to those under ss 417 and 418 of the Act has been prohibited.

[115] At English common law the privilege against self-incrimination does not H protect witnesses from answering questions which might have the effect of exposing them to civil liability.[159] The privilege against self-incrimination has been specifically abrogated in bankruptcy proceedings by Rule 6.175 of the Insolvency Rules 1986

which provides that at public examinations the bankrupt is required to answer all questions put by the

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A Court or which the Court allowed to be put and, by virtue of s 433 of the Insolvency Act 1986, the written record of a bankrupt's public examination could then be used in evidence in any proceedings against him.[160]

[116] In Australia the possible liability of accountants to the company based on the negligent preparation of a financial report has been held to be a legitimate subject B of the enquiry and there is no objection in principle to the use of s 597 of the Australian Corporations Law to obtain information to be used in litigation proposed or even pending.[161]

[117] In Canada questions concerning the use of forced testimony in civil proceedings do not really arise. The reason for this is that the privilege against self-incrimination has been comprehensively replaced in that country with a use C immunity. There is indeed very little room for reliance on the privilege against self-incrimination at all in Canada. Section 5(1) of the *Canada Evidence Act*[162] makes it very clear that

> 'no witness shall be excused from answering any question on the ground that the answer may tend to incriminate him, or may tend to establish his liability to D a civil proceeding at the instance of the Crown or any person'.

In exchange, a use immunity in respect of criminal proceedings is granted by s 5(2). Section 13 of the Charter, similarly, only confers a use immunity in relation to 'other proceedings' where there is a possibility of incrimination, ie proceedings with penal consequences.[163]

E [118] The position seems to be the same in the United States, at least insofar as a use immunity is conferred on examinees. That is, the use immunity merely protects the examinee from use and derivative use in subsequent criminal proceedings. United States Bankruptcy matters are regulated by the Bankruptcy Reform Act of 1978. The Federal Rules of Bankruptcy Procedure, Rule 2004, provides for the F examination of persons with information relating to a bankruptcy. The scope of the examination is extremely broad and wide-ranging. The Fifth Amendment privilege applies in respect of the examination, but s 6003 of Title 18 of the United States Code provides that a court may issue an order compelling a witness to testify even when the Fifth Amendment privilege against self-incrimination is claimed. Part V of G Title 18 governs the granting of immunity to witnesses before Federal tribunals, including administrative and some independent federal agencies. Section 6002 then provides for immunity from prosecution in the following way:

> '. . . (T)he witness may not refuse to comply with the order on the basis of his H privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used *against the witness in a criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'

I (Emphasis added.)

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A [119] The constitutionality of Title 18 of the US Code was clearly established by the Supreme Court in *Kastigar et al v United States*.[164] The court, in considering the constitutionality of the Organized Crime Control Act of 1970, of which part V of Title 18 is a part, held that the government may compel testimony from a witness B who invokes the Fifth Amendment by conferring on the witness use and derivative use immunity in criminal proceedings only.

[120] There is accordingly no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and C democratic societies based on freedom and equality.

[121] Turning then to principle and the application of s 8(1) of the Constitution, I fail to see how the applicants' submission can be sustained. As I have endeavoured to show in this judgment, the very purpose of the proceedings under ss 417 and 418 D of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile 'brain' and other 'sensory organs' or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly. I E remain alive to the thrust of the applicants' argument that, as erstwhile auditors of the company, they co-operated fully and were at all times prepared to co-operate fully with the liquidators and their legal and other advisers to supply all relevant information required. If in the light hereof it was oppressive, or vexatious or unfair to summons or interrogate the applicants in the way they were summoned or interrogated, their remedy was, as I have repeatedly stated, to approach the F Supreme Court. Their alleged harassment and unfair treatment would not be in consequence of the substantive content of the provisions of ss 417 and 418 of the Act, but the result of their improper application.

[122] As I see the matter, neither the purpose nor the effect of ss 417 or 418 is to G place the company in a better position than its debtors or creditors. The purpose is the opposite, namely to place the company in liquidation (because of its resulting disabilities) on such a footing that it can litigate on equal terms with its debtors and creditors. Sections 417 and 418 do not result in the applicants being denied the s 8(1) right to equality or the equal protection of the law or the s 8(2) right not to be H unfairly discriminated against. These sections are not inconsistent with s 8 and accordingly the applicants' attack on this ground cannot succeed.

[123] The applicants' discrete and narrow challenge of s 417(2)*(b)* on the basis that it authorises the use of compelled self-incriminating testimony at the enquiry in I subsequent criminal proceedings against the examinee would, in the light of the judgment in *Ferreira v Levin*, have been successful to the extent found and ordered in that judgment. No point would be served by repeating that order.

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A Costs

[124] As far as the question of costs is concerned the applicant is not, for the same reasons mentioned in *Ferreira v Levin (No 2)*,[165] substantially successful, for the extent to which s 417(2)*(b)* of the Act is unconstitutional does not achieve anything for the applicant in his dispute with the respondents, for he is obliged to answer all B questions otherwise lawfully put to him even if the answers thereto might tend to incriminate him. The respondents, it is true, have successfully opposed all other grounds of attack on the constitutionality of ss 417 and 418 of the Act. But in this case too, the respondents did nothing to oppose the referral of the other issues to C this Court; in fact they consented to the referral. Had the matter been opposed and full argument addressed to Fagan DJP, the other issues might not have been referred.[166] Under these circumstances justice and fairness would also best be served in this case if all the parties were to pay their own costs.

D The order

[125] In the result, the following order is made:

1. Save to the extent that the provisions of s 417(2)*(b)* of the Companies Act 61 of 1973 (as amended) were declared to be invalid by this E Court's order of 6 December 1995 in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* (CCT 5/95), the provisions of ss 417 and 418 of the Companies Act are declared to be not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 (as amended).

2. All the parties are to pay their own costs.

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Chaskalson P, Mahomed DP, Madala J, Langa J, Mokgoro J, Ngoepe AJ and Sachs J concurred in the judgment of Ackermann J.

Judgment

Kriegler J:

G [126] I have had the privilege of studying the learned and comprehensive judgment prepared in this matter by my Colleague Ackermann J. I concur in the order as formulated by him; I also subscribe to his rejection of each of the lines of attack on the constitutional validity of the sections in question.[167] Although I am in substantial agreement with my Colleague, I do wish to reserve my position in H respect of those parts of his reasoning which I specify below.

[127] *Ad* paras [17] to [34]

The differences between our Companies Act and those of the countries reviewed are so material that I prefer to seek no guidance in

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A those quarters.[168] In any event Ackermann J expresses views (in paras [46] and [47] of his judgment) regarding the power and duty of the Supreme Court, at common law and now under chap 3 of the Constitution, which in my respectful view are dispositive. Consequently I prefer to base my concurrence solely on the reasoning contained in paras [46] and [47].

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[128] The attack based on s 11(1) of the Constitution

In *Ferreira v Levin*[169] there was a difference of opinion as between my Colleagues regarding the content and scope of 'the right to freedom and security of the person' C contained in s 11(1) of the Constitution, as also regarding its applicability to s 417(2) *(b)* of the Companies Act. The line I took rendered it unnecessary to participate in that debate. The issue arises again in the present case, Ackermann J accepting, albeit for the time being, the majority view in *Ferreira v Levin*. My Colleague O'Regan J, who had reserved her position in relation to the purview of s 11(1) in that case, has now prepared a judgment in the instant case making plain D why, and to what extent, her perception of the particular part of s 11(1) differs from that of the majority in *Ferreira v Levin*. I adhere to the view I expressed in that case.[170] 'It is only if and when the production of evidence obtained pursuant to a s 417 enquiry jeopardises the fairness of the trial that the Constitution can be invoked.' That, however, does not stand in the way of my endorsing what E Ackermann J says in paras [51] to [55] of his judgment in this case. Whatever the scope and content of s 11(1) may be, and whatever my view on the standing of an examinee under s 417 to invoke constitutional protection under s 25(3), I concur with the reasoning and conclusion of Ackermann J in relation to the argument advanced on behalf of the applicants under the rubric of s 11(1). F

[129] The attack based on s 13 of the Constitution

Ackermann J deals with this topic in paras [56] to [92] of his judgment. He commences with a discussion of the impact of ss 35(2) and 35(3) of the Constitution on the proper interpretation and application of the sections. This leads him to the G conclusion (in para [64] of the judgment) that 'there is no provision in s 417 or s 418 which, when properly construed in the light of ss 35(2) and (3) of the Constitution, is inconsistent with such right'. I agree with that conclusion and with the reasoning on which it is based. I also agree with the extension of that reasoning H (in para [92] of the judgment) to the compulsory production of documents relevant to a legitimate enquiry under s 417.

[130] In paras [65] to [97], however, my Colleague conducts an investigation of privacy, a concept which he aptly calls 'amorphous and elusive'. In the course thereof he also considers the related question, equally vexing, of seizure of private possessions. I have no doubt that the

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A research and analysis he has done will in due course prove invaluable, but at this juncture I do not consider it necessary to accompany him. And considering it unnecessary, it is necessary that I do not do so. I am content to rest with the conclusion founded on a proper reading of the sections in the light of the provisions B of s 35(2) and (3) of the Constitution.

[131] The attack based on s 24 of the Constitution

My learned Colleague addresses this topic in paras [93] to [101] of his judgment, concluding that there is nothing in the sections which is inconsistent with the protection of procedural fairness contained in s 24*(b)* or *(c)* of the Constitution. I C agree with that conclusion and with the foundational reasons set out in paras [100] and [101] of the judgment. Properly applied, the mechanism of the sections should entail no unfairness; if its improper application threatens to do so, the Supreme Court can intervene prophylactically. I would, however, prefer not to endorse the doubts expressed by Ackermann J (in paras [96] to [98] of his judgment) on the D question whether an enquiry under the sections is 'administrative action' as contemplated by s 24 of the Constitution. Nor do I wish to commit myself to agreeing, if only with a doubt, as to whether a commissioner appointed under s 417 is an executive organ of State. My esteemed Colleague's misgivings may be well founded, but I wish to reserve my judgment on the two points for the day when E either may be decisive.

[132] The attack based on s 8 of the Constitution

With regard to this aspect of the case (dealt with in paras [107] to [122] of the judgment of Ackermann J) my approach is much the same as it was regarding the s F 11(1) attack. I agree with the conclusion; I agree with the identification and logical analysis of the principle involved (in paras [121] and [122]) but prefer to express no view on the possible lessons to be learnt from other jurisdictions. That I do, not because of a disregard for s 35(1) of the Constitution, nor in a spirit of parochialism. My reason is twofold. First, because the subtleties of foreign G jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems. For H the present I cannot claim that degree of proficiency. In any event the logical analysis by Ackermann J of the interaction between the sections and the constitutional provisions sought in aid is really dispositive of the claim.

I [133] The second reason is that I wish to discourage the frequent - and, I suspect, often facile - resort to foreign 'authorities'. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a J provision in our

A Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision. The prescripts of s 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights

must be considered, and regard may be had to comparable foreign B case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents. My Colleague has been at pains to discern the principles applied by comparable Courts in foreign jurisdictions, to establish whether they can be applied here and, if so, to what extent and subject to what modifications. That is what s C 35(1) of the Constitution enjoins and sound comparative law study dictates. It is merely because I have not independently verified the exercise that I refrain from concurring.

Didcott J concurred in the judgment of Kriegler J.

Judgment

O'Regan J:

D [134] I have had the opportunity of reading the judgment of Ackermann J. I concur in the order that he proposes for the reasons given in this judgment. The facts in this case are set out in the judgment of Ackermann J.

E [135] The applicants challenge ss 417 and 418 on the grounds that the procedure authorised by those provisions violates the right to freedom and security of the person (s 11(1)); the right to personal privacy (s 13); the right to administrative justice (s 24); an implied right to fairness in civil litigation and the equality guarantee (s 8). This judgment is concerned, in the main, with the challenge based on s 11(1).

[136] The applicants pointed to the following aspects of ss 417 and 418 F examinations which they argued render such examinations unconstitutional. Witnesses before such enquiries may be

forced to go to a place where they do not want to be;

forced to produce private books and documents that they want to keep confidential;

G forced to reveal confidential information that they want to keep private;

forced to give evidence by the production of documents and by their own oral testimony, by which they incriminate themselves, and which can then be used to vest them with civil liability;

H forced to do so without being heard on the decision which subjected them to the mechanism;

forced to do so in circumstances which render meaningful and effective legal representation all but impossible; and

exposed to civil liability on their own evidence, extracted under legal I compulsion in a process devoid of the normal checks and balances built into litigation.

[137] Section 417 of the Act has already been the subject of constitutional challenge before this Court. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) this J Court held that the provisions of s 417(2)*(b)* of the Act were invalid to the extent that the words

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' "and any answer given to any such question may thereafter be used in evidence against him" in s 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily'.

(At para [157].)

[138] The applicants argued that the obligation placed upon witnesses to go to an enquiry and give evidence and produce documents at that enquiry against their will, C

which may result in exposing those witnesses to civil liability, was in breach of s 11(1) of the Constitution. Section 11(1) of the Constitution provides that:

> 'Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.'

[139] In *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR D 1) two Judges of this Court held that the portion of s 417(2)*(b)* which provided that incriminating evidence given by a witness at a s 417 enquiry would be admissible in a subsequent prosecution of such witness was in breach of s 11(1). Ackermann J held that freedom as entrenched in s 11(1) should be interpreted as follows:'Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.'

(At para [49].) Later in the judgment he states that: F

> 'Even though the freedom rights in s 11(1) are residual freedom rights, there is no justification for not giving these residual freedom rights the broad and generous interpretation I have suggested. They constitute the residual rights of individuals (where such or similar rights are not protected elsewhere in chap 3) not to have "obstacles to possible choices and activities" placed in their way G by (for present purposes we need not, as already indicated, go any further) the State.'

(At para [69].) Ackermann J held that the challenged portion of s 417(2)*(b)* restricted the choices available to witnesses at a s 417 enquiry in breach of s 11(1). Such limitation he found not to be justifiable in terms of s 33. H

[140] Sachs J agreed that the challenged portion of s 417(2)*(b)* offended against s 11 (1) of the Constitution although he approached s 11(1) somewhat differently to Ackermann J:

> 'The words of s 11 should then be construed in such a manner as to provide constitutionally defensible space against invasions of freedom of a kind analogous in character and intensity to the imposition of physical restraint. I Legal traditions, both positive and negative, would help to define what this analogous or penumbral area would include: legal institutions developed and applied in the past with a view to curtailing abusive State action would readily fit; similarly, negative memories of past oppressive State behaviour in our country and elsewhere would help define whether or not a freedom issue is being raised. The first step is to establish the existence of what is a real or J substantial invasion of

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A freedom, and not a normal regulatory act; only when this is done should the need to justify the infringement arise. Once a substantial breach of this kind has been shown to exist, however, the scrutiny for justification required by s 33(1) can be truly stringent.'

(At para [257].) Like Ackermann J, Sachs J held that the challenged portion of s 417 (2)*(b)* constituted an unjustifiable infringement of s 11. B

[141] Eight members of the Court, however, held that the challenged portion of s 417 (2)*(b)* was in breach of s 25(3), the right to a fair trial, in that it permitted the admission of self-incriminating evidence given by a witness at a s 417 enquiry at a subsequent criminal trial. Seven members of the Court held that the provision was C not in breach of s 11(1). Chaskalson P, speaking for the majority, took a narrower view of s 11(1) than that adopted by Ackermann J and Sachs J. This narrow view was premised upon the level of justification stipulated for s 11(1) by s 33 of the Constitution. Chaskalson P stated:

> 'In terms of our Constitution we are enjoined to protect the freedom D guaranteed by s 11(1) against all governmental action that cannot be justified as being necessary. If we define freedom in the context of s 11(1) in sweeping terms we will be called upon to scrutinise every infringement of freedom in this broad sense as being "necessary". We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom E is subject to laws that are consistent with the principles of "fundamental justice", as the Canadian courts do.'

(At para [181].) Later in his judgment he held:

'This does not mean that we must necessarily confine the application of s 11(1) F to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demands it. But, because of the detailed provisions of chap 3, such occasions are likely to be rare. If despite the detailed provisions of chap 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in chap 3, there may be a reason to look to s 11(1) to protect such a right. But to secure such protection, the otherwise G unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny to which all limitations of s 11 are subjected.'

(At para [184].)

[142] Mokgoro J also did not accept the approach adopted by Ackermann J. She stated:'Attributing so broad a meaning to "freedom" in this section, has the effect of extending it too far beyond the perimeters of physical integrity. That "freedom" in s 11 (1) means freedom in the sense of physical integrity emerges from the plain meaning of the text and not from the narrowing of an all-embracing freedom right. This, however, does not mean that s 11(1) cannot be given a broad meaning sufficient to provide protection to an unenumerated right akin to freedom of the person, within the context of the rest of chap 3.'

(At para [209].) She supported the approach taken by Chaskalson P, subject to the reservations that, in her view, s 11(1) should be restricted to physical integrity (at para [210]) and that the section could not generally be interpreted to give protection J to unenumerated freedom rights (at para [212]). Like the majority of the Court, I considered

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O'REGAN J

A s 417(2)*(b)* to be in breach of s 25(3). I expressed no view as to whether s 417(2) *(b)* was in breach of s 11(1) (at para [244].)

[143] In this case, it is necessary to determine whether ss 417 and 418 are in breach of s 11(1). Ackermann J, writing for the majority, has for the purposes of this case, based his reasoning to a large extent on the approach approved by the majority in B *Ferreira*'s case. My approach to s 11(1) is different to that adopted by the majority in *Ferreira's* case.

[144] Section 11(1) protects the freedom and security of the person and specifically provides that no person may be detained without trial. The specific prohibition of detention without trial reminds us of the government's frequent violation of individual freedom in the years of apartheid. There were many statutes passed by C the former government which authorised detention without trial. Those statutes were extensively used and substantial numbers of people were detained without trial. Fundamental to the new Constitution, then, is a rejection of such deprivation of freedom. However, s 11(1) cannot be confined to the terms of the specific D prohibition of detention without trial. The section has a greater ambit.

[145] In my view, freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of E freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.

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[146] Both these aspects of freedom find recognition in clauses of the Constitution other than s 11(1). To that extent, s 11(1) is a residual clause. Section 25 is the principal provision in chap 3 that requires procedural fairness when a person is deprived of physical freedom. It contains detailed rules which must be followed to G protect the rights of persons who have been detained, arrested or charged. Section 11 (1), which contains no detailed procedures or rules, other than the prohibition of detention without trial, is supplementary to s 25. In cases where people are deprived

of physical freedom in circumstances not directly governed by s 25, s 11(1) will require that fair procedures be followed, as was held in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding* H *Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382). Of course, the nature of the fair process required in each case will depend on a variety of factors, including the ground upon which the deprivation of freedom is based.

[147] Similarly, the other aspect of freedom finds express recognition in specific I rights clauses such as expression (s 15), assembly (s 16), association (s 17), religion (s 14) and others. Section 11(1), however, will protect a residual arena of freedom. I do not believe that this residual scope of the right should be interpreted as broadly and generously as possible. To this extent I disagree, respectfully, with Ackermann J. I also disagree, respectfully, with Mokgoro J that the right to freedom J in s 11(1)

A should be limited to physical freedom. It is likely, given the clear entrenchment of freedoms such as expression, belief and association, that the residual scope of s 11(1) will largely concern physical freedom, but I am unconvinced that it should be limited to physical freedom.

[148] In my view, a purposive interpretation of this right would focus on the B general interpretation provision in chap 3 - s 35(1). Section 35(1) states:

> 'In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality. . . .'

C In interpreting the scope of s 11(1), it will be necessary to identify the values which underpin an open and democratic society based on freedom and equality. In undertaking that exercise, I agree with Ackermann J[1] and Sachs[2] that s 11(1) needs to be understood in the context of the fundamental commitment to dignity expressed in our Constitution in s 10. Our Constitution represents an emphatic rejection of a D past in which human dignity was denied repeatedly by an authoritarian and racist government. The Constitution commits our society to a transition to a new society based on principles of democracy, freedom and equality. The recognition of the value of human beings is a cardinal principle of the Constitution and one which will inform the interpretation of many of the specific rights in the Constitution.

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[149] However, the rights in chap 3 need to be interpreted in the understanding too that a democratic society based on freedom and equality remains an aspiration. The freedom and equality which the Constitution values has not yet been realised for all South Africans. An enduring legacy of the past is profound inequality. The poverty F in which many of our citizens live materially compromises their enjoyment of rights of freedom and equality. There is much to be done, by the State and citizens, to ensure that the entrenched rights have meaning in the lives of all South Africans.

G [150] In my view, the democratic society contemplated by the Constitution is not one in which freedom would be interpreted as licence, in the sense that any invasion of the capacity of an individual to act is necessarily and inevitably a breach of that person's constitutionally entrenched freedom.[3] Such a conception of freedom fails to recognise that human beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution H must embrace that interdependence without denying the value of individual autonomy. It must recognise the important role that the State, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms. The preamble to the Constitution states:'Whereas there is a need to create a new order in which all South Africans will

A be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms. . . .'

[151] It acknowledges the need to develop a new society in which all citizens can exercise their fundamental rights and freedoms. We know that this will not be an B easy task. The interpretation of the rights in chap 3 must be in sympathy with that undertaking. Accordingly, I agree with the following statement of Sachs J in *Ferreira's* case:

> 'The reality is that meaningful personal interventions and abstinences in modern society depend not only on the State refraining from interfering with C individual choice, but on the State helping to create conditions within which individuals can effectively make such choices. Freedom and personal security are thus achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other.'

(At para [251].) It does not seem to me that this approach will render all regulatory laws or criminal prohibitions subject to constitutional challenge in terms of s 11(1). D A purposive approach to s 11(1) recognises that it is aimed not at rendering constitutionally suspect all criminal prohibitions or governmental regulation. Our society, as all others in the late twentieth century, clearly requires government regulation in many areas of social life. It requires a criminal justice system based on the prohibition of criminal conduct. The need for effective government which E can facilitate the achievement of autonomy and equality is implicit within the constitutional framework. Only when it can be shown that freedom has been limited in a manner hostile to the values of our Constitution will a breach of s 11(1) be established.

F [152] The approach to the interpretation of s 11(1) that I have proposed may not necessarily produce a different result to the construction proposed by Ackermann J in *Ferreira's* case, although it seems clear that Ackermann J takes a broader view of the scope of s 11(1) than I do. Nor will my approach necessarily produce a different result to that proposed by Chaskalson P and adopted by the majority in G *Ferreira's* case and this case. In this case, it does not.

[153] The applicants argue that ss 417 and 418 are in breach of s 11(1) for several reasons. First, they state that witnesses may be compelled to attend and give evidence at an enquiry without being given an opportunity to be heard on the question of whether they should be coerced in this way. This challenge to the H provision is a challenge addressed to procedural fairness. In my view, it cannot be said that it is a necessary requirement of an obligation to give evidence that a potential witness first be given an opportunity to state why he or she should not be compelled to give evidence. If it becomes clear in the course of the witness's evidence that he or she knows nothing of the affairs of the company, no further I questions will be put. Or, if it is established that a witness has a sufficient excuse not to answer the questions, as contemplated by s 418, then he or she will be under no obligation to answer the questions. Similarly, if it is clear that the purpose of calling the witness was abusive or oppressive, then appropriate relief can be sought J from the Supreme Court. Ackermann J has set out in great detail the jurisprudence

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A of, in particular, the United Kingdom and Australia, in regard to the obligation upon Judges in those countries to prevent an abuse of procedures similar to the procedure governed by ss 417 and 418. I am not convinced that this jurisprudence is directly relevant in the light of the differences between the statutory provisions B upon which that jurisprudence is based and our own. Nevertheless, there can be little doubt that the Supreme Court may grant relief to prevent the abuse of the procedures provided for in ss 417 and 418. Accordingly, there can be no doubt that there are adequate safeguards in our own legal system to protect witnesses. Beyond these safeguards, the argument that s 11(1) requires notice and an opportunity to be C heard prior to the giving of evidence cannot be supported.

[154] The second ground upon which the applicants base their s 11(1) argument is that ss 417 and 418 impose an obligation upon witnesses to attend enquiries and to answer questions and disclose documents to that enquiry. I cannot accept that a D subpoena which requires compliance in terms of these provisions can be said to be a breach of freedom as contemplated by s 11(1). All modern societies require the assistance of members of the community in facilitating the administration of justice. Inevitably the obligations thus placed on witnesses can be inconvenient and, at times, unpleasant. In certain circumstances, giving evidence to a court or E commission may even put the witness at the risk of some disadvantage, such as civil liability. The overwhelming interest of society is, however, that citizens nevertheless co-operate to ensure that the administration of justice is not prevented. Such an interest is clearly present in the context of s 417 enquiries as well. In this case, it seems to me that the applicants have failed to show that ss 417 and 418 are F in breach of s 11(1).

[155] The applicants also base their objections to ss 417 and 418 on the right to privacy in s 13 and on an implied right to a fair civil trial and the right to equality in s 8. For the reasons given by Ackermann J, I consider that the applicants have not G established that ss 417 and 418 are in breach of any of these constitutional provisions. Finally, the applicants argued that ss 417 and 418 are in breach of s 24 of the Constitution which is concerned with administrative justice. I agree with Ackermann J that the applicants have not shown ss 417 and 418 to be in breach of s 24 of the Constitution. He expresses considerable doubts as to whether an enquiry H in terms of ss 417 and 418 is administrative action as contemplated by the Constitution. It is not necessary for the purposes of the case to decide this question, however, and I prefer to express no view at all upon it.

[156] For the above reasons, I concur in the order proposed by Ackermann J.

I Applicants' Attorneys: *Deneys Reitz*, Johannesburg. Respondents' Attorneys: *Fluxman, Rabinowitz-Raphaely-Weiner*, Johannesburg.

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1 1995 (3) SA 292 (CC) (1995 (2) SACR 125; 1995 (7) BCLR 851) at paras [7]-[12].
2 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at paras [6]-[8].
3 *S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) at para [59] and *Ferreira v Levin (supra*, n 2 para [7]).
5 *Id, per* Ackermann J para [127] and Sachs J paras [245], [249], [261], [269].
6 *Id, per* Chaskalson P paras [168], [186] (Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ concurring), Mokgoro J para [208] and O'Regan J para [244].
7 *Id* paras [122]-[124].
8 *Id* para [122].
9 *Id* paras [123]-[124].
10 *Id* para [151].
11 *Re Rolls Razor Ltd (No 2)* [1970] 1 Ch 576 at 592C ([1969] 3 All ER 1386).
12 (1890) 45 ChD 87 at 93.
13 [1991] Ch 90 (CA) at 102A ([1991] 1 All ER 894 at 900*b-d*). See also *British and Commonwealth Holdings plc (Joint Administrators) v Spicer & Oppenheim (a firm)* [1992] 4 All ER 876 (HL). In this case the House of Lords held at 886*g-h* that, having regard to the size of the financial crash, the possible oppression of the examinees did not outweigh the needs of the company's administrators, which were held to be reasonable under the circumstances.
14 *Cloverbay (id* at 102D-103E).
15 *Re Embassy Art Products Ltd* [1987] 3 BCC 292. See also H Rajak (ed) *Company Liquidations* (1988) at 306-7.
16 *Supra*, n 13. The appellants in the case were the auditors of a company ('Atlantic') that had been placed under administration. A very wide order to produce books, papers and other records had been issued against the appellants by the Registrar pursuant to s 236(2) of the Insolvency Act 1986. On an application by the appellants Hoffmann J discharged the Registrar's order. The Court of Appeal (Ralph Gibson and Woolf LJJ (Norse LJ dissenting)) allowed the appeal and restored the order of the Registrar (see [1992] 2 All ER 801 (CA) ([1992] Ch 342)). On a further appeal, the House of Lords affirmed the decision of the Court of Appeal.
17 *Id* at 880*g*.
18 *Id* at 883*a*, *per* Lord Slynn, who delivered the opinion of the House.
19 *Id* at 883*d-e*.
21 *Id* at 883*e*.
22 *Id* at 886*g-h*.

23 [1987] BCLC 77 at 80.
24 *Re London and Northern Bank Ltd, Haddock's Case, Hoyle's Case* [1902] 2 Ch 73 at 82; *In re Imperial Continental Water Corporation* (1886) 33 ChD 314 at 318-19; *In re British Building Stone Company Ltd* [1908] 2 Ch 450 at 454; *Re* I *Rolls Razor Ltd (No 2)* [1969] 3 All ER 1386 at 1397; *Re Kimberley Carpet Mills (Aust) Pty Ltd (in liq)* (1979) 4 Australian Company Law Reports 50 at 52.
25 *Per* Barwick CJ in *Rees v Kratzmann* (1966) ALR 3. Much earlier, in *Re London & Globe Finance Corpn Ltd* [1902] Weekly Notes 16, the Court held that it will disallow questions which were put merely for the purpose of satisfying personal spite or vindictiveness, and not *bona fide* for the benefit of creditors, contributories or the public.
26 (1972) ALR 723.
27 See the passages from Lord Slynn's speech in the *Spicer & Oppenheim* case quoted in para [23] above.
28 [1993] Ch 1 (CA) ([1992] 2 All ER 856).
29 Dillon LJ was referring to the judgment of Vinelott J in *Re Jeffrey S Levitt Ltd* [1992] 2 All ER 509 (Ch).
30 *Id* at 876 *f-j*.
31 [1994] 3 All ER 814 (HL).
32 *Id* at 821*d*-822*c*.
33 *Id* at 834*h*.
34 Which reads as follows: 'A person is not excused from answering a question put to the person at an examination . . . on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.'
35 Section 597(13) and (14).
36 (1990) 1 ACSR 726 (Supreme Court of New South Wales - Commercial Division).
37 *Id* at 738.
38 (1990) 3 ACSR 343 (Supreme Court of New South Wales, Enquiry Division)
39 *Id* at 346.
40 *Hamilton v Oades* (1988) 15 ACLR 123 (HC) at 128.
41 *Re Rothwells Ltd (Prov Liq Apptd)* (1989) 15 ACLR 168 (Supreme Court of Western Australia) at 181 and see also *Hamilton v Oades (supra*, n 40 at 129).
42 *Supra*, n 40 at 129.
43 (1970) 122 CLR 493 at 496.
44 (1991) 9 ACLC 49 (Supreme Court of South Australia) at 53.
45 (1992) 8 ACSR 736 (Supreme Court of New South Wales - Court of Appeal).
46 *Id* at 742.
47 *Re Spedley Securities Ltd: Ex parte Potts & Gardiner* (1990) 2 ACSR 152 (Supreme Court of New South Wales) at 155-6.
48 See, for example, *Hamilton v Oades (supra*, n 40 at 129-30, 131-3) and *Spedley Securities Ltd v Bond Corporation Holdings Ltd (supra*, n 36 at 732-7).
49 *Hamilton v Oades (supra*, n 40 at 132).
50 *Whelan v Australian Securities Commission* (1993) 12 ACSR 239 (Federal Court of Australia) at 255 lines 30-45.
51 *Douglas-Brown (the Official Liquidator of Woomera Holdings Pty Ltd) (rec and mgr apptd) v Furzer* (1994) 13 ACSR 184 (Supreme Court of Western Australia) at 191-3 where the Australian and English authorities are reviewed.
52 See *Lok and Others v Venter NO and Others* 1982 (1) SA 53 (W) at 58A; *Venter v Williams and Another* 1982 (2) SA 310 (N) at 313E; *Foot NO v Alloyex* I *(Pty) Ltd and Others* 1982 (3) SA 378 (D) at 383F.
53 1990 (1) SA 500 (C) at 509B.
54 See the remarks of Heher J in the Full Bench judgment in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W) at 843G; *Friedland and Others v The Master and Others* 1992 (2) SA 370 (W) at 379; *Botha v Strydom and Others* 1992 (2) SA 155 (N) at 159; and Meskin *et al Henochsberg on the Companies Act* vol I at 890.
55 See *Re Rolls Razor Ltd (No 2) (supra*, n 24 at 1395*i) per* Megarry J:
'One must remember, too, that what is made is an order of the High Court; and in that Court the Judge and the Registrar both hold office. A litigant who moves from I one to the other remains within the Court. He is not moving to a different Court, as he would be if he went to the Court of Appeal. What the order of the High Court is to be in any case is to be determined by the officer of the court who exercises the jurisdiction of the Court.'
56 *Ex parte Liquidators Ismail Suliman & Co (Pty) Ltd* 1941 WLD 33 at 34.
57 *Ex parte Brivik* 1950 (3) SA 790 (W) at 791G.
58 *Friedland's* case *supra*, n 54 at 379D-H.
59 1995 (1) SA 1 (C).
60 *Id* at 16C-E.
61 *Supra*, n 2 para [157].
62 *Yiannoulis v Grobler and Others* 1963 (1) SA 599 (T) at 601C-D as approved in *Pretorius and Others v Marais and Others* 1981 (1) SA 1051 (A) at 1063A.
63 *Supra*, n 13.
64 *Supra*, n 13.
65 *Levin v Ensor NO and Others* 1975 (2) SA 118 (D) at 121; *Corporate Finance Ltd and Another v Liquidator Two Plus (Pvt) Ltd (in Liq) and Another* 1978 (4) SA 42 (R) at 45; *Pretorius and Others v Marais and Others (supra* at 1063G-H) and *Anderson v Dickson* 1985 (1) SA 93 (N) at 112A-C.
66 [1979] 2 All ER 775 (Ch).
68 *Supra*, n 13.
69 *Id* at 101H-102A (Ch) and 899*j*-900*c* (All ER).

70 *Supra*, n 13 at 882*d-e* (All ER).
71 *Supra*, n 2.
72 *Supra*, n 2.
73 Section 35(3) of the Constitution.
74 See, for example, *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 996-1000.
75 *Supra*, n 2.
76 *Id* paras [90] and [245] respectively, although we disagreed as to the ambit of the s 11(1) residual right to freedom.
77 *Id*, *per* Chaskalson P (Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ, concurring) paras [169]-[185]. O'Regan J, para [244], decided the I case with the majority on the basis of an infringement of s 25(3), but expressed no view on the correct interpretation of s 11(1).
78 *Id*, *per* Chaskalson P (the other members of the Court as *supra* concurring) para [170].
79 *Id*, *per* Chaskalson P para [185]. Mokgoro J (with the majority) decided the case (para [208]) on the basis of an infringement of s 25(3) but was of the view, at para [209], that 'freedom' in s 25(3) was limited to 'freedom in the sense of physical integrity'.
80 (1965) 114 CLR 63 at 80.
81 *Supra*, n 40 at 127.
82 *Supra* n 2 para [151]. See 1996 (1) SA at 1076F-1077C.
83 *Supra* paras [16*(j)*], [19]-[23], [26]-[27], [32]-[34].
84 *Sher and Others v Sadowitz* 1970 (1) SA 193 (C) at 195; *S v Matisonn* 1981 (3) SA 302 (A) at 313.
85 See Hogg *Constitutional Law of Canada* 3rd ed para 15.7
86 Although the word 'law' is used in the subsection it is clear from the use of the word 'wet' in the Afrikaans text that a statutory provision is intended.
87 The formulation of this subsection bears a close resemblance to the rule of construction adopted by the United States Supreme Court as formulated by Justice Brandeis in *Ashwander et al v Tennessee Valley Authority et al* 297 US 288 (1936) at 346 as the seventh principle enunciated in that case. An analogous rule is employed in Canada. See *Hogg (id* n 20 *supra*). A similar rule of construction, known as *verfassungskonforme Auslegung*, is employed by the German Federal Constitutional Court. Where it is reasonably possible to do so the statute will be construed so as to save it from unconstitutionality but not where this would distort its meaning. See 2 *BVerfGE* 266 at (282); 18 *BVerfGE* 97 at (111); 53 *BVerfGE* 135 at 147 and, generally, v Mangoldt, Klein and Starck *Das Bonner Grundgesetz* 3rd ed art 3 Rdnr 205 *et seq*. According to Benda, Maihofer and Vogel *Handbuch des Verfassungsrechts* 2nd ed 34 Rdnr 53 other European Constitutional Courts also apply a similar principle.
88 *Supra*, n 73.
89 Scholars such as Dionisopoulos and Ducat *The Right to Privacy* (West Publishing Co, 1976), as referred to in Barker *Civil Liberties and the Constitution* 6th ed at 577 and following, have suggested three cores to the concept. The first constitutes the 'place-oriented conceptions of privacy' defining the right in spatial terms, of which *Olmstead v United States* 277 US 438 (1928) would be an illustration. The second, the 'person-oriented conceptions of privacy', where the emphasis is shifted from place or property to the person involved (see *Schmerber v California* 384 US 757 (1966)). The third concept has to do with how the 'right inheres in certain relationships', such as the marriage relationship, but not necessarily others (see *Griswold v Connecticut* 381 US 479 (1965)).
90 Rainer Forst formulated this statement in reaction to Michael J Sandel's communitarian critique of the 'liberal self': firstly, liberalism is said to rely on the concept of the atomistic self, individualised prior to communal relations and constitutive goods and, secondly, to subsume this individual under universalist and individualistic notions of 'right' that, despite their intention, destroy the real individuality of a communal being, rendering the 'unencumbered self' to become the disempowered citizen of the modern state. (See Rainer Forst 'How not to Speak about Identity: the Concept of the Person in a Theory of Justice' in *Philosophy and Social Criticism* (1992) vol 18 No 1 and M Sandel 'The Procedural Republic and the Unencumbered Self' in *Political Theory* (1984) vol 12 No 1.).
91 *Id*.
92 *Id*. This is, according to *Forst*, the third level of political discourse between citizens, where concrete difference and common equality are reconciled, and requires an acceptance of one's obligations towards the right of every member of I the polity not to be excluded.
93 *Id*. *Forst* points out that this community is spoken of by both Kant and Mead, and demands mutual respect as a universal moral duty towards persons as *moral persons*. Without this notion of the moral person's fundamental rights are meaningless, just as they are meaningless if not institutionalised and secured within a political community. Fundamental rights, although originating on the level of morality, need to be sustained on the level of political discourse and has implications for both the concrete and the abstract self.
94 Neethling, Potgieter and Visser *Law of Delict* 2nd ed at 333. See also *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C) at 247F-249D and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 455H-456H.
95 *Neethling (supra*, n 15 at 333). This approach accords with that followed by the US Supreme Court in *United States v Dionisio* 420 US 1 (1975) at 14 and *United States v Mara* 410 US 19 (1973) at 21, where the Court held that a person had no reasonable expectation of privacy with respect to physical characteristics which he/she exposes to the public on a daily basis.
96 1993 (2) SA 451 (A) at 462F.
97 *Id* at 462G.
98 *S v I and Another* 1976 (1) SA 781 (RA), *S v Boshoff and Others* 1981 (1) SA 393 (T) at 396.
99 *Reid-Daly v Hickman and Others* 1981 (2) SA 315 (ZA) at 323.
100 *S v A and Another* 1971 (2) SA 293 (T), *Financial Mail (supra*, n 96 at 463).
101 *Epstein v Epstein* 1906 TH 87.
102 Such as the publishing of information obtained from illegally tapping telephone conversations; *Financial Mail (supra*, n 96 at 463). See also Neethling *Persoonlikheidsreg* at 223.

103 Neethling *Persoonlikheidsreg* at 234-8; Neethling, Potgieter and Visser *Law of Delict* at 334.
104 1975 (1) SA 681 (A) at 704A-B.
105 *Id* at 704D.
106 *Supra*, n 94 at 249C-D where Watermeyer AJ followed the American approach which proscribes invasions of privacy which can *reasonably* be considered offensive to persons of ordinary sensibilities. This case concerned the unauthorised publication of a person's photograph; this has been classified as a wrongful invasion of privacy in terms of the Nordic Conference on the Right to Respect for Privacy of 1967.
107 1966 (2) SA 56 (RA) at 58D-E.
108 *Id* at 58H.
109 Neethling *Persoonlikheidsreg* at 247 *et seq*. It is also significant that public interest in information plays a role in determining whether the publication of private facts by the media is justified. *Financial Mail (Pty) Ltd v Sage Holdings (Pty) Ltd (supra*, n 96 at 462-3).
110 Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2nd ed (1990) at 368.
111 Appl 8962/80, *X and Y v Belgium* D & R 28 (1982) 112 at 124; see also *Van Dijk* at 369.
112 Series A No 294B; Application No 17101/90; (1994) 18 EHRR 393
114 *Id* para 81.
116 See *Katz v United States* 389 US 347 (1967) at 361, *Abel v United States* 362 US 217 (1960) at 241.
117 (1990) 68 DLR (4th) 568 at 578.
118 (1984) 11 DLR (4th) 641 (SCC) at 652-3.
119 In *McKinley (supra*, n 117 at 578*a-c*).
120 *R v Wong* (1987) 41 CCC (3d) 163 (Ont CA).
121 James A Fontana *The Law of Search and Siezure in Canada* 3rd ed (1992) at 19.
122 Von Münch/Kunig *Grundgesetz-Kommentar* (4aufl) band 1, art 1 Rn 10, art 2 Rn 30-1.
123 See also *Ferreira v Levin (supra,* n 2 paras [84]-[85].
124 27 *BVerfGE* 344 at 350.
125 *Von Münch/Kunig (supra*, n 122, art 1 Rn 10).
126 54 *BVerfGE* 148 at 153; 6 *BVerfGE* 32 at 41.
127 27 *BVerfGE* 344 at 351; 34 *BVerfGE* 238 at 245; 80 *BVerfGE* 367 at 373.
128 6 *BVerfGE* 389 at 433.
129 At 247: '. . . weil in diesen Faellen nach allgemeiner Auffassung von einem Recht am eigenen Wort nicht mehr die Rede sein kann. Soweit es z. B. im geschaeftlichen Verkehr ueblich geworden ist, fernmuendliche Durchsagen, Bestellungen oder Boersennachrichten mittels eines Tonabnehmers festzuhalten, ist in aller Regel das Recht auf freie Entfaltung der Persoenlichkeit des Sprechers noch nicht betroffen. Bei derartigen Mitteilungen steht der objektive Gehalt des Gesagten so sehr im Vordergrund, dass die Persoenlichkeit des Sprechenden nahezu vollends dahinter zuruecktritt und das gesprochene Wort damit seinen privaten Charakter einbuesst.'
130 The German law treats the insolvency of persons and the liquidation of companies in the same way. German insolvency law is governed by the Konkursordnung. The equivalent of s 417 is 75 of the Konkursordnung. Apart from the special provisions in 207 ff of the Konkursordnung, all provisions, including 75, apply both to natural and to juristic persons. (See G Robbers *Einführung in das deutsche Recht* at 275.)
131 56 *BVerfGE* 37 at 49-51.
132 *Id* at 42: '(A)uch davon abhaengen, ob und inwieweit andere auf die Information der Auskunftsperson angewiesen sind, ob insbesondere die Auskunft Teil eines durch eigenen Willensentschluss uebernommenen Pflich-tenkreises ist.'
133 *Id* at 48.
134 *Id* at 50.
135 See n 89 above.
136 *Supra* n 36 at 738 and see also para [30] *supra*.
137 *Supra* n 38 at 346.
138 201 US 43 (1906) at 74-5; see also *United States v White* 322 US 694 (1944) at 698.
139 *Id* at 73. See also *White (supra*, n 138 at 698). Special problems of privacy may be presented by subpoena of a personal diary. See *Fisher et al v United States et al* 425 US 391 (1976) at 401 n 7.
140 *Re Pergamon Press Ltd* [1971] Ch 388 (CA) ([1970] 3 All ER 535).
141 *Id* at 399D-H (Ch) and 539*c-f* (All ER).
143 *Corporate Law* 2nd ed at 28.01.
144 1976 (1) SA 758 (W).
145 *Id* at 763E-F.
146 It is accordingly unnecessary to consider the correctness of the view expressed in *Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others* 1995 (2) SA 433 (SE) at 443I, where Jones J held that an enquiry under ss 417 and 418 constituted administrative action for purposes of s 24 of the Constitution.
147 Sections 96(2) and 99(5)*(d)* of the Constitution.
148 In schedule 3 to the Constitution, which requires a commitment from Judges to 'administer justice to all persons alike without fear, favour or prejudice'.
149 By resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, the UN endorsed the Basic Principles on the Independence of the Judiciary as adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985.
150 *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22E *per* Corbett JA.
151 *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C *per* Howie AJA.
152 See *Minister of the Interior v Harris* 1952 (4) SA 769 (A). Another example is the Soviet Constitution of 1977 which enacted a wide panoply of individual rights but which made wholly inadequate provision for their enforcement through independent courts. See Henkin *The Rights of Man Today* at 66-70.
153 *Id* at 792A-C where the learned Judge of Appeal said the following:
'From the second preamble to the South Africa Act it is clear that the authors of our constitution had in

mind the doctrine of the *trias politica* and the existence of some judicial power to enforce the constitutional guarantees. That seems to follow by necessary intendment. But I do not think the further inference is justified that they I had in contemplation that the judicial power had for ever to be exercised by Courts constituted in a manner which satisfies certain criteria to the end that the independence, competence and justness of these tribunals be manifest and secured. I do not think they intended that Courts should always be of the kind to which they were accustomed. We have had many kinds of Courts; we have had trial by battle, by fire and by flood. We have heard of modern "people's Courts", in which the standard of justice was perhaps no higher than in the *judicium ferri candentis* of the J Lombards (Gengler, *Germanische R-Denkmäler* p 759).'

154 The principle of 'equality of arms', implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us. See, in this regard, Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2nd ed (1990) 319 and *Dombo Beheer BV v Netherlands* 18 EHRR 213.

155 *Supra*, n 2.

156 *Id* para [157].

157 *Id* para [154].

158 Case CCT 17/95 of 8 December 1995 para [18]. (Now reported at 1996 (1) SA 1207 (CC) (1996 (1) SACR 94; 1996 (1) BCLR 141) - Eds.)

159 *Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (No 2)* [1977] 3 All ER 717 (CA) at 721*c-h*. See also *Blunt v Park Lane Hotel Ltd and Briscoe* [1942] 2 KB 253 (CA) ([1942] 2 All ER 187) and *Halsbury's Laws of England* 4th ed (1976) vol 17 para 240.

160 See *R v Kansal* [1992] 3 All ER 844 (CA) at 850*a-f*. See also Schmitthoff (ed) *Palmer's Company Law* vol 2 at 1522-1.

161 *Supra*, n 50 at 255-6.

162 RSC 1985, c C-5.

163 Hogg *Constitutional Law of Canada* 3rd ed (1992) at 1142.

164 406 US 441 (1972) at 453.

165 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)* CCT 5/95, the judgment on costs delivered on 19 March 1996, reported at 1996 (2) SA 621 (CC), paras [5] and [7].

166 *Ferreira v Levin (supra*, n 2 para [10]).

167 Sections 417 and 418 of the Companies Act 61 of 1973, henceforth referred to as 'the sections'.

168 I have in mind particularly that the sections were amended (by ss 9 and 10 of Act 29 of 1985) so as to afford the Master extensive powers in relation to examinations.

169 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1).

170 In para [195].

1 *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) at paras [47]-[51].

2 *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382) at para [43].

3 See R M Dworkin *Taking Rights Seriously* (1977) at 262-3.

BHP BILLITON PLC INC AND ANOTHER v DE LANGE AND OTHERS 2013 (3) SA 571 (SCA) A

2013 (3) SA p571

Citation	2013 (3) SA 571 (SCA)
Case No	189/2012 [2013] ZASCA 11
Court	Supreme Court Of Appeal
Judge	Mthiyane DP, Cloete JA, Mhlantla JA, Leach JA and Petse JA
Heard	November 8, 2012
Judgment	March 15, 2013
Counsel	*F Snyckers SC* (with *KS McLean*) for the appellants. *GJ Marcus SC* (with *S Budlender*) for the respondents.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Application to compel — Whether out of time — Two requests made — Whether amounting to same request — If so, C then hit by 180-day deadline for applications to compel — Majority of court finding marked difference between requests, since second request couched in narrower terms — Application to compel accordingly not out of time — Promotion of Access to Information Act 2 of 2000, s 78(2).

Administrative law — Access to information — Access to information held by D public body — Request — Refusal — Whether justified — Mandatory protection of commercial or confidential information of third party — Where disclosure would likely cause harm to third party — Eskom and aluminium smelter refusing to disclose discounted price smelter pays for electricity on ground that doing so would harm smelter — Majority of court finding that, since much of requested information already in public domain, information not protected — Promotion of Access to Information Act 2 of 2000, E s 36(1)(b).

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Whether justified — Mandatory protection of commercial or confidential information of third party — Where disclosure would constitute breach of duty of confidence owed to third F party in terms of agreement — Smelter refusing to disclose discounted price it pays for electricity on ground that doing so would breach duty of confidence — No express provision imposing confidentiality — Acceptance of reciprocal duty of confidentiality between public body and third party not sufficient to trigger protection — Promotion of Access to Information Act 2 of 2000, s 37(1)(a). G

Headnote : Kopnota

The respondents, a financial journalist (De Lange) and his employer (Media 24), had requested Eskom to furnish them with documentation concerning the pricing formulas contained in two long-term bulk-purchase agreements concluded between Eskom and the appellant (Billiton) during the 1990s for the supply of discount electricity to two of Billiton's aluminium smelters. H There were two such requests, both made under the Promotion of Access to Information Act 2 of 2000, the first on 30 June 2009 and the second on 18 September 2009. Each request was refused by Eskom, the first on 29 July 2009 and the second on 13 November 2009.

The respondents then, on 18 March 2010, approached the South Gauteng High I Court for an order to compel Eskom to furnish Media 24 with the requested information. The order was granted. While Eskom elected to abide by the decision of the high court, Billiton appealed to the SCA. Billiton submitted that the request for pricing formulae was properly refused in the light of ss 36 and 37 of PAIA, which provides for the mandatory protection of commercial or confidential information of a third party. Billiton's concern was that the information, once supplied to Media 24, would fall into the J

A hands of its competitors and cause it financial harm, and that it was thus protected under s 36(1)*(b)*. Billiton further argued that the requested information was protected under s 36(1)*(c)* because it was 'supplied in confidence', and under s 37(1)*(a)* because the disclosure would breach a 'duty of confidence' owed by Eskom to Billiton. Billiton in addition took a B point in limine that Media 24's high court application, which was launched more than 180 days after the refusal of the initial request, was out of time as intended in s 78(2) of PAIA, * and that it was consequently barred from asserting its right to access under PAIA. Media 24 argued that it was not, because the application was launched less than 180 days after the second request.
Held (per Mthiyane DP, for the majority): The point in limine revolved around C the factual question of whether the two requests had to be viewed as one (it would be hit by the deadline), or two (it would not). There was a marked difference between the two requests, the second having been couched in narrower terms, and accordingly Media 24 was not out of time. As to the legality of Billiton's refusal of access to the requested information: a party D who wanted to rely on the above-mentioned provisions of PAIA to refuse access to information, had the burden of establishing that it would suffer the harm contemplated, ie the onus was on the holder of the information (in the present case, Billiton), not the requester. Billiton's argument that the information requested was ordinarily unavailable to its competitors was substantially overstated since a significant amount of this information was E in fact readily available — at cost — from an outside party. This being so, it was difficult to see how giving access to it would result in the perceived harm to Billiton. In short, the harm relied on by Billiton was not of the kind that would 'likely' occur or 'reasonably' be expected to occur, and s 36(1)*(b)* was thus not applicable. Nor was it a case of 'information supplied in confidence by a third party': the information sought was a term in an agreement concluded with Eskom, a state entity, and s 36(1)*(c)* was F thus totally inapplicable. As to s 37(1)*(a)*: the fact that the parties might have accepted that they owed each other reciprocal duties of confidence — as argued by Billiton — did not mean that disclosure would 'constitute an action for breach of a duty of confidence' such that Billiton could rely on it to refuse access. (Paragraphs [25] and [27] – [31] at 580D – F and 580H – 582A.)

G In a dissenting judgment Cloete JA (Leach JA concurring) held that the information required in the second request was embraced by the first request, and could thus not be characterised as a new or different request, that the application was accordingly out of time, and that Billiton would in any event have succeeded on the merits. (Paragraphs [44] and [50] – [52] at 585B – C and 586H – 588C.)

Cases Considered

H **Annotations**

Case law

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21): dictum in paras [76] – [77] I applied

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: A *Limpopo Province and Others* 2008 (2) SA 481 (SCA) (2008 (5) BCLR 508; [2008] 2 All SA 145): referred to

Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere 1988 (4) SA 224 (A): referred to

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): B referred to

President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363): compared

President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC): dictum in para [15] applied C

SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A): referred to

Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA): dictum in para [41] applied.

Statutes Considered

Statutes

The Promotion of Access to Information Act 2 of 2000, ss 36(1)*(b)*, D 36(1)*(c)*, 37(1)*(a)* and 78(2): see *Juta's Statutes of South Africa 2011/12* vol 5 at 1-238, 1-239 and 1-249.

Case Information

FA Snyckers SC (with *KS McLean*) for the appellants.

GJ Marcus SC (with *S Budlender*) for the respondents. E

Appeal against a decision in the South Gauteng High Court, Johannesburg.

Order

1. The appeal is dismissed, save for paras 166.4.1 and 166.4.2 of the F order of the court a quo which are set aside and replaced with the following:

   'The first respondent (Eskom) is ordered to pay the costs of the application, including the costs of two counsel.'

2. No order is made as to costs on appeal. G

Judgment

Mthiyane DP (Mhlantla JA and Petse JA concurring):

[1] This appeal arises from a successful application by the first and second respondents (Media 24) against the appellants (Billiton) in the H South Gauteng High Court (Kgomo J) in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). Media 24 had made a request to Eskom Holdings Ltd (Eskom), the third respondent, for information concerning two contracts concluded during the 1990s that Eskom has with Billiton, for the supply of electricity to two smelters that I produce aluminium. These smelters are the Hillside smelters of Richards Bay and Mozal smelter of Maputo, Mozambique, both of which belong to the Billiton group of companies. In terms of these contracts Mozal is entitled to receive electricity from the 1990s until March 2026, and Hillside until 2028, at a lower rate than the standard tariff. J

Mthiyane DP (Mhlantla JA and Petse JA concurring)

A [2] In terms of the Constitution everyone has the right of access to any information held by the state. [1] PAIA is national legislation contemplated in s 32(2) of the Constitution, that was introduced to give effect to the right of access to information. Section 11(1)*(a)* and *(b)* of PAIA provide:

> '**11 Right of access to records of public bodies**
>
> (1) A requester must be given access to a record of a public body if —
>
> B *(a)* that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.' [2]

C The information sought by Media 24 is in the possession of Eskom, a 'public body' mentioned in s 11(1) of PAIA. Because the information is in the possession of a public body, Media 24 is not required to give reasons why the information is sought. The position would be otherwise if the information relating to the two contracts was in Billiton's possession. In that event Media 24 would have had to show that it requires the D information for the exercise or protection of its rights. [3]

[3] Although Media 24 was not obliged to give its reasons for requesting the information, given that such information was in the hands of a public body, they can be readily deduced from the extent of the public interest E generated by the subject matter of these two contracts. The contracts relate, after all, to the supply of electricity by Eskom and the problems experienced by it.

[4] To all intents and purposes Eskom is the sole provider of electricity F in this country. The two smelters, Hillside and Mozal, consume 5,68% of Eskom's total base load electricity capacity. In 2008 the electricity supply was repeatedly interrupted and the country was afflicted by regular power outages. Eskom was unable to sustain a consistent electricity supply and was obliged to resort to load shedding. Its lack of capacity was compounded by the unhealthy financial situation in which G it found itself, as reflected in its financial statements for the year ended 31 March 2009. According to its financial statements for the year ended 31 March 2009, Eskom incurred an operating loss of R3,2 billion. In addition, in that same year of its financial statements, Eskom reflected a further loss (on embedded derivatives) of R9,5 billion.

H [5] The deponent to Media 24's founding affidavit [4] averred that 'the operating loss of R3,2 billion is an actual loss made by Eskom in the financial year concerned' and stated further that —

Mthiyane DP (Mhlantla JA and Petse JA concurring)

'(t)he loss of R9,5 billion on embedded derivatives represents the A assessment by Eskom of the likely losses that it will incur due to exposure to embedded derivatives over future years'.

Media 24 is of the view that the embedded derivatives arise entirely out of the contracts that Eskom has with Billiton. B

[6] In its answering affidavit Billiton, through its deponent, [5] did not deny that Eskom suffered an operating loss of over R3,2 billion. Billiton accepted Eskom's financial statements for the year ended 31 March 2009 and averred that they spoke for themselves. As to 'embedded derivatives', again the loss was not denied but the deponent averred that C the 'loss' in respect of embedded derivatives did not arise solely from the contracts. The deponent then went on to disclose that the effect of the pricing formula stipulated in the contract was simply that the price paid by Billiton for electricity in terms of the contract was lower than the standard tariff. Billiton then argued that from 'an accounting perspective', the contracts were 'not loss making' and were contributing towards D Eskom's operating profits, albeit at smaller margins than might have otherwise been the case.

[7] The situation in which Eskom found itself, and the perceived relationship between these contracts and the problems Eskom experienced, E gave rise to considerable public interest, which culminated in parliamentary debates where the appropriateness of these contracts was questioned. Other factors that bothered the public representatives and the public were, according to Billiton:

(a) The gross disparities between the amounts paid by ordinary consumers for electricity. F

(b) The effect of these contracts on the substantial losses incurred by Eskom.

(c) The effect of the contracts on the substantial tariff increases, imposed at Eskom's request, on the ordinary South African consumers.

(d) The relationship between the present contracts and power outages G suffered by the public in South Africa since 2008.

[8] Against this backdrop and the heightened public interest regarding these two contracts, Media 24, seeking to inform the South African public on the issue, submitted a request for access to information in H terms of PAIA to Eskom on 30 June 2009. In that request it sought the following documents —

'25.1 The bulk purchase agreement for the supply of electricity by Eskom to the Hillside Aluminium Smelter in Richards Bay;

25.2 The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo; I

25.3 The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.'

Mthiyane DP (Mhlantla JA and Petse JA concurring)

A [9] On 29 July 2009 Eskom refused the request, advancing various grounds for its refusal. For purposes of this judgment it is not necessary to discuss these grounds.

[10] Media 24 did not pursue Eskom's refusal of this request. It averred that, notwithstanding, it considered Eskom's refusal to be unlawful and B incorrect. It took the view that it would be more 'appropriate and prudent' to submit a 'narrower and more specific' request for information.

[11] This it did on 18 September 2009, and in this request Media 24 sought:

C '1. All and any documents, or relevant extracts of documents, evidencing the formula for and/or manner of the determination of the price for the supply of electricity by Eskom Holdings Ltd or its affiliates to:

a. BHP Billiton plc or any of its affiliates or Hillside Aluminium Ltd for the operation of the Hillside Aluminium Smelter in D Richards Bay, South Africa; and

b. BHP Billiton plc or any of its affiliates or Mozambique Transmission Co SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

2. All and any documents, or relevant extracts of documents, evidencing the identities of all signatories to all written agreements E between Eskom Holdings Ltd or its affiliates and any other party, for the supply of electricity to:

a. BHP Billiton plc or any of its affiliates or Hillside Aluminium Ltd for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

b. BHP Billiton plc or any of its affiliates or Mozambique Transmission Co SARL or Mozal SARL for the operation of F the Mozal Aluminium Smelter in Maputo, Mozambique.

3. All and any documents or relevant extracts of documents, evidencing the date of commencement and date of termination of all written agreements between Eskom Holdings Ltd or its affiliates and any other party, for the supply of electricity to:

G a. BHP Billiton plc or any of its affiliates or Hillside Aluminium Ltd for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

b. BHP Billiton plc or any of its affiliates or Mozambique Transmission Co SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.'

H [12] On 20 October 2009 Media 24 received a response from Eskom to the effect that Eskom had decided to extend the period in which to reply to its request for access to information.

[13] By letter dated 13 November 2009 Eskom communicated its I decision to Media 24, acceding to some of its information and refusing access in other aspects. The relevant portion of the letter reads as follows:

'**Section A: Granting Access**

Upon consideration of your request for access to information on behalf of Media 24 (trading as Sake 24), we have decided to grant access to the J following record(s):

Mthiyane DP (Mhlantla JA and Petse JA concurring)

1. Identities of all signatories A

1.1 The signatories to the electricity supply agreement for Hillside are Eskom Holdings Ltd and Hillside Aluminium Limited.

1.2 The signatories to the electricity supply agreement for Mozal are Eskom Holdings Ltd, Mozambique Transmission Co (Motraco), Electricidade de Mocambique EP and Swaziland Electricity Co. B

Section B: Refusal

Upon consideration of your request for access to information, on behalf of Media 24 (trading as Sake 24), we believe that access to the following records should be refused on the ground set out below: C

1. The formula for and/or manner of the determination of the price for the supply of electricity

1.1 Having applied our mind, upon consideration of your request, and after been (sic) declined on consent to release the information, Eskom will not disclose:

1.1.1 any documents or relevant extracts of the documents relating to the formula and/or manner of the price D determination for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)*(b)* and *(c)* and 37(1)*(a)* of the Promotion of Access to Information Act No 2 of 2000 (the Act); and

1.1.2 any documents or relevant extracts of the documents relating to the formula and/or manner of the price E determination for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)*(b)* and *(c)* and 37(1)*(a)* of the Promotion of Access to Information Act No 2 of 2000 (the Act).

1.2 The requested documents or the relevant extracts thereof F contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its G contractual negotiations both in South Africa and Mozambique and prejudice it in commercial competition.

1.3 Should Eskom disclose the documents or relevant extracts of the documents relating to the formula and/or manner of the price determination, Eskom will be in breach of a duty of confidence owed to either Hillside Aluminium Ltd or H Motraco.

2. The date of commencement and date of termination of all written agreements —

2.1 Having applied our mind, upon consideration of your request, and after been (sic) declined consent to release the information, Eskom will not disclose: I

2.1.1 any documents or extracts of documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)*(b)* and *(c)* and 37(1)*(a)* of the Promotion of Access to Information Act 2 of 2000 (the Act); and J

Mthiyane DP (Mhlantla JA and Petse JA concurring)

A 2.1.2 any documents or extracts of documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)*(b)* and *(c)* and 37(1)*(a)* of the Promotion of Access to Information Act 2 of 2000 (the Act).

B 2.2 The requested documents or the relevant extracts thereof contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group C believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its contractual negotiations and prejudice it in commercial competition.

2.3 Should Eskom disclose the requested information, Eskom will be in breach of a duty of confidence owed to Hillside D Aluminium Ltd or Motraco.'

[14] Media 24's second request concerned the following parts of the agreement:

- the pricing formulae;
- the signatories to the agreements;
- E the date of commencement and dates of termination of the agreements.

[15] It was as a result of Eskom's refusal that Media 24 launched the application in the high court. Eskom elected to abide by the decision of the court. In this court, Billiton no longer contends that there was any F lawful basis for refusing the request in respect of the signatures and the dates of commencement and termination of the contracts. Despite this, however, it refuses to provide the information concerned by relying on a point in limine to the effect that Media 24's second request was out of time.

G [16] In respect of the pricing formulae Billiton submits that the request was lawfully refused in the light of ss 36(1)*(b)*, 36(1)*(c)* and 37(1)*(a)* of PAIA. Media 24 joins issue with Billiton in this regard. First, it asserts that none of the grounds of refusal relied on by Billiton justified the refusal of the request under PAIA. Second, if any of the grounds of refusal had been H established, the information still had to be provided pursuant to the 'mandatory disclosure in the public interest' right in s 46 of PAIA. Third, it advances certain interpretations of s 37(1)*(a)* and the public interest override provision in s 46 of PAIA. In the view I take of the matter, it is not necessary to deal with the second and third contentions of Media 24.

I [17] The appeal, which is before this court with its leave, raises four issues. The first is the point in limine taken by Billiton. Billiton averred that Media 24's second request was out of time and consequently it was precluded from asserting its right of access to information under PAIA. The second relates to the grounds of refusal in respect of the request, insofar as it relates to the disclosure of the signatories to the two J contracts and the dates of commencement and the dates of termination

of the contracts. The third is the public interest issue. The fourth and A final issue pertains to the constitutional challenge.

[18] It follows that if the point in limine is decided in favour of Billiton, that would dispose of the matter entirely. If not, but the arguments advanced by Media 24 in respect of ss 36(1)*(b)*, 36(1)*(c)* and 37(1)*(a)* are upheld, it is unnecessary to traverse the issues relating to the B s 46 public interest override provisions and the constitutional challenge. I turn to the issues and propose to deal with them in turn.

Point in limine

[19] In the appeal before us, Billiton persisted in its point in limine. It C argued that the application to the high court was launched on 18 March 2010, which is more than 180 days after the refusal of the initial request on 29 July 2009. It contended that the application was out of time and that Media 24 is accordingly time barred. In its turn, Media 24 averred that, at the time the application was launched, the 180 days had not expired. It argued that the second request was refused in D November 2009 and that consequently, when the application was launched in March 2010, the 180 days had not expired.

[20] The dispute between the parties revolves around whether the second request and the first request are one and the same request. If they are, then they are indeed hit by the 180-day deadline. See E *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21) para 46. If not, Media 24 is not precluded from asserting its right of access to information in terms of PAIA.

[21] The resolution of the above question is a factual issue and entails F examining the contents of both requests. In regard to the contents of the two requests there is, in my view, a marked difference. In the first request Media 24 sought the documents referred to in para [8] above:

> 25.1 The bulk purchase agreement for the supply of electricity by Eskom to the Hillside Aluminium Smelter in Richards Bay. G
>
> 25.2 The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo.

25.3 The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.'

The second request refers only to the pricing formulae, the signatories to H the agreements and the dates of commencement and dates of termination of the contracts. In my view the two requests are not the same. I therefore conclude that Media 24 was not out of time and accordingly the point in limine falls to be dismissed.

[22] I now turn to Billiton's refusal of access to information based on I ss 36(1)*(b)*, 36 (1)*(c)* and 37(1)*(a)* of PAIA. The first two provisions provide for the mandatory protection of commercial information of a third party. The third — s 37(1)*(a)* — refers to mandatory protection of certain confidential information and protection of other confidential information of a third party. While Eskom abides by the decision of the J

A court, it is not prepared to disclose information in its possession relating to the two contracts. If such a disclosure occurs it will lead to the consequences contemplated in the above sections.

[23] In terms of s 36(1) the information officer of a public body (such as Eskom) is obliged to refuse a request for access to a record of the body B (here, information relating to the contracts) if the record contains '*(b)* financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which *would be likely to cause harm* to the commercial or financial interest of that party' (emphasis added); or '*(c)* information *supplied in confidence* by a third party the C *disclosure of which* would be reasonably expected' (emphasis added) — '(i) to place that party at a commercial disadvantage in contractual or other negotiations'; or '(ii) to prejudice that party in commercial competition'.

[24] In s 37(1)*(a)* a public body is obliged to refuse a request for access to a record of the body if such *disclosure* would constitute an action for D breach of a duty of confidence owed to a third party.

[25] The information that Billiton seeks to protect from disclosure is that relating to the 'pricing formulae'. It contends that if this information is supplied to Media 24 it will fall into the hands of its competitors and consequently cause harm [6] to it as contemplated in ss 36(1)*(b)* and *(c)* of E PAIA. As I understand the law, a party relying on these provisions must provide a basis to substantiate its reliance. (See *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) para 15.) A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in ss 36(1)*(b)* and *(c)*. The party upon whom the F burden lies, in this case Billiton, must adduce evidence that harm 'will and might' happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester. [7]

[26] In *Transnet* this court explained the degree of proof that is required G as follows:

> '[42] It follows that the difference between *(b)* and *(c)* of s 36(1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In *(b)*, that which is likely H is something which is indeed expected. This necessarily includes, at least that which *would* reasonably be expected. By contrast, *(c)* speaks of that which *could* reasonably be expected. The results specified in *(c)* are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.' [8]

[27] In the high court Kgomo J noted that Billiton's stance 'rests' on the I premise that the pricing information requested is ordinarily unavailable

to its competitors. Billiton fears that its disclosure will harm its financial A and commercial interests by informing other industry participants of the production costs of

the smelters. It concludes therefore that that is the reason why all aluminium producers vigorously protect information relating to their electricity costs. The same line of argument was pursued by Billiton in the appeal before us. But as pointed out by counsel for B Media 24, the papers demonstrate that the premise on which this argument is based is false or, at the very least, substantially overstated. The record shows, however, that the information Billiton seeks to withhold is not currently unavailable to Billiton's competitors. There is a significant amount of information about electricity and other costs of C aluminium that is readily available to those who can afford to pay for it. Media 24 put up a brochure by a company called Brook Hunt, which is dedicated to providing specific and continually updated information about costs of aluminium smelters. The costs of purchasing this information from Brook Hunt would be approximately R200 000 — an amount well beyond the means of an average South African consumer of D electricity supplied by Eskom; and consumers undoubtedly have a public interest in the information, in the hands of Eskom, which affects the payment and consumption of electricity supplied by Eskom.

[28] In the circumstances, if the information of the kind described above is already in the public domain, as Media 24 has demonstrated, I do not E see how giving access to it would result in the perceived harm to Billiton. The harm relied on by Billiton is not of the kind that would be 'likely' to occur or 'reasonably' be expected to occur. (See *Transnet* para 42.) Besides, Billiton has already admitted that, in terms of the pricing formula, it pays less for electricity than the standard tariff.

[29] As to whether the information is protected from disclosure under F s 36(1)*(c)*, it is my view that the stance adopted by Billiton is without merit. The information requested by Media 24 is not 'information supplied in confidence' as the section requires. Billiton concluded an agreement with the state entity and the specific information sought constitutes a term in an agreement with the state entity. It is significant G that Billiton makes no effort in its heads of argument to explain how s 36 (1)*(c)* is applicable.

[30] Turning to s 37(1)*(a)* of PAIA, a public body such as Eskom is obliged to refuse access 'if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in H terms of an agreement'. Eskom is on record as stating that there is no express provision in either of the contracts that imposes a duty of confidentiality in relation to the provisions of the contracts. It relies on its 'general' practice of not disclosing such information and then makes reference to a confidentiality agreement signed between Eskom, Hillside I and Billiton. However, Billiton appears to accept that the agreement concerned applies only to the supply of electricity to another site. Billiton relies squarely on a statement in its affidavit that the 'parties' unanimously and continuously accepted that they owe each other reciprocal duties of confidentiality not to disclose any commercial or operationally sensitive or confidential information arising from those agreements. J

Cloete JA (Leach JA concurring):

A [31] I agree with counsel for Media 24 that this is insufficient to 'constitute an action for breach of a duty of confidence' as contemplated in s 37(1)*(a)*, in the event of a disclosure of the records sought by Media 24. There is no reference in any of the agreements to a term to substantiate the 'general practice referred to above'. In my view B s 37(1)*(a)* is inapplicable and does not avail Billiton in its attempt to avoid disclosure of the information sought by Media 24 in terms of the provisions of PAIA.

[32] In the event of the appeal being dismissed, both counsel were agreed that this is not a case in which the unsuccessful party, in the event C of it being Billiton, should be ordered to pay costs. In the result the appeal is dismissed. There will be no order as to costs.

[33] The final issue is costs in the high court. Eskom persisted in its refusal to disclose the information sought. Its counsel advanced argument opposing the application, notwithstanding its decision to abide the D decision of the court. The high court, however, mulcted Billiton with the costs of suit and merely ordered Eskom to pay costs

up to the filing of its answering affidavit. In this court both parties submitted that the high court ought to have ordered the state entities to pay such costs. I agree.

[34] In the result, the following order is made:

1. The appeal is dismissed, save for paras 166.4.1 and 166.4.2 of the E order of the court a quo, which are set aside and replaced with the following:

   'The first respondent (Eskom) is ordered to pay the costs of the application, including the costs of two counsel.'

F 2. No order is made as to costs on appeal.

Judgment

Cloete JA (Leach JA concurring):

[35] I have had the advantage of reading the judgment of the learned Deputy President. I regret that (save for the alteration to the costs order made by the high court) I cannot concur in the process of reasoning G followed, the conclusion reached or the order made. In my view the point in limine taken by Billiton is decisive; Billiton should in any event succeed on the merits; and the appeal should be allowed.

[36] Section 78(2) of PAIA provides that a requester such as Media 24 has 30 days to apply to a court for the sort of relief it seeks in these H proceedings. The reported judgment of the Constitutional Court in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21) reflects that the court ordered, inter alia, that:

> '*(e)* The words within I 30 days in s 78(2) of the Promotion of Access to Information Act 2 of 2000 are declared to be inconsistent with ss 32 and 34 of the Constitution and s 78(2) is declared to be invalid for that reason.
>
> *(f)* The declaration of invalidity made in para *(e)* above is suspended for a period of 18 months from the date of this order [13 August 2009] to enable Parliament to enact legislation to correct the J inconsistency which has resulted in the declaration of invalidity.

Cloete JA (Leach JA concurring):

> *(g)* Pending the enactment of legislation by Parliament or the expiry of A the period referred to in para *(f)* above, whichever occurs first, the words within 30 days in s 78(2) of the Promotion of Access to Information Act 2 of 2000 shall be replaced by the words within 180 days from the date when the requester receives notice of the decision on internal appeal.
>
> *(h)* Pending the enactment of legislation by Parliament or the expiry of B the period referred to in para *(f)* above, whichever occurs first, a court considering an application contemplated in s 78(1) of the Promotion of Access to Information Act 2 of 2000 shall have the power to extend or condone non-compliance with the period of 180 days referred to in para *(g)* above.'

I have obtained a copy of the judgment filed at the Constitutional Court C and it appears from p 47 thereof that para *(g)* of the order does not contain the words 'on internal appeal'. It would further appear from the judgment itself that the reference to 's 78(1)' in para *(h)* of the order should have been, or should have included, a reference to 's 78(2)' and the appeal was argued by both sides on that basis. Parliament did not D enact the legislation contemplated in the order within the period of suspension laid down in para *(f)* of the order and has not done so since.

[37] The first request by Media 24 to Eskom was made on 30 June 2009 and it was refused on 29 July of the same year. The full and exact terms of the request were for:
E

> '*(a)* The terms and Conditions (ie The Bulk Purchase Agreement) between Eskom Holdings and its affiliates, and Gencor/Alusaf for the supply of electricity by Eskom Holdings and its affiliates, to Alusaf, an affiliate of BHP Billiton plc, formerly Gencor, for the operation of the Hillside aluminium smelter in Richards Bay, F South Africa.
>
> *(b)* The Terms and Conditions (ie The Bulk Purchase Agreement) for the supply of electricity by Eskom Holdings to Mozal, an affiliate of BHP Billiton plc, for the operation of the Mozal aluminium smelter in Maputo, Mozambique.

(c) The total and final invoices containing the total and final amounts G due by BHP Billiton plc or its affiliates for the supply of electricity to the said Hillside aluminium smelter and the Mozal aluminium smelter for the financial years ending March 2007, March 2008 and March 2009.'

Shorn of verbiage, Media 24 wanted access to the contracts between H Eskom and Billiton for the supply of electricity and the invoices in respect thereof for three years.

[38] The second request was made on 18 September 2009 and refused some two months later on 30 November. The terms of this request are set out in para [11] of the judgment of the Deputy President. What was I requested was the pricing formula in the contracts for the supply of electricity by Eskom to Billiton, together with the duration of, and the identity of the signatories to, the contracts.

[39] The reason for the second request, preceded by some background, is given in Media 24's founding affidavit as follows: J

Cloete JA (Leach JA concurring):

A 'On 30 June 2009, I submitted a request for access to information in terms of PAIA to Eskom. I refer to this as the initial request. I stress that this initial request is not the subject of the present application and I mention it simply by way of background. A copy of the initial request is attached . . . . In that request I sought the following documents:

1. The bulk purchase agreement for the supply of electricity by B Eskom to the Hillside Aluminium Smelter in Richards Bay.
2. The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo.
3. The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.

C On 29 July 2009, Eskom refused this initial request. A copy of its letter refusing the request is attached . . . . It relied on a variety of grounds for its refusal.

Notwithstanding the fact that I and the second applicant considered Eskom's refusal to be unlawful and incorrect, we ultimately took the D view that it would be more appropriate and prudent for a narrower and more specific request for information to be filed. Accordingly, we did not pursue any review in respect of Eskom's decision in relation to the initial request.'

[40] Billiton dealt with these allegations in the answering affidavit as E follows:

'I deny that, properly analysed, the initial request is not the subject of the present application. On a perusal of the two request documents, it is clear that the only difference is in the wording used to describe the record sought by [Media 24]. That difference however is illusionary — what is sought in [the second request] is inseparably part of and F included in [the first request]. Put differently, [the first request] sought all the terms of [the electricity supply agreements] while [the second request] seeks some, but not all of, those self same terms.

In the circumstances I respectfully submit that the application is out of time and should be dismissed on that basis alone.'

G [41] Media 24 in the replying affidavit in turn responded as follows:

'I deny the contents of this paragraph. [Media 24] persist[s] in their view that the first request is not the subject of the present application. As is explained in . . . the founding affidavit, [Media 24] took the view that it would be more appropriate and prudent for a narrower and more specific request for information to be filed than the first request. H Accordingly the second request was drawn up and filed.'

[42] An analysis of the terms of the first and second requests shows that despite different wording, all of the information requested in terms of the second request, and more particularly that requested in para 1 thereof I (which, I emphasise, is the only information with which this appeal is concerned), was also requested in terms of the first request. Counsel representing Media 24 specifically and correctly conceded in oral argument that this was so; to use counsel's own phrase, 'the signatures, duration and pricing formula were embraced by the first request'.

[43] Media 24 was only entitled to obtain the information refused if it J brought court proceedings to compel the furnishing of the documents

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Cloete JA (Leach JA concurring):

within 180 days of the refusal. The refusal was communicated on 29 July 2009. A The court proceedings culminating in this appeal were commenced more than 180 days later, on 18 March 2010. There was no application for condonation, as contemplated in para *(h)* of the order in *Brümmer*. That, to my mind, is the end of the matter.

[44] I wish to emphasise that the second request cannot be categorised B as a new or a different request. The documents requested were more limited than the documents requested in the first request — but it is common cause that they were covered by the first request. That being so, refusal of the documents sought in the first request of necessity entailed refusal of the documents sought in the second request. The greater C includes the lesser. And the lesser must be taken to have been refused not only as a matter of plain logic, but also because of the provisions of s 28(1) of PAIA, which provides:

> '(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any D provision of Chapter 4 of this Part, every part of the record which —
>
> *(a)* does not contain; and
>
> *(b)* can reasonably be severed from any part that contains,
>
> any such information must, despite any other provision of this Act, be disclosed.'

[45] What Media 24 should have done if it considered that it required E only part of the documents that it had requested in terms of the first request, was to limit the application to compel — not make another, but limited, request. If the position were otherwise, it would defeat the time limit which the Constitutional Court laid down in *Brümmer* — for a requester could then make a series of requests for progressively narrower F categories or portions of documents, and thereby obtain successive periods of 180 days in respect of each request. That would be manifestly absurd.

[46] The fact that Eskom treated the second request as an independent request cannot redound to the disadvantage of the appellants or serve to G circumvent the provisions of PAIA. Media 24's counsel relied on the following dictum in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) (2008 (5) BCLR 508; [2008] 2 All SA 145) para 17:

> 'Moreover, our law permits condonation of non-compliance with H peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted. . . .'

(The principle is discussed in more detail in *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G – 50D.) The argument was that I Eskom had by its conduct tacitly waived compliance with the 180-day period. But the time period was not enacted solely for the benefit of the public body (in the present matter, Eskom), but also for the benefit of the third party (in the present matter, Billiton) so that, after the lapse of the period, the third party could legitimately assume the danger to have passed and regulate its affairs on that basis, without having thereafter J

Cloete JA (Leach JA concurring):

A again (and possibly repeatedly) to seek, in terms of ch 5 of PAIA, to prevent disclosure of information that had already been refused by the public body.

[47] The objects of the Act are spelt out in s 9, and include the following:

> *'(a)* to give effect to the constitutional right of access to —
>
> B (i) any information held by the State; and
>
> (ii) any information that is held by another person and that is required for the exercise or protection of any rights;
>
> *(b)* *to give effect to that right* —
>
> (i) *subject to justifiable limitations*, including, but not limited to, limitations aimed at the reasonable protection of privacy, C commercial confidentiality and effective, efficient and good governance . . . .' [Emphasis added.]

One of the limitations is the time period for compelling the furnishing of the information sought by court proceedings. By amending the period of D the time limit in PAIA, the Constitutional Court in *Brümmer* necessarily recognised the constitutionality of this very provision as amended. I repeat that in this matter there was no application for condonation. Media 24's attitude therefore amounts to this: We have not brought ourselves within the constitutionally justifiable parameters laid down in PAIA for compelling information that has been refused; we make no E excuse for that; but we want the information anyway.

[48] I am perfectly conscious of the public debate that surrounds the provision of electricity by Eskom to Billiton. It is already known that Eskom supplies about 6% of the electricity generated by it to Billiton, F and at a rebated rate. It is not necessary to consider what access to the precise manner of determination of the price paid by Billiton to Eskom for electricity would contribute to that debate. A refusal to allow access to that information is not to stifle the debate, but rather to enforce a specific requirement of a statute that (I say yet again) the Constitutional Court has held passes constitutional muster (once amended), and G thereby to uphold the rule of law.

[49] Although it is strictly speaking unnecessary for me to do so, I would briefly record my respectful disagreement with the majority judgment on the merits as well. No argument was addressed to this court based on s 36(1)*(c)* and it can therefore be ignored.

H [50] So far as s 36(1)*(b)* is concerned, the brochure produced by Brook Hunt refers to 'details of power source and energy costs variables' and 'comprehensive cost leagues and graphs showing historic and forecast costs . . . to allow clients to assess change in costs'; and the spreadsheet annexed to the Deutsche Bank report entitled 'Aluminium: Where is fair I value?' (also annexed to the replying affidavit) gives as its source of information 'Brook Hunt, DB estimates'. That indeed is what Brook Hunt produces — information on which *estimates* can be based. That is a far cry from the precise manner in which the cost of electricity from Eskom paid by Billiton has in the past been and will in the future be calculated, which is the information Media 24 seeks. Nor do I believe J that Media 24 can remotely be said to have rebutted the detailed and

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Cloete JA (Leach JA concurring):

motivated evidence of Dr Von Szczepanski of Billiton, that in the A aluminium business globally the prices paid for, inter alia, electricity are a closely guarded secret because otherwise the producer would be at a severe competitive disadvantage. The very fact that Brook Hunt produces estimates of such prices (and it is not the only company that does so) that it sells at a considerable cost, bears out this statement and negates any conclusion that the prices are 'in the public domain'. B

[51] In any event, these being motion proceedings, Billiton's evidence must be accepted: *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) paras 13 and 14. The rule applies equally to the situation where the onus is on the respondent, in C casu, Billiton, as this court has repeatedly said in at least 15 reported judgments spanning the last quarter of a century — starting with *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A), and continuing, most recently, with *President of the RSA v M & G Media Ltd* that was decided in the context of PAIA and is therefore D directly in point. The rule is dictated not by the incidence of the onus but by the nature of the proceedings the applicant, in casu, Media 24, has chosen to institute. Therefore, while I accept, as pointed out by the Deputy President in para [25] of his judgment, that a party who relies on s 36(1)*(b)* of PAIA has a burden of establishing that it will suffer harm as E contemplated in the section; and while I also accept the degree of proof required as set out by the Deputy President in para [26] of his judgment, the position is this: in the event of a conflict of fact (and save in exceptional circumstances as mentioned in *President of the RSA v M & G Media Ltd* (SCA), para 13, that are not present here) the question F

whether Billiton has discharged the onus must be decided on the facts put forward by it. It has manifestly discharged the evidential burden to allege sufficient facts that will justify refusal of the information sought by Media 24, as required by *President of the RSA v M & G Media Ltd* (SCA), para 14; and as Media 24 did not seek a reference to evidence or to trial on this (or any other) point, the veracity of Billiton's evidence must be accepted. G

[52] So far as s 37(1)*(a)* is concerned, the requirements of that section were in my view satisfied by the following evidence. Eskom said:

> 'Eskom owes a duty of confidentiality to its customers in relation to information concerning the contractual arrangements between them.' H

Billiton said:

> 'The parties unanimously and continuously accept that in respect of the [electricity supply agreements] they owe each other reciprocal duties of confidentiality, not to disclose any commercially or operationally I sensitive or confidential information arising from those agreements. More particularly, Eskom has since inception of the agreements acknowledged that, particularly the pricing information is extremely sensitive and confidential and that disclosure thereof would be severely detrimental to Billiton.
>
> Eskom has at all times been aware that all aluminium producers protect, as far as possible, information as to their electricity costs. This J

> A practice applies to all aluminium producers, across the globe and has done so for decades.'

This evidence was met in each case by Media 24 with a bald denial in the replying affidavit. There was accordingly no genuine dispute of fact, and I repeat that these are motion proceedings. The principle in B *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I – 635C is therefore applicable and — there being no suggestion that the evidence of the appellants is inherently not credible, or so far-fetched or clearly untenable that the court would be justified in rejecting it merely on the papers — that evidence must be accepted: C *President of the Republic of South Africa v M & G Media Ltd* (SCA), para 13.

[53] For these reasons I would allow the appeal and alter the order of the court a quo to read: 'The application is dismissed'.

Judgment

Petse JA (Mhlantla JA concurring):

D [54] I have had the advantage of reading the judgments of my colleagues, Mthiyane DP and Cloete JA. I respectfully agree with the order proposed by the learned Deputy President and his reasoning. I am, however, with equal respect, unable to agree with either the reasoning or the conclusion reached by Cloete JA.

E [55] Regrettably I have found it necessary to add my own observation in relation to the point in limine. The difference in the approaches of my colleagues seems to me to lie in their interpretation of the content of the first and second requests by Media 24 to Eskom made on 30 June 2009 and 18 September 2009, respectively.

F [56] My colleague Cloete JA is of the view that since the information required in terms of the second request was embraced by the first request, it would defeat the time limit which the Constitutional Court laid down in *Brümmer*, 'for a requester could then make a series of requests for progressively narrower categories or portions of documents, and thereby obtain successive periods of 180 days in respect of each G request'.

[57] To my mind the question whether repeated requests for information in terms of PAIA would constitute abuse or amount to substantially the same request and thus calculated to circumvent the provisions of H s 78(2) of PAIA, is an issue which can only properly be determined on a case-by-case basis in the context of the facts of each case.

[58] Although the information covered by the second request would have been encapsulated in the first request had Eskom not declined the latter one, sight should, however, not be lost of the fact that the former I required limited information and was not as extensive as the first request.

[59] Moreover, Eskom itself regarded and understood the second request to be distinct from the first one. It requested more time to deal with it and consulted Billiton in regard thereto. Thus Billiton could not have been under any illusion that Media 24 was still pursuing the matter, J albeit to a limited extent only. Accordingly there would have been no

basis, as my colleague Cloete JA suggests, for Billiton (as the third party) A to legitimately assume the danger to have passed and regulate its affairs on that assumption.

[60] The proposition by my colleague Cloete JA that Media 24 could and should have instituted proceedings to compel Eskom — once its first B request had been declined — but limit such application to only part of the documents it had requested in terms of the first request, with respect, pays insufficient regard to one of the cardinal objects of PAIA which, in terms of s 9*(d)* thereof, is —

> 'to establish voluntary and mandatory mechanisms or procedures to give C effect to that right [right of access to a record of a public or private body] in a manner which enables persons to obtain access to records of public and private bodies *as swiftly, inexpensively and effortlessly as reasonably possible*'. [Emphasis added.]

[61] I therefore conclude that, on the facts of this case, Media 24 should not be penalised for adopting a pragmatic approach which, to my mind, D accords with the objects of PAIA when it made the second (but limited) request, rather than bringing an application in court to compel, which would not have been a swift, inexpensive and effortless manner of gaining access to the information required. Hence my concurrence in the judgment and order of the learned Deputy President. E

Judgment

Leach JA (Cloete JA concurring):

[62] Having enjoyed the benefit of reading the judgments prepared by my colleagues in this matter I find myself unable to agree with the reasoning and conclusion of Mthiyane DP and Petse JA in regard to the F objection in limine. And although I agree with Cloete JA on this issue, I am constrained to set out reasons of my own for reaching a contrary conclusion.

[63] It is accepted by all that the information to which these proceedings G relate, namely certain of the information contained in the request of 18 September 2009, had been among that sought by way of the original request of 30 June 2009. The refusal on 29 July 2009 of the original request thus resulted in the information sought in the second request, and particularly that to which these proceedings relate, having been refused at that stage. Consequently, while my colleague Petse JA is H perfectly correct in his finding that the second request related to information 'encapsulated in' and was not 'as extensive' as the first request, this leads me to a contrary conclusion on the point in limine.

[64] The point in limine can only be dismissed if the limited information sought by way of the second request had not already been sought and I refused. As I have said, everyone accepts that the information in the second request was contained in the first request, and I can see no basis for finding that this information was not refused along with the other information sought in the first request. The more limited nature of the second request cannot alter that simple fact. Accordingly, the expiry period for the bringing of an application under s 78(2) of PAIA started J

Leach JA (Cloete JA concurring)

A running on 29 July 2009, and was still running when, some six weeks later, the second request was lodged seeking certain of the information originally refused.

[65] Furthermore, the fact that Eskom requested more time, and consulted with Billiton after the second request had been lodged, does B not mean that Billiton was not entitled to assume that the period under s 78(2), which commenced to run on 29 July 2009, would lapse after 180 days. Billiton knew that the information sought in the second request had earlier been refused. The fact that certain of that information had again been requested does not mean that it had to treat the C matter as if the period for an application under s 78(2) had not commenced to run in respect of such information. It must be remembered that Billiton's interest in the information asked for differed from that of Eskom. Billiton feared that disclosure would harm its financial and commercial interests in a competitive industry, and it was entitled to have those interests protected to the extent that PAIA required persons D seeking information to do so within the time period that Act prescribed. Eskom's attitude to the second request was irrelevant to that issue.

[66] Furthermore, I do not see how the objectives of s 9*(d)* of PAIA should lead to the mechanisms and procedures prescribed by that Act E being ignored. The question is not whether there had been an abuse of the procedures laid down by the Act calculated to circumvent s 78(2), but whether there had been compliance with the Act. Not only did Media 24 not comply but, in addition, by repeating part of its request for information already refused rather than proceeding to seek such information by way of an application under s 78(2), it disregarded the remedy F PAIA provided. I fail to see how this can be regarded as a 'pragmatic approach' in line with s 9*(d)* of PAIA, to seek that information swiftly, inexpensively and with less effort. The opposite seems to me to be the case.

[67] For these reasons and those set out by Cloete JA in his judgment, G I would uphold the objection in limine and, for that reason alone, uphold the appeal. Strictly speaking, that conclusion renders it unnecessary to venture an opinion on the remaining issues raised in the appeal, but, for completeness, I should record that I find myself in respectful agreement with the reasoning of Cloete JA set out in paras [50] – [52] of his judgment.

H [68] For the above reasons I, too, would allow the appeal and alter the order of the court a quo in the manner suggested by Cloete JA.

Appellants' Attorneys: *Mervyn Taback Inc*, Johannesburg; *Webbers*, Bloemfontein.

Respondents' Attorneys: *Willem de Klerk Attorneys*, Johannesburg; *Honey Attorneys*, Bloemfontein.

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* Section 78(2) as enacted imposed a 30-day time limit for the institution of such an application, but the Constitutional Court in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21) held it to be unconstitutional and replaced it with a 180-day limit — Eds.

1 See s 32(1)*(a)* of the Constitution.

2 Chapter 4 sets out various grounds for refusal of access to records which are not relevant to the determination of this matter. As will become clearer later in the judgment, access to information relating to the two contracts was refused on the basis of ss 36(1)*(b)* and 37(1)*(a)* of PAIA.

3 Section 32(1)*(b)* of the Constitution.

4 Jan George de Lange.

5 Johanna Smit, dated 14 May 2010.

6 *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 41.

7 *President v M & G Media* supra para 15.

8 Supra n6 para 42.

TITTY'S BAR AND BOTTLE STORE (PTY) LTD v ABC GARAGE (PTY) LTD AND OTHERS 1974 (4) SA 362 (T)

1974 (4) SA p362

Citation	1974 (4) SA 362 (T)
Court	Transvaal Provincial Division
Judge	Viljoen J
Heard	June 13, 1974
Judgment	August 8, 1974
Annotations	Link to Case Annotations

A

Flynote : Sleutelwoorde

Practice - Applications and motions - Striking out of matter in applicant's replying affidavits - Rule of Court 6 (15) - Grounds for in such Rule not exhaustive - Matter B which should have appeared in founding affidavit struck out - New and irrelevant matter struck out where respondents would be prejudiced if it were not struck out - Servitude - Restrictive condition in title deeds - When purchasers from common vendor can enforce such condition.

Headnote : Kopnota

The use of the word "may" in Rule 6 (15) of the Uniform Rules C of Court merely indicates that the Court has a discretion in an application to strike out matter from an affidavit but, in spite thereof, the sub-rule was not intended to be exhaustive of the grounds upon which such an application may be brought. The Court still has an inherent jurisdiction to grant relief where the Rules of Court make no provision therefor. It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have D appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. It lies in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. The Court, on the application of the respondents, struck out certain allegations in the applicant's replying affidavits E which should have appeared in the applicant's founding affidavit. Other allegations which were irrelevant and new and would gravely prejudice the respondents if they were not struck out were also struck out as the respondents would have had to be given leave to file a fourth set of affidavits to deal with such allegations and they were serious allegations of improper and unethical conduct by a business rival without any details being furnished in support thereof to which the respondents would be unable to reply in a positive manner.

F In an application by an owner of land against another owner of land for the enforcement of a restrictive condition contained in the latter's title deeds, where such owners purchased their land from a common vendor, the fourth requisite referred to in *Ex parte Will G. Hare (Pty.) Ltd.*, 1958 (4) SA 416 (C) at p. 418H, that "both parties in a dispute before the Court, or their predecessors in title, purchased from the common vendor on the understanding that the restrictions were G to enure for the benefit of all the other lots included in the general scheme, whether or not they were also to enure for the benefit of other land retained by the vendor" must at least be present before it can be held that, as between the common vendor and the purchasers of lots, there has

been a contract for the benefit of third parties entitling a purchaser to enforce the restrictive condition.

Case Information

Application for an order striking out certain matter from the H applicant's replying affidavit. The facts appear from the reasons for judgment.

A. Mendelow, Q.C. (with him *W. J. Van der Merwe*), for the respondents.

A. S. Van der Spuy, S.C. (with him *I. Mahomed*), for the applicant.

Cur. adv. vult.

Postea (August 8).

1974 (4) SA p363

VILJOEN J

Judgment

VILJOEN, J.: The applicant herein seeks to interdict the respondents from using or permitting the use of erf 58 situate in the township of Laudium, Pretoria, for any purposes of conducting a bar or a bottle store or for the supply of intoxicating liquor to the public whether for consumption on or A off any portion of the said erf. In the founding affidavit Lutchman Mooloo states that he is a shareholder and director in the applicant company which is the registered owner of erf 359 in the business centre of Laudium, on which erf he is duly licensed to conduct the business of a bar, bottle store and restaurant and in particular to supplying intoxicating liquor to the public. These businesses are owned and conducted by the B applicant. The first respondent is the registered owner of erf 58 in the township of Laudium and carries on the business of a garage and a café on this erf. Second respondent carries on the business of a restaurant, part of the amenities of which is a bar installed in the premises of the said restaurant. It also conducts the business of a bottle store on the premises C from which it supplies liquor to the restaurant and bar, apart from the sale and supply thereof to members of the general public for off-consumption. Third respondent is a permanent resident of Laudium and is the holder of the relevant liquor licences under which the aforementioned liquor businesses are conducted by the second respondent on the said erf.

D The deponent attaches the first respondent's deed of transfer of the said erf to his affidavit and refers to the following condition appearing therein:

> "6. It is a condition of the said deed of transfer, annexure B hereto, that -
>
> 'C*(a)* The erf shall be used solely for a garage and for purposes incidental thereto or for E such other purposes as the Administrator may permit and subject to such conditions as he may determine after consultation with the Townships Board and the local authority.'"

He proceeds to allege that at no time has there been any application by any person or company in terms of condition C*(a)* of deed of transfer 2725/1966 to the Administrator for consent to use erf 58 or any portion thereof or the premises thereon or F any portion of the premises for the purposes of conducting a bar or a bottle store or for the supply of intoxicating liquor to the public whether for consumption on or off the erf or premises.

Paras. 7, 8 and 9 contain the following allegations:

> "7. I state that applicant is, as owner of an erf in the same township, which was acquired from a common G vendor, to wit the City Council of Pretoria, and under a general common scheme for developing the area for Indian ownership and occupation, entitled to rely upon the provisions of the said condition of title and to enforce observance thereof.
>
> 8. I furthermore state that applicant is, as owner of a business similar to those businesses conducted by respondents, entitled to approach the above honourable Court for an interdict against any unlawful use of the said erf.
>
> H 9. I state that the conduct of the said businesses, in particular the liquor businesses aforementioned, prejudicially affects applicant who is engaged in similar businesses for gain."

The affidavit contains further allegations to the effect that the respondents are now moving the bottle store business to other premises on the same erf and that it is in conflict with the title condition quoted above and against the interests of applicant and of the public of Laudium that respondents should achieve the removal of the business

and the deponent says that such removal should, as a matter of urgency, be prevented by the Court. On the ground of this latter averment it was presumably sought to have the matter dealt with as one of urgency. However, the urgency seems to have fallen away because subsequent to the date of the A attestation of the founding affidavit, which occurred on 2 May 1974, affidavits were filed on both sides and the matter was heard by me in the motion Court on 13 June 1974. For the purposes of this judgment I do not deem it necessary to comment on the allegations contained in paras. 10 - 15 save to remark, in passing, that it is not clear to me by virtue of B what right or capacity the applicant speaks for the public of Laudium.

In the answering affidavit on behalf of the three respondents, the third respondent, although not admitting that an application in terms of the condition quoted above is necessary, states that an application has in fact been lodged with the Administrator. In the application to the C Administrator, a copy of which is attached to her affidavit, she sets out how it came about that a liquor licence was granted on the premises. Briefly the history is as follows: During 1970 she and her husband decided to float the second respondent for the purpose of conducting a restaurant on the premises. It was then decided to apply to the Minister of Justice for a restaurant liquor licence in terms of sec. 100 D sex of the Liquor Act, 1928. It was explained to them that, in cases where such authority is granted by the Minister, the latter could reasonably be expected to grant the further authority to sell liquor off the premises. Application was thereupon made for a restaurant as well as a bottle store liquor licence, which, after proper advertisement, was granted. E During 1972 the City Council of Pretoria communicated with the second respondent taking up the attitude that the restaurant liquor licence was in order, but not the retail off-consumption licence because the latter was in conflict with the town planning scheme which was operative for Laudium. As a result of negotiations between the second respondent and the planning section of the City Council it was decided to apply for F permission in terms of the scheme to conduct such business. Application was duly made, the necessary advertisements appeared in the Press, there were no objections and on 5 October 1972 permission was granted subject to the consent of the Administrator being obtained. For certain reasons the second respondent did not immediately apply for such consent, G but it has now, since the lodgment of the founding affidavit, done so. The third respondent avers that the second respondent is confident of obtaining the consent of the Administrator.

In her affidavit the third respondent takes the stand that the applicant has no *locus standi* to bring the application by reason of the following facts:

H "(i) As will more fully appear from annexure 'D' hereto, erf 359 is situated approximately one-half to one mile from erf 58.

(ii) The applicant waived his right to object to the businesses conducted by the respondents on erf 58.

(*aa*) On 15 December 1970, and again on 16 December 1970, advertisements appeared in an Afrikaans and an English newspaper, circulating in Pretoria, giving notice that an application would be submitted to the magistrate, Pretoria, on 23 December 1970 for the grant of a liquor licence in terms of sec. 100 *sex* of the Liquor Act. These advertisements must have come to the knowledge of the applicant.

(*bb*) Again on 22 and 29 December 1972 notices were placed twice in *The Star* and *Vaderland* newspapers that application would be made to the Administrator for a consent user of erf 58, more in particular for the conduct of the businesses that are

carried on on erf 58 by the respondents. These advertisements must also have come to the applicant's knowledge.

(*cc*) To the knowledge of the applicant the A respondents have been carrying on the said businesses on erf 58 since 1971. At no stage whatsoever has any complaint been lodged against the respondents.

(iii) The population in Laudium has increased tremendously during the last few years. People from the Northern Transvaal as far as Messina and Louis Trichardt and also from Johannesburg come to Laudium to stay here permanently. The demand for accommodation has increased so much that a number of blocks of flats are developed and under B construction in one of the new extensions of Laudium. The demand for erven, services, etc., in Laudium have reached such a stage that the whole character of Laudium has changed.

It is quite clear that the original plans for the development of Laudium have faded away. To such an extent has the character changed that erf 55 which has the same rights as erf 58, is being used for a bank, printing words, sock factory, club-house and polony C factory without any consent from the Administrator. As in the case of the respondents on erf 58, only the City Council of Pretoria's consent was obtained to carry on with the businesses on erf 55."

It is clear from the reference in the answering affidavit as well as from the context, that the stand referred to was taken up in answer to the applicant's allegations in para. 8 of its founding affidavit, viz., that applicant is, as owner of a D business similar to those businesses conducted by respondents, entitled to approach the Court for an interdict against the unlawful use of the said erf. The unlawful use referred to is clearly the user of the premises contrary to the title condition contained in para. 6 of the founding affidavit which E is followed by the allegations in this latter paragraph is to the following effect:

"*(a)* If the applicant is the owner of the said erf (a fact which I cannot admit because of the lack of personal knowledge) I admit that it was obtained from the City Council of Pretoria.

(b) Save as aforesaid, each and every other allegation contained in this paragraph is denied."

On behalf of the applicant Lutchman Mooloo filed a replying F affidavit. Application is now made for two passages in this replying affidavit to be struck out. The first passage reads as follows:

"Since the general denial includes a denial of the averment that there was a general common scheme for developing the relevant area from which I derive my proprietary rights in and to erf 359, I refer to the following facts:

'(1) *(a)* That I derived my title to erf 359 from the G Pretoria City Council which is a vendor common to myself and the respondents in respect of erf 58;

(b) that the township of Laudium was established for the sale of erven subject to certain general conditions of establishment of title and specific conditions of title applicable to business erven therein, which is consistent only with a general scheme for the development of the said township. In support of the allegations herein I refer to H an extract of certain conditions of establishment of the township which are annexed to a true copy of my deed of sale in respect of erf 359 hereunto annexed and marked annexure F(1) and to the proclaimed conditions of the township hereunto annexed marked F(2). I also annex hereto marked G a township diagram showing the various business erven in Laudium township including the special business erven in the town centre and the erven in the industrial/garage area of the township (including respondent's erf 58) which latter erven could only obtain rights other than industrial and/or garage rights in very special circumstances and with the consent of the Administrator;

(c) that the restrictions imposed by the common vendor on the garage erven, such as erf 58 (including title restriction C*(a)* mentioned in the founding affidavit), were imposed *inter alia* and particularly for the benefit of the owners of all the special business erven in the town centre such erven being depicted on a true copy of a diagram of the main shopping centre, hereunto annexed marked annexure H;

A *(d)* that all lots in the town centre, including the applicant's erf 359, were purchased on the footing that the restrictions imposed upon the erven in the aforesaid

garage/industrial zone would enure for the benefit of the other business erven aforementioned included in the said general common scheme.

(2) The common general scheme of development evinced by the conditions of establishment of the township is B also accepted in and is supported by the town planning scheme applicable to Laudium, being Amendment Scheme, 1 of 1938, a true copy of which scheme, if required by the above honourable Court, will be produced at the hearing of this matter. The local authority administering the said scheme has in fact acted within the framework of the said scheme by requiring that, when granting its consent to use the said erf 58 for purposes other than a public garage, the owner thereof should obtain the further consent of the Administrator of the Transvaal.'"

C The second passage relates to the prejudice and damage suffered by the applicant, and reads:

"The applicant is adversely affected by the respondents' conduct of the businesses because, in the first place, it means that the applicant is not getting the full benefit of the substantial price it paid for the acquisition of erf 359 on the basis that this erf carried business rights, whereas erf 58 D could, in the absence of proper consent, only be used as a public garage. Secondly, the applicant carries on its business in the proper business centre of the township whereas the respondents operate from a short distance away on the road leading to the commencement of the township. This enables the respondents to enjoy an advantage which is pursued quite unscrupulously; the agents of the respondents constantly incite customers of the applicant who are on their way to the business of the applicant or who are emerging from that business to E refrain from making their purchases from the applicant and to patronise the second respondent because the second respondent would sell liquor more cheaply."

The first passage quoted above is sought to be struck out on the ground that it contains matter which should have been included in the founding affidavit, and the second passage on the ground that it is irrelevant.

F In developing his argument, Mr. *Mendelow*, for the respondents, has referred me, in support of his submission that the first passage should be struck out, to *De Villiers v De Villiers*, 1943 T.P.D. 60, and *The Master v Slomowitz*, 1961 (1) SA 669 (T) at p. 673H. He submits that the applicant makes out a case of *locus standi* only in the replying affidavit of Mooloo which contains allegations to the effect that the G restrictive condition in the first respondent's title deed referred to amounts to a condition which enures for the benefit of other lotholders in the township of Laudium, including, of course, the applicant. His contention is that it is no sufficient basis for *locus standi* to allege that the properties concerned were purchased from a common vendor and that there H was a common scheme in existence. In this regard I was referred to *Eiffel Mansions (Pty.) Ltd.* v *Cohen*, 1945 W.L.D. 200, in which matter RAMSBOTTOM, J., as he then was, decided that, where there is a restriction in a title deed that not more than one residence can be erected without the consent of the original vendor and such original vendor gives his consent to the flats being erected, other flat holders who bought from the same vendor with the same restriction cannot object to the flats being erected unless they can show that the restriction was imposed

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by the common vendor on each purchaser for the benefit of all other purchasers. I was also referred to the matters of *Blanckenberg and Another v Forbes*, 1955 (3) SA 170 (C), and *Ex parte Will G. Hare (Pty.) Ltd.*, 1958 (4) SA 416 (C).

The replying affidavit does contain allegations which do not, A not even in bare from, appear in the founding affidavit. These are allegations which not only permit of an inference to be drawn that the restrictions imporsed on the third respondent's lot enure for the benefit of other lotholders in the township, but which are to that express effect. Compare paras. 1 *(c)* and *(d)* of the first portion sought to be struck out. In the *Ex parte Will G. Hare* case, *supra*, ROSENOW, J., says at pp. 418D - 419B:

B "The doctrine that purchasers of lots of ground from a common vendor may be entitled to enforce *inter se* restrictive conditions contained in their restrictive titles is based upon the principle that one person can enter into a contract with another for the benefit of a third party who by acceptance becomes a party to the contract with the promissor. (*Alexander* C *v. Johns*, 1912 AD 431). Whether or not there was such a contract is a question of fact to be decided in each case upon the evidence before the Court. Where the contract between vendor and purchaser states for whose benefit a particular condition is imposed, the problem is simplified; where, as in this case, the contract of sale and the deed of transfer are silent on this point, it is a matter to be inferred from all the

circumstances, whether or not a contract for the benefit of third parties is entered into. (*Eiffel Mansions (Pty.) Ltd*. v. D Cohen, 1945 W.L.D. 200 at p. 205). The English case of *Elliston v Reacher*, 2 Ch.D. 374, quoted in *Alexander v Johns, supra*, sets our four essential requisites:

(1) derivation of title from a common owner;

(2) that, prior to the sale of the land to the parties in the suit, the vendor laid out the estate for sale in lots, subject to restrictions intended to be imposed on all the lots, which were consistent only with some general scheme of development;

(3) that the restrictions were intended by the common E vendor to be, and actually were, for the benefit of all the lots intended to be sold;

(4) that both parties in a dispute before the Court, or their predecessors in title, purchased from the common vendor on the understanding that the restrictions were to ensure for the benefit of all the other lots included in the general scheme, whether or not they were also to enure for the benefit of other land retained by the vendor.

As pointed out in *Wyndham and Others v Rubenstein and Another*, F 1935 CPD 364, the Appellate Division did not purport to lay down in *Alexander v Johns, supra*, that all the requisites set out in *Elliston v Reacher* must be proved according to our system of law. Indeed inasmuch as the case of *Hattingh v Robertson*, 21 S.C. 273, was approved, it would seem, by implication, that all that is really essential is that it must appear, from all the circumstances, that mutual rights were in fact confered on the different purchasers.

For the purpose of deciding the problem, the presence or G absence of any one of the said four requisites would in a given case be useful, but in every case it would seem that at least the fourth requisite must be present before it can be held that, as between the common vendor and the purchasers of lots, there has been a contract for the benefit of third parties. (See *Eiffel Mansions* case, *supra* at p. 205)."

By no stretch of the imagination can the fourth requisite be said to be present in either para. 6 or para. 7 or in the two H paragraphs read together. I do not attach any importance at all to the fact that the Administrator may, presumably without consulting other lot-holders, permit the first respondent's lot to be used for purposes other than the expressed restricted one, because a contract on behalf of a third party may include, like any other contract, a conditional stipulation. The fact that the restriction is registered against the title deed, is not of any determinable importance. In spite of the registration the restriction

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VILJOEN J

may still amount to a personal servitude. In para. 7 nothing more is said than that there is a common scheme in operation, and that the properties were acquired from a common vendor. These allegations only extend to and cover the first two A requirements set out at p. 418 of the *Ex parte Will G. Hare* judgment, *supra*. The fourth requisite (see p. 419), although very conspicuous in the replying affidavit, as I have pointed out, is completely absent from the founding affidavit. I agree, with respect, with ROSENOW, J., that in every case it would seem that at least this fourth requisite must be present before it can be held that as between the common vendor and the B purchasers of lots there has been a contract for the benefit of third parties.

Mr. *Van der Spuy*, for the applicant, resists the application for striking out the first portion referred to above, on three grounds, viz.:

(a) that this particular striking out application is not a C proper one in terms of the Rules;

(b) that, even if only a bare case, he has made out some case in the founding affidavit, which, now that the *locus standi* has been put in issue, he is entitled to enlarge upon and supplement in the replying affidavit and

(c) that the applicant has, in any event by virtue of the D allegations contained in para. 8 of the founding affidavit, *locus standi* on the principle set out in *Patz v Greene & Co.*, 1907 T.S. 427.

In support of his first contention Mr. *Van der Spuy* has referred me to Rule 6 (15) of the Uniform Rules of the Supreme Court which provides as follows:

E "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs, including costs as between

> attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

Mr. *Van der Spuy's* submission is that this sub-rule was meant F to be exhaustive and that no striking out application which is brought on any ground other than those mentioned, can succeed. He submits that the word "may" was not intended to empower the Court to entertain a striking out application on other grounds; the intention was merely to give the Courts a discretion and not to make it obligatory to strike out matter which is G scandalous, vexatious or irrelevant. I agree with Mr. *Van der Spuy* that the use of the word "may" merely indicates that the Court has a discretion but, in spite thereof, the sub-rule was, in my viwe, not intended to be exhaustive. The Court still has an inherent jurisdiction to grant relief where the Rules of Court make no provision therefor. Cf. *Neal v Neal*, 1959 (1) SA 828 (N) H . It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. See Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp. 75, 94. In my view this practice still prevails.

In submitting that an applicant may in the replying affidavit supplement a case he has made out in the founding affidavit Mr. *Van der*

Spuy has referred me to the decision in the matter of *Reiter v Bierberg and Others*, 1938 S.W.A. 13, in which the head-note reads:

> "A petitioner for an interdict against spoliation is entitled to embody in his petition only sufficient allegations to establish his right, and in his replying affidavit he may supplement the information in the petition by anything further to enable him to refute the case put up by respondent."

A It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains suffcient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit. In the B present case, the applicant has not made out even a skeleton of a case in so far as his *locus standi* rests on a *stipulatio alteri. Reiter's* case, *supra*, does not assist the applicant.

In regard to Mr. *Van der Spuy's* third point, I do not deem it necessary to decide whether *Patz v Greene & Co., supra*, applies at all in a case such as the present because, whatever C the principle to be extracted from the decision may be, I do not think it assists the applicant in the main application (the respondent in the application for striking out) because I am concerned at the moment with an application to strike out certain matter which relates merely to a *stipulatio alteri*. I am not concerned with any other ground of *locus standi* alleged D in para. 8 of the founding affidavit. If the allegations in the last-mentioned paragraph do in fact constitute such ground, the applicant would be entitled to rely thereon as an alternative basis for *locus standi* whether the portion of the replying affidavit now sought to be struck out suffers that fate or not.

I proceed to deal with the application directed against the E second portion. In submitting that this second portion should be struck out, Mr. *Mendelow* concedes that Rule 6 (15) applies. He submits that the case presented by the applicant in its founding affidavit is that the respondents are conducting a rival business illegally which prejudicially affects the applicant in its business. In the replying affidavit the F applicant goes much further afield, argues Mr. *Mendelow*.

In my view the first two sentences of the second portion sought to be struck out, which amount to this, viz. that, in view of the respondents illegal encroachment on the rights of the applicant as a purchaser of a general business erf for which it had paid a high price on account of the rights attached to this G erf and the restrictions attached to erf 58 which is in close proximity to its erf, are not irrelevant and will be allowed to stand. However, the allegations that the advantage which the respondents enjoy is

pursued quite unscrupulously and that the agents of the respondents constantly incite customers of the applicant who are on their way to the business of the applicant H or who are emerging from that business, to refrain from making their purchases from the applicant and to patronise the second respondent because it sells liquor more cheaply, constitute a cause entirely different from the one set out in the founding affidavit. Whereas in the founding affidavit the complaint simply is that the respondents are illegally conducting businesses which by reason of its proximity to the applicant's business cause damage to the applicant, completely new and irrelevant matter is now

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raised in the replying affidavit to the effect that the respondents deliberately and improperly entice the applicant's customers away from it. I am satisfied that the respondents in the main application (the applicants in the striking out A application) would be gravely prejudiced in their case if the allegations referred to by me were not struck out. Not only is this new matter, which the respondents will not be able to deal with and refute unless they be given leave to file a fourth set of affidavits, but serious allegations are made of improper and unethical conduct by a business rival without any details whatsoever being furnished in support thereof. Even given an B opportunity to deal with these vague and sweeping allegations, it would be impossible for the respondents to do so in a positive manner.

In the result I make the following order:

1. That the following passages from the applicant's replying affidavit be struck out:

   C *(a)* The passage in para. 6 commencing with the words:

   "Since the general denial..." and proceeding to the end of the paragraph, as well as annexures F(1), F(2), and G referred to therein and attached to the replying affidavit.

   (b) The passage in para. 7 *(a)* commencing with the words:

   D "This enables the respondents..." and proceeding to the end of sub-para. *(a)*.

   (c) The applicant is ordered to pay the costs of the application.

Applicant's Attorneys: *Schwartz & Goldblatt*. Respondents' Attorneys: *Weavind & Werksmans*.

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v PHAMBILI FISHERIES (PTY) LTD; MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v BATO STAR FISHING (PTY) LTD 2003 (6) SA 407 (SCA)

2003 (6) SA p407

Citation	2003 (6) SA 407 (SCA)
Case No	32/2003 and 40/2003
Court	Supreme Court of Appeal
Judge	Howie P, Schutz JA, Mthiyane JA, Conradie JA and Jones AJA
Heard	May 2, 2003; May 5, 2003
Judgment	May 16, 2003
Counsel	L A Rose-Innes SC (with him P B J Farlam) for the appellants in the Phambili Fisheries (Pty) Ltd appeal. P B Hodes SC (with him R P Quinn SC) for the respondents. W H Trengove SC (with him A Schippers and A M Breitenbach) for the appellant in the Bato Star Fishing (Pty) Ltd appeal. I Jamie SC (with L J Bozalek) for the respondents (the heads of argument having been drawn by I Jamie SC, L J Bozalek and P R Hathorn).
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law - Review - Powers of Court - Reiterated that Court not sitting in appeal on correctness of functionary's C decisions - Court to display appropriate judicial deference to functionary's decision, particularly where subject-matter of administrative action very technical and Court having no proficiency therein - Court confined to review of procedure adopted by functionary in arriving at his decision. D

Fish and fisheries - Fishing quotas - Allocations of in terms of Marine Living Resources Act 18 of 1998 - Review of - Grounds of review based on allegation that Chief Director's allocation failing to achieve goal of Act of transformation required by s 2*(j)* of Act - Review application succeeding in High Court - On appeal reiterated that Court E not sitting in appeal on correctness of Chief Director's decisions - Court to display appropriate judicial deference to Chief Director's decision, particularly where subject-matter of administrative action very technical and Court having no proficiency therein - Court confined to review of procedure adopted by Chief Director in arriving at his decision - Chief Director having taken goal of F transformation into account in making allocations - Accordingly, Court upholding appeal and setting aside decision of Court *a quo*.

Costs - Special order as to - Appeal - Punitive costs - Punitive costs awarded on basis of non-compliance with Rules 8(6)*(d)*(ii) and 8(7) of Rules of Supreme Court of Appeal and unnecessarily inflated record - G

2003 (6) SA p408

Court disallowing appellants' attorneys from recovering one-third of costs A of preparing record from respondents or their own clients.

Headnote : Kopnota

The respondents were fishing companies that came from the ranks of historically disadvantaged persons (hdp). They had in terms of the Marine Living Resources Act 18 of 1998 (MLRA) applied for, and been awarded, quota allocations in the hake deep sea trawling sector for the 2002 season. They complained that they ought to have been awarded B higher quotas. They maintained that, in making the quota allocations, the Chief Director: Marine Coastal Management had failed to take transformation into account and that, had he done so, he would have awarded them higher quotas. Their complaint did not relate to procedure but to the ultimate decision of the Chief Director. The appellants (the C respondents in the Court *a quo*) were the Minister, the Chief Director, the Deputy Director-General and 16 fishing companies which also had been awarded quotas and which opposed the application. The allocation procedure had consisted of the Chief Director's using the 2001 allocations as a starting point, deducting 5% from those figures and placing it in an 'equity pool' and then D re-distributing the 'equity pool' amongst the various quota-holders, to arrive at the 2002 allocations. The re-distribution was done in such a way that companies holding large quotas received back less than their 5% deduction and companies holding smaller quotas received back more than their 5% deduction. The respondents maintained that much more ought to have been taken from the companies holding larger quotas and that many other, smaller applicants ought to have E been denied rights altogether. The respondents asked the Court to set aside the Chief Director's allocation in its entirety and to refer the matter back to him, so that he might perform the allocation procedure in what they maintained was the proper manner. The respondents succeeded in application for the review of the Chief Director's decision in a Provincial Division. In an appeal against that decision, F

Held, that the Court *a quo* had found that the Chief Director had ignored the goal of the MLRA of transformation and had relied on extraneous criteria such as stability and capital intensity in reaching his decision. In so doing, it found, he had ignored the provisions of s 2 (particularly, s 2*(j)*) of the MLRA and his decision had therefore been fatally flawed. (Paragraphs [25] and [26] at 423J and 424C - C/D.) G

Held, further, that it was apparent that the Act (and s 2*(j)* in particular) introduced a mandatory requirement to have regard to the redress of certain wrongs of the past. And if the Chief Director had failed to heed this injunction, he would have failed in his duty and his decision would be open to attack. However, contrary to the respondents' contention that s 2*(j)* had a predominating force, that did not mean that the subsection swamped the H rest of the Act. (Paragraphs [27] and [28] at 424E/F and H/I - I/J.)

Held, further, that, the various functionaries concerned had to have regard to a wide range of objectives and principles. Those objectives and principles would often be in tension and might even be irreconcilable with one another. Accordingly, contrary to the respondents' contention that s 2*(j)* had to be given I effect to each time, it would be impractical, if not impossible, to give effect to every one of them on every occasion. Section 2 did not say that a functionary had to have regard to each consideration in each case, nor what weight had to be accorded to it, nor how the various considerations were to be balanced against one another, nor when and how fast transformation was to take place nor that the considerations listed in s 2 J

were the only ones to which regard had to be had. These matters were left to the discretion of the Chief Director. (Paragraphs A [27] and [31] at 424E/F and 425G - I.)

Held, further, that s 18(5) of the MLRA was not applicable as neither of the respondents was a new entrant. (Paragraph [32] at 425I/J.)

Held, accordingly, that the Court *a quo* had erred in its interpretation of ss 2 and 18(5) and in holding that the Chief Director had not had regard to the sections. (Paragraph [33] at B 425J - 426A.)

Held, further, that, on a reading of the Chief Director's reasons for his allocations, it was plain that transformation had been taken into account. The starting point had been the allocations in the previous season. So, at that point, no new allowance had yet been made for transformation. But, in the next step, further allowance had certainly been made. The quotas of the holders of larger allocations C had been

reduced and the smaller rights-holders had been beneficiaries of that reduction. (Paragraphs [36] and [37] at 427D and E/F - F/G.)
Held, accordingly, that, under this head of attack, the Court *a quo* had been wrong on both the law and the facts and the argument that s 2*(j)* had been ignored had to fail. (Paragraph [38] at 427F/G and G/H.) D
Held, further, as to the alleged vagueness or absence of reasons, that the respondents' contention that the Chief Director ought not to have used the 2001 allocations as the starting point was unreasonable. It was difficult to see what else could have been used. (Paragraph [42] at 428H - H/I and J.)
Held, further, as to the respondents' objection to the choice of 5% and not a larger percentage, that there came a time in quantification decision-making when a discretionally chosen E number had to be adopted. There were moments when the fixing of a number was not capable of exact rationalisation or explanation. A fair reading of the reasons made it clear that the Chief Director, suitably assisted, in the exercise of his discretion, had decided that an appropriate percentage for the diminution of quotas at the end of 2001 was 5%. It was plain that in doing so he had taken into account F the immediate need for transformation, as well as the potential for creating instability in the industry, possibly leading to inadequate investment and job losses. (Paragraph [43] at 429C and D - E/F.)
Held, further, that contrary to the respondents' contention that adequate reasons for the allocation had not been given, the reasons set out for the decision were reasons enough for dissatisfied applicants to have attacked the decision, should they have G chosen to do so. (Paragraphs [39] and [44] at 427H - I and 429G/H - H.)
Held, further, as to whether the decisions were capricious or based upon arbitrary or irrelevant considerations, that the Court *a quo* found that the Chief Director had taken extraneous criteria into account and that the decision to use the 2001 allocations as a starting point had been arbitrary and capricious. H (Paragraph [46] at 430C - C/D.)
Held, further, that in complaining that the Chief Director had acted arbitrarily, capriciously or irrationally in reaching his decisions, the respondents showed little concern for the interests of others or the benefit of the public as a whole. That was not an approach which should or might have been adopted by the Chief Director. He was obliged to have regard to a broad band of considerations and the I interests of all that might be affected. (Paragraph [51] at 431H - I.)
Held, further, that it appeared that what was really under attack was the substance of the decision, not the procedure by means of which it had been arrived at. That was not the job of the Court. (Paragraph [52] at 432E.)
Held, further, that judicial deference was particularly appropriate where the J

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subject-matter of an administrative action was very technical or of a kind in which a Court had no particular A proficiency. The Court could not even pretend to have the skills and access to knowledge that was available to the Chief Director. It was not the Court's task to better his allocations, unless it should have concluded that his decision could not be sustained on rational grounds. That the Court could not say. Accordingly, the attack based on capriciousness had to fail. (Paragraph [53] at 432F - G/H.) B
Held, further, that there was also no merit in the suggestion that the Chief Director had been swayed, or too much swayed, by considerations, particularly stability, which he should have regarded as extraneous. Considerations such as instability in the industry, under-capitalisation and loss of jobs were not extraneous to the proper making of allocations. This was particularly so, having regard to the provisions of ss 2 *(a)* and *(d)* of the Act and the Departmental Guidelines. (Paragraphs [54] and [56] C at 432G/H - 433A/B and 433B/C - C/D, paraphrased.)
Held, accordingly, that the Court *a quo* had erred in regarding stability and the need for investment as extraneous matters. (Paragraph [57] at 433D.)
Held, further, as to the contention that Phambili had had a legitimate expectation of a 'substantial allocation and increase' in the allocation to it, the requirements for legitimacy of expectation D included: *(a)* the representation underlying the expectation had to be 'clear, unambiguous and devoid of relevant qualification'; *(b)* the expectation had to be reasonable; *(c)* the representation had to have been induced by the decision-maker; and *(d)* the representation had to have been one which the decision-

maker could competently and lawfully have made. (Paragraph [65] at 435B/C - G/H.) E

The *dictum* in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) (2003 (4) BCLR 378) at para [19] applied.

Held, further, that, as to *(a)*, the numerous and disparate statements upon which the respondents relied - Departmental Policy Guidelines, media statements and a speech by the Minister in the National Assembly - could not amount to a representation that was 'clear, unambiguous and devoid of relevant qualification'. F (Paragraphs [64] and [66] at 434J - 435A/B and 435H.)

Held, further, that, as to *(b)*, Phambili's reliance on what it thought had been represented had not been reasonable. (Paragraph [68] at 436D/E - E.)

Held, accordingly, that there was no substance in this ground of review. (Paragraph [69] at 436D/E - E.) G

Held, further, that, in objecting to what it alleged to have been an unheralded change in policy in the making of the allocations that was unfair to the applicants, Bato relied on s 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996 entitling everyone to 'administrative action that was lawful, reasonable and procedurally fair'. That an applicant had such a right was clear. But, in order to establish whether the right had been violated, one had to ask whether there had been something in the mind of the Chief Director H of which an applicant would not have been aware and which would have conflicted with earlier policy statements. (Paragraphs [70] and [71] at 436E/F - G and H/I - J.)

Held, further, that on the evidence, however, there was no substance in any part of this argument. (Paragraph [72] at 437G - G/H.) I

Held, accordingly, that there was no merit in any of the respondents' review grounds. The Court *a quo* should not have upheld the review. (Paragraph [74] at 438A - A/B.)

Held, further, that the essential message of the Court's judgment was that it was not the function of a Court to sit in appeal on decisions to grant fishing allocations or to constitute itself as an authority as to how to make such J

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allocations. That, however much it was denied, was what the respondents had been asking the Court to do. A (Paragraph [74] at 438B - B/C.)

Held, further, as to the costs of the record on appeal, that in preparing the record Rules 8(6)*(d)*(ii) and 8(7) of the Supreme Court of Appeal Rules had not been complied with. In the present case, where the appeal had been urgent and the record long, that non-compliance called for a punitive costs order. Urgency was not an excuse for remissness and there was no excuse for the failure to B comply with these Rules. (Paragraph [76] at 438F - G and H - I/J.)

Held, further, that the unnecessary repetition of the full heading of the case and the names of all the attorneys in the index and in each of the volumes of the record would also be taken into account in determining a punitive order. (Paragraph [78] at 439B/C - C and E - E/F.)

Held, further, that, taking together the failure to comply with Rules 8(6)*(d)*(ii) and 8 (7) and the inflated indexes C and lists of attorneys, an appropriate order would be to disallow the recovery by the appellants' attorneys from the respondents, on their clients' behalf, or from their own clients, one third of the cost of preparing the record. (Paragraph [79] at 439E/F - G.) Appeal allowed.

The decisions in the Cape Provincial Division in *Phambili Fisheries (Pty) Ltd v Minister of Environmental Affairs and Tourism and* D *Others* and in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* reversed.

Cases Considered

Annotations

Reported cases E

Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others (1983) 48 ALR 500: dictum at 507 applied

Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC): dicta in paras [45] and [87] applied

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) (1996 (5) BCLR 658): dictum in para [180] applied F

Joffin and Another v Commissioner of Child Welfare, Springs, and Another 1964 (2) SA 506 (T): dictum at 508F - H applied

Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others 1999 (4) SA 734 (C): referred to

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA): dictum in paras [21] - [22] applied G

National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (W): dictum in para [28] applied

Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A): referred to

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa H *and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241): dictum in para [90] applied

Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA): dictum in paras [9] - [11] applied

Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal I 1999 (2) SA 91 (CC) (1999 (2) BCLR 151): referred to

S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348): dictum in para [42] applied

South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) (2003 (4) BCLR 378): dictum in para [19] applied J

Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa A *Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA): dictum in paras [16] - [23] applied

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA): dictum in paras [11] - [12] applied.

Rules Considered

Rules of Court

The Rules of the Supreme Court of Appeal, B Rules 8(6)*(d)*(ii), 8(7): see *The Supreme Court Act and the Magistrates' Courts Act and Rules* 3rd ed (Juta, 2003) at 125.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996, s 33(1): see *Juta's Statutes of South Africa 2002* vol 5 at 1-148 C

The Marine Living Resources Act 18 of 1998, ss 2, 18(5): see *Juta's Statutes of South Africa 2002* vol 6 at 1-319, 1-321.

Case Information

Appeal from decisions in the Cape Provincial Division (Ngwenya J and Potgieter AJ). The facts appear from the judgment of Schutz JA.

L A Rose-Innes SC (with him *P B J Farlam*) for the appellants in the Phambili Fisheries (Pty) Ltd appeal. D

P B Hodes SC (with him *R P Quinn SC*) for the respondents.

W H Trengove SC (with him *A Schippers* and *A M Breitenbach*) for the appellant in the Bato Star Fishing (Pty) Ltd appeal.

I Jamie SC (with *L J Bozalek*) for the respondents (the heads of argument having been drawn by *I* E *Jamie SC*, *L J Bozalek* and *P R Hathorn*).

In addition to the authorities cited in the judgment, counsel for the parties referred to the following: F

A J Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk 1985 (1) SA 389 (A) at 415C - D

Administrator, Transvaal v Traub 1989 (4) SA 731 (A) at 756E - J, 761D - G

Beckingham v Boksburg Licensing Court 1931 AD 280 at 282

Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC) at 315C - G, 315I - 316B, 316C - E G

Colonial Produce and Export Co Ltd v Paarl Licensing Court 1922 CPD 93

Computer Investors Group Inc v Minister of Finance 1979 (1) SA 879 (T) at 898D - E H

Dawood v Mahomed 1979 (2) SA 361 (D) at 365H

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC) para [11] at 439G - 440B

De Falco v Crowley Borough Council [1980] 1 All ER 913 (CA) at 921*e* - *g*, 924*j*, 925*c* I

Derby-Lewis and Another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission 2001 (3) SA 1033 (C) at 1064B - 1065G

Dickinson v SA General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) at 628F J

Essack v Pietermaritzburg City Council and Another 1971 (3) SA 946 (A) at 948 A

Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC) at para [33]

Ex parte Kommissaris van Kindersorg: In re N L 1979 (2) SA 432 (T) at 434F - H B

Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335D - E

Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others 1999 (2) SA 471 (C) paras [23] - [24] at 482C - 483E C

Galp v Tansley NO and Another 1966 (4) SA 555 (C) at 559H

Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 14 (A) at 35B - C, 48C - D

Golube v Oosthuizen and Another 1955 (3) SA 1 (T) at 4F - G

Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) at para [41] D

Hamata v Chairperson, Peninsula Technikon IDC and Others 2000 (4) SA 621 (C) at 640G - 641A

Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 91G - I

Hofmeyr v Minister of Justice and Another 1992 (3) SA 108 (C) at 117F - H

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and E *Others* 2001 (1) SA 545 (CC) at para [21]

Ismail and Another v Durban City Council 1973 (2) SA 362 (N) at 371H - 372B

James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A) at 660E - H F

Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A)

Jooste v Compensation Commissioner 1997 (1) SA 83 (C) at 88J - 89A

Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening) 1999 (2) SA 1 (CC) at para [17] G

Jurgens Eiendomsagente v Share 1990 (4) SA 664 (A) at 677J - 678F

Kolbatschenko v King NO 2001 (4) SA 336 (C) at 353F - H, 356C - D, 356E - G

Livestock and Meat Industry Control Board v Robert S Williams (Pty) Ltd 1963 (4) SA 592 (T)

Mabi v Venterspost Town Council 1950 (2) SA 793 (W) at 800 H

McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald's Corporation v Dax Prop CC and Another; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC 1997 (1) SA 1 (A) at 14A - C

Mbebe and Others v Chairman, White Commission, and Others 2000 (7) BCLR 754 (Tk) I

Merber v Merber 1948 (1) SA 446 (A) at 452 - 3

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) para [22] at 735I - J, paras [98] - [99] at 755C - F, para [114] at 760C, para [123] at 762C J

Minister of Home Affairs v Austen 1986 (4) SA 281 (ZS) at 289B - F A

Minister of Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Minister of Prisons v Cooper 1978 (3) SA 512 (C)

Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC) at para [36]

National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at paras [81], [82], [86], [97] B

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at paras [60], [61], [62]

Nel v Le Roux NO and Others 1996 (3) SA 562 (CC) para [14] at 572E - F C

New National Party v Government of the Republic of South Africa 1999 (3) SA 191 (CC) at paras [19], [24]

Nomala v Permanent Secretary, Department of Welfare 2001 (8) BCLR 844 (E) at 854B - 856H

Oranje-Vrystaatse Vereniging van Staatsondersteunde Skole en 'n Ander v Premier van die Provinsie D *Vrystaat en Andere* 1996 (2) BCLR 248 (O) at 267E - G

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 697 (HL) at 700I, 701B, 715H

Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) E *Inc* 2001 (2) SA 1 (CC) at paras [19], [20], [21]

Pietermaritzburg City Council v Local Road Transportation Board 1959 (2) SA 758 (N) at 774B - G

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at paras [133], [134] F

R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 (QB)

R v Minister of Defence, ex parte Smith [1996] QB 517 at 556B - C

R v Police Complaints Board, ex parte Madden; R v Police Complaints Board, ex parte Rhone [1983] 2 All ER 353 (QB) at 369*e* - 370*a*, 370*f*, G 372*c*

R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 (HL) at 446*b* - *g*

Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others 2003 (5) SA 518 (C) (2003 (3) B All SA 288) H

Re Poyer and Mills Arbitratum [1964] 2 QB 467 at 478

Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board 1999 (8) BCLR 918 (T) at 926F - 927E

S v Dzukuda and Others; S v Tshilo 2000 (4) SA 1078 (CC) (2000 (2) SACR 443; 2000 (11) BCLR 1252) at para I [37]

Sachs v Minister of Justice; Diamond v Minister of Justice 1934 AD 11 at 24 - 5, 40

Sodorov v Minister of Home Affairs 2001 (4) SA 202 (T)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) at paras [29] - [30]

The Master v Slomowitz 1961 (1) SA 669 (T) at 672A - B, 673H - 674E J

Tikly and Others v Johannes NO and Others 1963 (2) SA 588 (T) at 590F - 591A, 591H - 592E A

Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another 1989 (4) SA 31 (T) at 34G - 40J

Transvaal Racing Club v Jockey Club of South Africa 1958 (3) SA 599 (W) at 604C - E B

Union of Teachers' Associations v Minister of Education and Culture 1993 (2) SA 828 (C) at 836B

Van Eeden v Van Eeden 1999 (2) SA 448 (C) at 454D - G

Ynuico Ltd v Minister of Trade and Industry and Others 1995 (11) BCLR 1453 (T) at 1471E

Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd 1992 (2) SA 489 (A) at 507C - E C

Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at 503

West Coast Fishermen's Co-operative v Government of the Republic of South Africa and Others 1998 (2) SA 224 (C)

Wiese v Joubert en Andere 1983 (4) SA 182 (O) at 195A - C D

Yengwa and Others v Durban City Council and Others 1967 (2) SA 328 (D) at 333E - 334A

Aronson and Dyer *Judicial Review of Administrative Action* (North Ryde, NSW, 1996) at 146 - 6, 148

Baxter *Administrative Law* at 255 - 63, 442 - 4, 521 - 2, 720 - 3

Burns *Administrative Law under the Constitution* (1998) at 167 E

Craig *Administrative Law* 4th ed (1999) at 536, 603 - 9, 623 - 4

Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 31

De Smith, Woolf and Jowell *Principles of Judicial Review* 5th ed at 493 - 5, 513 - 14, 570, 571 - 2 fn 15 F

De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4th ed at 518 - 19

Devenish *A Commentary on the South African Bill of Rights* (1999) at 473

Erasmus *Superior Court Practice* at B1-46, B1-47 G

Hoexter and Lyster *The New Constitutional and Administrative Law* vol 2 (Juta) at 182 - 4, 304

Mureinik *Administrative Law Reform* (1993) at 41

Plasket 'The Exhaustion of Internal Remedies and s 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 *SALJ* at 50 H

Rautenbach and Malherbe *Constitutional Law* 2nd ed (1996) at 205

Van Winsen, Cilliers and Loots *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4th ed (Dendy (ed)) at 359

Wade and Forsyth *Administrative Law* 8th ed (2000) at 329 fn 72, 373 - 6, 848 fn 56. I

Cur adv vult.

Postea (May 16). J

Judgment

Schutz JA: A

[1] Up until 1978 our seas were increasingly being plundered by all and sundry. In that year, in order to prevent the further destruction of our fishing stocks and indeed to an extent to restore them, the notion of Total Allowable Catch ('TAC') was introduced. In respect of all the hake fishing sectors the TAC, once determined for a fishing season, then set a limit on the total tonnage that might be B caught. Quotas for individual companies were introduced for the first time in the following year, 1979. Although there have been changes in detail over succeeding years, the limit imposed by the TAC and the quota or later allocation system still prevail. This case is concerned with the allocation of quotas for the 2002 season in the hake deep sea C trawling sector, which accounts for the great bulk of the tonnage caught. The other hake sectors are inshore trawling, longlining and handlining. The principles upon which the 2002 allocations are based are intended to extend over the medium term, that is also to the 2003, 2004 and 2005 seasons. D

[2] As the annual hake catch is a limited resource and as there is money to be made out of selling fish, it may be imagined that quotas are a much-coveted asset. Today's competition to acquire them is sharpened by the ownership patterns resulting from the history of the industry and by the deprivations imposed by the previous political system upon those whom are referred to in this case as historically disadvantaged persons or people (hdp). Inevitably there is tension E between the large established companies (also the 'pioneer' companies) and the small new aspirants coming from the ranks of the hdp. There is a tendency to describe these two groups stereotypically. As with most generalisations, stereotypes are apt to be misleading. Prosperous the established companies may be, but if one looks more F closely into them one finds, in varying degrees, how they improve the lives of hdp as co-owners, shareholders, managers, skippers, crews, other sorts of employees, factory workers, consumers and the like. Also if one examines some of the hdp companies more closely one finds that they are not entirely composed of the archetypal necessitous fisherman. Appreciating these facts is but the starting point of a realisation G that the person making the quota allocations, who is mindful of the call for fostering 'transformation' or 'reconstruction', has a difficult task before him; a task which is not made more easy by the fact that it is notorious in the industry that some applicants are not entirely frank as to who they are, or what exactly they intend doing. And his decision, however wise and reasonable, will satisfy no one H entirely. This by way of introduction.

[3] The respondents are two fishing companies, Phambili Fisheries (Pty) Ltd (Phambili) and Bato Star Fishing (Pty) Ltd (Bato). They brought review applications in the Cape Provincial Division, which came before Ngwenya J and Potgieter AJ. The applications were heard I together and succeeded, against the Minister of Environmental Affairs and Tourism (the Minister), the Chief Director: Marine Coastal Management (the Chief Director), the Deputy Director-General: Environmental Affairs and Tourism (the Deputy Director-General), (collectively 'the Government J

appellants') and 16 fishing companies which were successful in obtaining quotas and who opposed the A applications (the industry appellants). Among them are firms such as Irvin and Johnson Ltd and Sea Harvest Corporation Ltd, long-established fishing companies and the two largest. But among them are also wholly black-owned companies and companies with quotas considerably smaller than those of Phambili or Bato. There are also indications in the record that a further 11 of the smaller companies supported the B opposition to the respondents' applications, even though they did not join as parties.

[4] The quota allocations were made by the Chief Director on 24 December 2001, under the powers vested in the Minister under s 18 of the Marine Living Resources Act 18 of 1998 (the MLRA) which C had been delegated to him in terms of s 79. At the time Phambili and Bato were existing quota-holders with quotas much smaller than those held by the large companies. For the 2002 season in respect of which they complain, they were again awarded quotas, slightly larger than they had had, being increases originally from 1 069 to 1 083 tons and 803 to 856 tons respectively. They had applied for considerably more D than they were awarded. Their complaint is, essentially, that as hdp companies the increases in quotas should have been much larger, at the expense of the established companies, or even by the elimination of some of the small quota holders. The deep sea trawling TAC for the season was 138 495 tons. E

[5] The procedure adopted for the determination of allocations in the four hake sectors and the numerous other fishing sectors was a detailed and complex one. On 27 July 2001 a general notice was published in the *Government Gazette*. It invited interested parties to apply for fishing allocations. Attached to it was a F *pro forma* application form which required the insertion of numerous details. Among those that are relevant are the following: particulars of the shareholding of applicant companies, full details of hdp as owners, directors, shareholders, members, beneficiaries, or as placed in top, senior or middle management positions, and of the proportion of professional, skilled, semi-skilled and unskilled hdp G workers, together with details of their earnings.

[6] Also forming part of the Government Notice were certain policy guidelines. The introduction stated:

> 'The Minister intends to allocate rights for a period not exceeding four years . . ., which will greatly enhance opportunities H for investment and the promotion of *stability* in the fishing industry.'

(Emphasis supplied.) Under the heading 'Evaluation of applications' the following, *inter alia*, was stated:

> 'Applications will be evaluated *in accordance with the objectives and principles set out in s 2 of the Act* and with I regard to the policy guidelines set out below. *No precedence, ranking or weighting is implied by the order or content of the policy guidelines*.
>
> 1. Business plan, fishing plan or operational and investment strategy:
>
> Cognisance has been taken of the fact that substantial investments have been made by many of the current rights holders. This factor, together with J

> the need to create an environment that will promote *further long-term investment in human and material* A *resources are important considerations*. Historical involvements, proof of investment and past performance are therefore important factors. Applicants that are able to

demonstrate the creation of employment through the effective utilisation of their allocation will be viewed in a favourable light.

2. Equity, transformation, restructuring and empowerment: B

The *transformation* of South Africa from an unequal society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality poses particularly profound challenges for the fishing industry. It is here that there are acute imbalances in personal wealth, infrastructure and access to financial and other resources. While it is acknowledged that *transformation or restructuring of the fishing industry cannot be* C *achieved overnight, it nevertheless is a primary objective to build a fishing industry that in its ownership and management, broadly reflects the demographics of South Africa today.*

In determining the degree of transformation, the following factors will be taken into account:

- *ownership of, or equity within the applicant;* D
- *the distribution of wealth created gained through access to marine living resources;*
- he extent to which the applicant *provides employment* to members of historically disadvantaged sectors of the community.

There is also a high degree of gender inequality throughout the fishing industry. The manner in which this is addressed, as well as racial and other historical imbalances in the context of contributing E towards achieving equity, are important factors.

In the more *capital-intensive sectors of the fishing industry, a higher level of internal transformation of current rights holders rather than the introduction of new entrants is encouraged*.

To effectively address the injustices of the past in an orderly and just manner and to achieve equity in the fishing industry, it is F the intention to allocate a notable proportion of the TAC/. . . to deserving applicants in order to encourage *transformation*, either through the *internal restructuring of current rights holders, or through the accommodation of new entrants*.

3. Impact on the resources, environment and the fishing industry:

A key responsibility is the need to conserve the marine living resources for present and future generations, while at the same time G achieving optimum utilisation and ecologically sustainable development. In order to achieve this, the following considerations will apply:

. . .

. . .

- The hake line sector (longline and handline) has been identified as a suitable vehicle for the promotion of [HDP] in the H hake sector, more specifically small-and-medium-sized enterprises (SMME'S). In order to achieve the objectives contemplated in s 2 of the Act, particular regard will be paid to the need to grant access to new entrants, particularly those from historically disadvantaged sectors of society.'

(Emphasis supplied.) I

[7] It is not in issue that the contemplated procedures were followed. What is complained of is the ultimate decision of the Chief Director, as will be explained below.

[8] Leaving aside the procedures for the moment, I draw attention to J

what has been said in para [2] above as to transformation. To illustrate how internal transformation might take A place, I take the example of Sea Harvest, which achieved the highest score for transformation. For all operations wholly owned by Sea Harvest, 96,3% of the employees are from 'designated groups' as defined by the Employment Equity Act 55 of 1998 ('black people, women and people with disabilities'). 38% of management comes from 'designated groups'. Of the board of nine, three (including the B chairman) are hdp. 5,3% of Sea Harvest's shares are in the hands of employees. 73,2% of Sea Harvest is owned by Tiger Brands Ltd ('Tiger'). Tiger is owned as to 38% by pension funds (13% of this is owned by the Public Investment Commissioner. He invests, *inter alia*, on behalf of government service retirement funds, the Unemployment Insurance Fund C and the Workmens' Compensation Fund). I will not go into further detail. Mr Penzhorn, the managing director of Sea Harvest, accordingly says 'It is therefore naïve and incorrect to categorise Sea Harvest as a "white-

concerned entity'''. I & J also took meaningful transformation steps which it is unnecessary to detail. D

[9] I return to the allocation process. There were 110 applications for quotas in the sector, 54 of them from existing rights holders and 56 from new applicants. The two groups were separately evaluated, first by the Advisory Committee. This body acted in accordance with the Advisory Committee Guidelines and the Advisory Committee Instructions. Members of the first group were further E evaluated in accordance with the Criteria for Existing Holders and of the second in accordance with the Criteria for New Entrants. Points were awarded to each applicant and the results were presented to the Chief Director. This committee evaluated each applicant as an applicant. The process was a detailed one and the committee was guided by expert advice. Overall hundreds of applications had to be processed, F leading to a useful summary with recommendations to assist the Chief Director in his final decision. The committee played no role in regard to the ultimate *quantum* of any allocation. G

[10] The Chief Director decided not to admit any new applicants and granted rights to 51 of the 54 existing rights holders. Of the TAC of 138 495 tons, 1 487 tons were set aside for appeals. This decision was the subject of one of the complaints raised before the Court below. A further 803 tons were set aside for possible allocation to an applicant under investigation for his fitness. After the deduction of these amounts the remaining balance of the TAC was 136 205 tons. H

[11] Then come the steps which were the main target of the attack in the review applications. The tonnages allocated in 2001 were used as the starting point for the 2002 allocations made to the 51 successful applicants. Five percent was then deducted from each applicant's allocation and placed in an 'equity pool' totalling I 6 810 tons, which was distributed in proportion to their scores in the comparative balancing assessment. The manner in which this distribution was made was such that the holders of large allocations contributed more to the pool than they received back on the distribution. For instance, Sea Harvest J

contributed 1 842,45 tons and received back only 152,66 tons. Correspondingly the holders of small allocations received A back more than they had contributed. Although the tonnages of which the major companies have been deprived have been derided as 'piffling', they are not of themselves small. Irvin and Johnson's 2001 quota of 47 662 tons was reduced by 2231 tons (4,7%) and Sea Harvest's 36 849 tons by 1 690 tons (4,6%). B

[12] Proceeding from what has been set out above, we are presented with a large body of evidence, which has been lucidly summarised in the various heads of argument. Much of what is contained in them may be of interest to a future historian or a present participant in the industry, but I shall confine myself to those facts C which are directly relevant to the issues so that my decision and the reasons therefor may be apparent.

[13] The attack on the Chief Director's decision is conducted by both respondents with some stridency. It ranges around most of the review grounds to be found in the books, and more, but the essential theme is a simple one. The central aim of the Chief Director D should have been to bring about transformation in a drastic fashion, and in this he has failed miserably. He should have taken much more from the big companies and he should have altogether denied rights to many other, smaller applicants. Consequently both Phambili and Bato should have received much larger allocations than they did. There is a E tendency towards indifference as to what happens to other applicants, large and small. The tone of the attack is that the respondents know far better than the Chief Director does how he should do his job, but little appreciation is manifested of the complexity of his task or of the competing interests involved. We are not asked to replace his allocations with our own, but we are requested to set aside his F allocations in their entirety, so that he may start again and make new allocations in the manner in which the respondents say they should have been made in the first

place. A warning to us emerges out of the form of this attack. Are we indeed being asked to review the Chief Director's decisions, or are we being asked to do his job for him, not G in the sense of substituting his allocations with our own, but in the sense of telling him how, in our opinion, he has erred, and how he should do his job properly, in our opinion, the second time round? But before I can answer that question I shall have to consider the detailed grounds of review. Leading up to that, some history. H

Brief history of the hake deep sea industry and its transformation to date

[14] The hake industry is more than a century old in this country. It has come to be recognised as one of the best managed fisheries in the world. In 1979 the deep sea sector had only five 'pioneer' participants. The number of participants rose to seven in 1986 and 21 in 1992. Between 1992 and 2002 the number rose to 51. Phambili first I gained a quota in 1997 and Bato in 1999. Also in 1999, after the MLRA had come into force, the decision in *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* 1999 (4) SA 734 (C) frustrated the Minister's intention of awarding 10 000 tons to the J

new longlining sector, of which 6 000 tons were to have been deducted from the deep sea sector. The Minister A then, in saving the situation, secured the agreement of the larger quota holders to give up 10 000 tons, of which 3 000 went to new entrants to the deep sea sector, 3 000 as additional quota to existing smaller quota holders and 4 000 to the longlining sector. In 1979 one hundred percent of the deep sea trawling TAC of 135 000 tons was shared among the five 'pioneers'. By 2002 their tonnage had dropped B to 100 841, which was 72,8% of a TAC of 138 495.

[15] The 'pioneer' companies' share has deteriorated even more in the hake industry as a whole, as the other sectors are more accessible to newcomers than the deep sea trawl sector and there has C been a shift of quota to them. The inshore trawling sector's catch has risen from 5 000 tons in 1979 to 10 165 tons in 2002. The longlining sector has risen from nil in 1993 to 10 840 tons in 2002. The handlining sector has increased from nil in 1997 to 5 500 tons in 2002. Overall then, the share of the 'pioneer' companies in the hake industry as a whole had dropped to 60,7% in 2002. D

[16] By contrast with the other sectors the deep sea trawl sector is highly capital intensive. Its current fixed capital investment amounts to some R5,4 billion at replacement values. It is labour intensive and currently employs 8 838 people (excluding those E employed in distribution) with a further 1 300 people employed by intermediary hake and catch-buying processors. The large 'pioneer' participants play an important part in the industry's success. They are largely responsible for the international demand for South Africa's hake through having developed high quality products and effective international marketing and distribution. The industry F generates sales of R1,45 billion annually and its exports are worth R750 million. Small quota holders and new entrants rely to a substantial extent on the 'pioneers' for the processing, marketing and distribution of their catches.

[17] Nor is transformation in the deep sea sector achieved only by increased quotas for small holders and the entry of new G participants. As indicated in paras [2] and [8] of this judgment it is achieved also by internal transformation within the big companies. Much detail has been given in the papers as to who is actually who, both in the case of the large companies and the small ones. No point would be served in repeating the detail but what is demonstrated is H that the allocation of quotas to small companies is not the only way in which transformation is effected. And the generalisation that the issue is between large 'white' companies and small 'black' ones is simply not accurate.

[18] A further important fact stated by Mr Kleinschmidt, the Deputy Director-General, and not disputed, is that transformation I initiatives in the last few years have caused instability, which is manifested by decreased investment, with the result that the trawler fleet is ageing. Consequently the industry runs the risk of becoming less and less internationally competitive in the long term. This consideration played J

an important part in reaching the decision that is under attack. I have relied on certain of the government evidence up to A this point, but before I proceed further I have to deal with the respondents' contention that most of it is not admissible.

Admissibility of the Government's evidence B

[19] The government's case, in the view of the Court *a quo*, was dead in the water from the start if regard be had to the following finding:

> '(T)here is no direct evidence before us as to how the Chief Director arrived at his decision. Neither is there direct evidence as to how the advisory committee went about its task. To this extent we would consider the applicants' arguments as being unchallenged to the extent that they may be factual or unanswered where they raise C queries.'

[20] In the Court *a quo* the government's main answering affidavit was made by Mr Kleinschmidt, the Deputy Director-General. The Chief Director, the decision-maker, Dr Mayekiso, made only a confirmatory affidavit, in which he confirmed the facts in Kleinschmidt's affidavit 'insofar as they refer or relate to me'. D Consequently, found the Court *a quo*, it was left in the dark as to what reasons had motivated Mayekiso's decisions. The Court *a quo* was quite wrong. Among other things, Mayekiso had made a supplementary affidavit in which he had said:

> 'As regards Mr Kleinschmidt's main answering affidavit, in addition to my general confirmation thereof insofar as it refers or relates to me (which I repeat), I specifically confirm the reasons E given by Mr Kleinschmidt for the decision and his explanation of the information and factors which I took into account. I would add that during the medium term fishing rights allocations process and thereafter Mr Kleinschmidt and I often discussed issues relating to the process and resulting allocations, including the policy issues raised. Mr Kleinschmidt was the other person delegated by the [Minister] to make such allocations.' F

Kleinschmidt added in a supplementary affidavit:

> 'I would, however, emphasise that I and the [Chief Director] spent the better part of a day together working through the draft affidavit and that the final product carries his unconditional *imprimatur*.'

[21] Kleinschmidt also explained why only one main answer had been G prepared. It was because of the volume of the papers and the number of issues raised that the legal advisers decided that it would facilitate the Court's understanding of the defence if a single answering affidavit were prepared, to be supported by confirmatory affidavits. The affidavits to which I have referred above were made in the *Phambili* matter but similar affidavits were also made in the H *Bato* matter.

[22] For reasons that I find difficult to fathom the Court *a quo* also held that the explanations for the allocations provided by Kleinschmidt were not within his personal knowledge and should have 'no probative value'. The Court *a quo* also commented adversely on the fact that no affidavit was put forward on I behalf of the Advisory Committee. As it did not make the decision, I do not see the need to have done so.

[23] I do not agree with these findings on admissibility. They were not supported by the respondents and I accept the Government affidavits as evidence. J

I now turn to the MLRA, which is pivotal to the review. A

The long title to and ss 2 and 18 of the MLRA

[24] The long title of the MLRA reads:

> 'To provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain B marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith.'

Section 2, which is headed 'Objectives and principles' reads:

'The Minister and any organ of State shall, in exercising any power under this Act, have regard to the following objectives and C principles:

(a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;

(b) the need to conserve marine living resources for both present and future generations;

(c) the need to apply precautionary approaches in respect of the management and development of marine living resources; D

(d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;

(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation; E

(f) the need to preserve marine biodiversity;

(g) the need to minimise marine pollution;

(h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;

(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable F rule of international law; and

(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

(Emphasis supplied.) Section 18, which deals with the granting of rights, reads in part: G

'(1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.

(2) . . .

(5) *In granting any right referred to in ss (1), the Minister shall, in order to achieve the objectives contemplated in s 2, have* H *particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.*

(6) All rights granted in terms of this section shall be valid for the period determined by the Minister, which period shall not exceed 15 years, whereafter it (*sic*) shall automatically terminate and revert back to the State to be reallocated in terms of the provisions of this Act relating to the allocation of such rights.' I

(Emphasis supplied.)

Were ss 2 and 18(5) properly understood and were they heeded?

[25] The Judges *a quo* were of the opinion that s 2 had been ignored, so that the Chief Director's decision was fatally flawed. The finding that the J

SCHUTZ JA

Chief Director ignored the section is a remarkable one, which is repeatedly rebutted in the course of the A extensive record. One reason for the Court's view was that the Chief Director had not expressly said that he had had regard to it. Another reason articulated was that:

'It appears that there are strong nuances which seem to underlie the decision but they are not expressly articulated as part of the reasons. These are that there are a number of existing rights holders B who are *established in the hake industry*, that the industry is *capital intensive* and that there must be *stability* in the industry.'

(Emphasis supplied.)

[26] As will appear later the basis of the Court's finding on this aspect of the case was that the Chief Director had ignored the C goal that the Act had sought to achieve (transformation), while relying on 'extraneous criteria such as stability or capital intensity'. The restoration of historical imbalances was said to be the 'mischief' that the Act was designed to remedy. Various of the subsections of s 2 were said to be merely a replay of the past. I have difficulty with D this reasoning. No doubt s 2*(j)* was

intended to remedy the 'mischief' of past discrimination, but that does not mean that it overmasters the other subsections merely because they lack novelty.

[27] The argument for the respondents is not capable of being stated precisely, no doubt because it is not a precise argument. E Contained within it is the proposition that s 2*(j)* must be given effect to each time; also that that subsection has a predominating force. The argument becomes particularly hazy when it is asked, 'but how much exactly should have been allocated to you through the proper application of s 2*(j)* and at whose expense'? Perhaps an even more difficult question to answer would be whether the F respondents, among other existing rights holders, should not be made to give up some part of their quota in favour of new entrants. The difficulty in answering questions of this kind again points to the possible conclusion that we are dealing with a discretionary administrative decision which in the view of the respondents lacked G appropriate generosity.

[28] Safer by far it is to start with the Act itself and learn from it what its manifold objects are - see, for instance, *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) paras [16] - [23] H at 810D - 812H and *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) paras [9] - [11] at 586I - 587F. If one reads the Act it is apparent that it introduces a mandatory requirement to have regard to the redress of certain wrongs of the past. And if the Chief Director were to fail to heed this injunction he would fail in his duty and his I decision would be open to attack. But that does not mean that the subsection swamps the rest of the Act. Nor does the Act suggest as much. It would be absurd to suggest, for instance, that transformation should be hastened by increasing the TAC drastically, as this would subvert the injunction to conserve marine living resources for both J

present and future generations, as required by s 2*(b)* and would result ultimately in everybody being the loser. A

[29] It is true that ss 2 and 18 do contain two imperative words - 'shall' in s 2 and again in s 18(5) - and two compelling phrases - 'the need to restructure' in s 2*(j)* - and 'have particular regard to the need to permit' in s 18(5). However, it should be noticed that in the English version each subsection of s 2 B (other than s 2(i)) commences with the phrase 'the need', whereas in the Afrikaans version only ss (2)*(a)* and (2)*(b)* commence with the phrase 'die noodsaak', whereas ss (2)*(c)* - *(h)* and *(j)* commence with the less pressing phrase 'die behoefte'. But even taking the two relevant 'shalls' to be shalls, their object is not that each of paras *(a)* - *(j)* shall be given operative effect C each time but only that the functionary shall 'have regard to' or 'have particular regard to' them. As to the meaning of this phrase, Ludorf J explained in *Joffin and Another v Commissioner of Child Welfare, Springs, and Another* 1964 (2) SA 506 (T) at 508F - H: D

> 'The words "have regard to" in their ordinary meaning simply mean "bear in mind" or "do not overlook".
>
> In *Illingworth v Walmsey* [1900] 2 QB 142, the words "regard shall be had to" the difference were held to mean the tribunal must bear the difference in mind and that it had a discretion.
>
> In *Perry v Wright* [1908] 1 KB 441, similar words were said to be "a guide, not a fetter". E
>
> I quote these two cases if authority in the use of the English language be necessary but to my mind the section obviously enjoins the Commissioner to bear these matters in mind and to exercise a discretion in regard thereto.'

[30] A conclusion that the subsections are there to guide and not to fetter functionaries is reinforced by the fact that the F considerations listed in s 2 are 'objectives and principles'. According to *The Shorter Oxford English Dictionary*, an objective is 'a thing aimed at or sought; a target, a goal, an aim'; and a principle is 'a general law or rule adopted or professed as a guide to action; a fundamental motive or reason for action'. G

[31] Moreover the various functionaries concerned, with many and diverse powers, must have regard to a wide range of objectives and principles. Those objectives and principles will often be in tension and may even be irreconcilable with one another. Accordingly it would be impractical if not impossible to give effect to every one of them on every occasion. Nor does the section say that a functionary must have H regard to each consideration in each case, nor what weight is to be accorded it, nor how the various considerations are to be balanced against one another, nor when or how fast transformation is to take place, nor that the listed considerations are the only ones to be had regard to. These matters are left to the discretion of the Chief Director. I

[32] I would add, with regard to the applicability of s 18(5) which deals with new entrants, that neither of the respondents is a new entrant.

[33] Accordingly I am of the view that the Court *a quo* erred in its interpretation of the sections. And, in any event, I consider that the J

SCHUTZ JA

Court also erred in holding that the Chief Director did not in fact have regard to the sections. A

[34] The record reveals a constant reiteration, in detail at times, of the need to take transformation into account. These reiterations are contained in the guidelines and policy directions levelled at functionaries forming part of the chain of decision-making. No purpose would be served in setting out the detail. The Advisory B Committee, having been so instructed, acted in accordance with the instructions and the Chief Director accepted the consequent recommendations of the Committee in leading up to making his decision.

[35] I have the Chief Director's word that he did have regard to the need for transformation. It would be difficult to believe that C he did not. Moreover, the reasons given for the decisions on the various allotments demonstrate that he did:

'7. Chief Director's decision on allocation of rights

7.1 In coming to his decision, the CD decided not to take the scoring in respect of by-catch and offal strategies into account. D During the process of considering the applications in the light of the scoring, the DDG concluded that the information provided by the applicants and the percentages upon which the scores were determined were not sufficiently reliable to warrant a distinction being drawn based on these criteria.

7.2 After considering each application and having regard to the assessments of the Advisory Committee, the CD decided: E

- that no new entrants could be accommodated;
- that (51) of the 2001 rights holder applicants be granted rights;
- not to make a decision in respect of application #17595 (Houtbay Fishing Industries (Pty) Ltd). A decision will be made on this application once the s 28 enquiry into alleged breaches of that applicant's permit conditions and its alleged contraventions of F the Marine Living Resources Act 18 of 1998, have been finalised.

7.3 The decision not to grant rights to new entrants was based on the following reasons:

- The Hake Long-line and Hand-line (which is soon to be regulated) sectors provided a more suitable vehicle for the promotion of SMME's and the admission of new entrants than the Hake Deep Sea G Trawl sector does.
- The Hake Deep Sea Trawl sector is highly capital intensive and is already over subscribed. As a result, the amounts allocated to smaller right-holders in the 2001 season were not economically viable.
- The TAC for the Hake Deep Sea Trawl sector remains at 138 495 tons.
- All but one of the 2001 right-holders applied for rights. H
- The inclusion of a new entrant in this environment could destabilise the industry, threaten the investment in the industry, discourage future investment and may lead to job losses.

8. *Quantum* allocated

8.1 A TAC of 138 495 tons is available for allocation to hake deep sea trawl right-holders. I

8.2 An amount of 1 487 tons is set aside for appeals. A further amount of 803 tons is set aside for possible allocation to Houtbay Fisheries (Pty) Ltd. This leaves 136 205 tons for immediate allocation to successful applicants. Any residue from the amounts set aside will be distributed proportionally to right-holders.

8.3 The distribution of quantum amongst the right-holders is calculated and J

determined in the "General reasons" Document attached hereto as annexure B. The starting point for the calculation A is the allocation made to right-holders in the 2001 season. Five percent of this amount was then deducted from each applicant, amounting to 6 810.25 tons in total. This amount was distributed amongst the right-holders in proportion to their scoring in the comparative balancing assessment.'

In an annexed document the following is also said about an earlier stage in the process: B

'Of the 54 applications from 2001 right-holders, 51 were successful. The 2001 right-holders were comparatively balanced against one another in accordance with assessment criteria based on:

- the degree of transformation; C
- the degree of involvement and investment in the industry;
- past performance;
- legislative compliance;
- degree of paper quota risk.'

[36] On a fair reading of these passages it is plain, in my opinion, that transformation was taken into account. Paragraph 7.3 of the first document sets out the reason for not granting any rights to D new entrants. The longline and handline sectors were more appropriate. The deep sea sector was highly capital intensive and over-subscribed. And the inclusion of new entrants in the sector could destabilise the industry, threaten investment in it and discourage future investment, which might lead to job losses. E

[37] What was done in the deep sea sector is set out in para 8.3. The starting point was the allocations in the previous season. So, at that point no new allowance had yet been made for transformation. But in the next step further allowance certainly was made. The quotas of the holders of larger allocations were reduced and the smaller F rights holders were the beneficiaries of that reduction.

[38] Accordingly, I am of the view that under this head of attack the Court *a quo* was wrong both on the law and on the facts. The passages quoted will be revisited under other heads, such as the suggestions that the decisions were not expressed with reasons, or G were capricious, or were influenced by extraneous criteria, or were too vague to be understood; but the argument that s 2*(j)* of the MLRA was ignored must fail.

Vagueness? Absence of reasons? H

[39] The much-reiterated argument for the respondents is that what the appellants call reasons are not reasons at all. Alternatively, they are said to be vague as to *why* the allocations were made as they were and particularly they are said not to constitute 'adequate' reasons within the meaning of s 5(3) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) because they do not answer two questions; *why choose the 2001 allocations as a starting* I *point*, and *why five percent* and not some larger percentage? The appellants do not challenge that there was a constitutional duty resting on the Chief Director to give reasons for his administrative actions but they do say that quite adequate reasons were given. J

[40] What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case A of *Ansett Transport Industries*

(Operations) Pty Ltd and Another v Wraith and Others (1983) 48 ALR 500 at 507 (lines 23 - 41), as follows:

> 'The passages from judgments which are conveniently brought together in *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206 - 7; 1 ALD 183 at 193 - 4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the B decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." C
>
> This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its D complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'

To the same effect, but more brief, is Hoexter *The New Constitutional and Administrative Law* vol 2 at 244:

> '(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was E taken or not taken; otherwise they are better described as findings or other information.'

See also *Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others* 1986 (2) SA 756 (A) at 772I - 773A. F

[41] Detailed reasons were spelt out for not granting entry to any new applicants. Among the considerations were high capital investments, the danger of destabilising the industry and the discouragement of investment, with accompanying job losses. These considerations having been stated as facts or motivating opinions did not go away when procession was made to the next stage, what to do G among the existing rights holders. The first criticism is that there is no explanation for why the 2001 allocations were used as a starting point.

[42] Counsel for the respondents declined to commit themselves to what the starting point should have been, largely confining themselves to saying that it should not have been the 2001 H allocations, which reflected the *status quo*. This unreadiness for commitment is unsurprising as it is difficult to see what else could have been used, given that, already, consequent upon those allocations and their predecessors, there was a whole complicated structure of employment, vessels, skills, developed markets and so forth. The respondents argue as if it were incumbent upon the Chief I Director to approach the allocations, on each occasion, as if there were no existing fisheries, no existing participants, no existing investments and no track record of expertise and of involvement in the industry in its various aspects. That cannot be so. To my mind, the respondents' approach is an approach so unreasonable that it leads to a J

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person embracing it to be forced to seek an explanation for that which needs no explanation. Transformation should have been taken into A account at this stage already, it is implicitly suggested. Further implicit is the suggestion that the *status quo* should have been altered to allow for transformation. Why this should have been done when transformation was going to be allowed for at the next stage is obscure. Why the decision could not be understood is itself not understood. Incomprehensibility is perceived where there is none. B

[43] The second main criticism is, why five percent? Again a question arises, if not 5%, then how many percent? This unanswerable question also is not answered. This is also not surprising. There comes a time in quantification decision-making when a discretionally chosen number has to be adopted to reflect an allowance C which, although expressed as a percentage figure, is intended as an expression of degree, for example large, moderate, small - as the case may be. This happens when a Judge determines that the apportionment of fault is 60:40, when the contingency allowance

for remarriage is determined at 20%, or where the general damages are fixed at R120 000. There are moments D when the fixing of a number is not capable of exact rationalisation or explanation. To my mind, a fair reading of the reasons makes it clear that the Chief Director, suitably assisted, in the exercise of his discretion, decided that an appropriate percentage for the diminution of quotas at the end of 2001 was 5%. I also consider it to be E plain that in doing so he took into account the immediate need for transformation as well as the potential for creating instability in the industry, possibly leading to inadequate investment and job losses.

[44] It should be added that what reasons are to be given for a decision is *the decision* of the decision-maker. The decision F in this case is the allotment of certain tonnages to particular applicants. The reasons for that decision, in my opinion, are set out and are chiefly that there will be no new entrants, that 51 of the existing holders are to be allotted quotas, that the allocations for the previous year will be used as a starting point, save that five per cent will be deducted for redistribution to further transformation. G Further it is made plain that the need to achieve stability has been taken into account. These are reasons enough for dissatisfied applicants to attack the decision should they so choose.

My conclusion is that reasons were given, that they were reasonably clear and that they were adequate. H

[45] Before proceeding to the next heading (arbitrariness) it should be noticed that in the course of the second step transformation was taken into account at two levels. The first was the five percent reduction in quotas followed by a reallocation which favoured smaller quota holders as a class. But the reallocations also favoured individual smallest quota holders who had scored well on I transformation. For instance, the allotment to Mayibuye Fishing CC went up by 30%, that of Combined Fishing Enterprises by 37% and Khoi-Qwa Fishing Development Corporation by 57%. The scoring criteria set out in the passage quoted at the end of para [35] above has the degree of internal transformation J

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by applicants as the first criterion. Four points out of ten were allotted to A transformation. Thus one finds, for instance, when all the criteria had been taken into account, that applicants having the same 2001 allocations did not achieve identical increases in quotas in 2002. As an example, five applicants enjoying quotas of 599 tons in 2001, received in 2002 quotas of 772, 611, 628, 772 and 654 respectively. A few applicants with small quotas actually lost quota when compared with B 2001.

Were the decisions capricious or based upon arbitrary or irrelevant considerations?

[46] The Court *a quo* was of the view that the Chief Director had taken extraneous criteria into account (as already stated) C and that the decision to use the 2001 allocations as a starting point was arbitrary and capricious.

Section 33(1) of the Constitution enjoins that all administrative action must be 'lawful, reasonable and procedurally fair'. The common law and ss 3 - 6 of PAJA elaborate and give content to these standards. D They are not new. As was stated by Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para [87] at 292:

> 'The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of E the controlling legislation.'

[47] From what has already been said as to the interpretation of ss 2 and 18 of the MLRA, it is apparent that the Chief Director, as the delegate of the Minister, has a wide discretion to strike a balance, in furtherance of the objectives and principles of the Act. To a large extent he gives effect to government economic policies. In such F a case a judicial review of the exercise of powers calls for deference, in the sense stated in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) paras [21] and [22] at 471A - D, that

'. . . a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit G the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to H scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'

(This passage is a quotation from Hoexter's 'The Future of Judicial Review in South African Administrative Law' (2000) 117 I *SALJ* 484 at 501 - 2.)

[48] See also Sachs J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658) para [180] at 931J - 932B (SA):

'The matter is not simply one of abstract constitutional theory. The judicial J

function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, A investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the B Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts.'

[49] Similarly Chaskalson P in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348) para [42] at 1195G - 1196E said: C

'To apply that test to economic regulation would require Courts to sit in judgment on legislative policies on economic issues. Courts are ill equipped to do this and in a democratic society it is not their role to do so. In discussing legislative purpose Professor Hogg says:

"While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, D the court need not be so definite in respect of legislative facts in constitutional cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist.

The rational-basis test involves restraint on the part of the court in finding legislative facts. Restraint is often compelled by the nature of the issue: for example, an issue of economics which is disputed by professional economists can hardly be definitively resolved E by a court staffed by lawyers. The most that can realistically be expected of a court is a finding that there is, or is not, a rational basis for a particular position on the disputed issue.

The more important reason for restraint, however, is related to the respective roles of court and Legislature. A Legislature acts not merely on the basis of findings of fact, but upon its judgment as to F the public perceptions of a situation and its judgments as to the appropriate policy to meet the situation. These judgments are political, and they often do not coincide with the views of social scientists or other experts. It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democracy it would be a serious distortion of the political process if appointed officials (the Judges) could veto the policies of elected officials."' G

[50] Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the Executive, not the Judiciary. H

[51] The respondents' complaint is that, in reaching his decisions, the Chief Director acted arbitrarily, capriciously or irrationally. But, in pressing for what would be to the advantage of the respondents, they show little concern for the interests of others, or the benefit of the public as a whole. That is not an approach that should or may be adopted by the Chief Director. He is obliged to have regard to a broad band of considerations and the I interests of all that may be affected. If the Chief Director had indeed acted in accordance with the respondents' prescriptions one may imagine the fate of a review application brought by the 'pioneer' companies, they pointing to the trawlers rusting by the quayside, the one-time crewmen lounging in the streets and the fishing J

nets, like the regimental colours, laid up in the cathedral; the 'pioneers' in A consequence complaining of capricious action. The Chief Director's decision is indeed a polycentric one. And in deciding whether his decision is reviewable it should be remembered that even if the respondents had succeeded in proposing what to my mind would be a better solution than that adopted by him (they did not attempt to do so), it would not be open to me to adopt it, for the reason stated by Chaskalson P in *Bel Porto* above in para [45] at 282F - G: B

> 'The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds C that they consider that a different decision would have been preferable.'

See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para [90] at 709D - H. D

[52] During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was 'wrong'. This is the language of appeal, not review. I do not think that the word was misused, because time and again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by *Hoexter (op cit* at E 185):

> 'The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.' F

[53] Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say. Accordingly I am of the view that the attack based on capriciousness must also fail. G

[54] Nor do I think that there is merit in the suggestion that he was swayed by considerations, particularly stability, that he should have regarded as extraneous, or that he was too much swayed by them (the argument against stability as a consideration weakened as the case H proceeded). I do not think that considerations such as instability in the industry, under capitalisation and loss of jobs were extraneous to the proper making of allocations. Some of the objectives or principles named in s 2*(d)* are the achievement of economic growth, human resource development, capacity building and employment creation. It would have been irresponsible of the Chief Director to have deprived I the industry to any marked extent of the obvious benefits of the large fleets of trawlers, the existing skills and the secure employment offered by the 'pioneer' companies. In the latter connection it is to be noted that the labour unions consider that those companies tend to be more labour intensive J

and provide a variety of side benefits that go with secure employment. Ignoring stability would also not have been A consonant with the need to have regard to achieving optimum utilisation in terms of s 2*(a)*.

[55] In my opinion, the rationality and reasonableness of the Chief Director's decision is further demonstrated by what has been said already, at some length, in paras [41] - [43] and [45] above under the heading 'Vagueness? Absence of reasons?' B

[56] It should also be observed that the Policy Guidelines quoted in para [6] above made it perfectly clear that stability was a factor much in the mind of the Department. An applicant participating in the allocation process was therefore fully alerted to the fact that stability was likely to be taken into account, to a greater or lesser C but to an unknown extent, so that it simply did not lie in its mouth to complain when it was taken into account.

[57] It remains to say that the Court *a quo* erred, again, in regarding stability and the need for investment as extraneous D matters.

The tonnage set aside for appeals

[58] It will be remembered that before allocating the deep sea TAC the Chief Director 'set aside' 1 487 tons to allow for the possibility of appeals. Section 80 of the MLRA provides for an appeal to the Minister against a decision of one of his subordinates. Phambili E contended that the Chief Director was not entitled to set aside a part of the TAC for this purpose and, secondly, that by acting as he did he had 'impermissibly fettered' and 'rendered nugatory' the Minister's powers on appeal. The Court *a quo* did not uphold these two contentions. F

[59] They seem to contradict each other. The first (no right to set aside) suggests that no part of the TAC should have been reserved. The second (impermissibly fettered) suggests that even more should have been set aside. Be that as it may, neither the MLRA, nor the Minister in delegating his powers enjoined the Chief Director to allocate the entire TAC at one time. So much for the first contention. G

[60] As to the second, it is inappropriate to consider it at this stage. The objection could become relevant only if an applicant should succeed on appeal but not receive the tonnage to which it was entitled, because there was too little left to allocate, or if it failed in its appeal for the same reason. Then there might be talk of H an unfair appeal. But we are dealing with a review of the original allotment decision. Both respondents have in fact appealed to the Minister and we now know (as the result of further evidence tendered by Bato which I consider should be admitted - the appellants not objecting) that as a result of their appeals, Phambili has been I awarded a further 43 tons and Bato an additional 17. There has been no suggestion that they have not received what they were awarded on appeal to the Minister. There is no logic in setting aside all the allotments because too much or too little was, in the opinion of the respondents, set aside for appeals. J

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The Chief Director did not consider the tonnages applied for A

[61] Bato raises a further argument - that the Chief Director did not apply his mind to its allocation, in that he did not give consideration to the tonnage sought by Bato or to its ability to fish that tonnage. Notwithstanding the Chief Director's uncontroverted statement that he did consider each application separately, the argument is that there is no trace in the record that he considered the two points raised. What the purpose would have been in considering them B when it was manifest that the aggregate of all the tonnages sought exceeded the TAC is not clear. On examination this argument is revealed as an oblique attack on two other stages leading up to the decision. The first is that the quota holders would 'retain' 95% of C their former quotas come what may. This limited the tonnage available to assuage Bato's demands. The permissibility of the 95-5 split has been considered above. The further complaint is that certain 'paper quota' holders were allowed to 'retain' their old quotas (or rather 95% of them). The result was, again, that there was less tonnage available for Bato than there should have been. This decision, also, was one based on policy, which according to Bato was 'wrong'. D Failing a permissible ground of review, the fact that we may consider a decision not to be the wisest (I do not say that I hold that view) is not a matter for review. E

Minimum viable quota

[62] A further ground of review raised by Bato, not dealt with by the Court *a quo*, is that the director did not have regard to the notion of minimum viable quota (MVQ), by which is conveyed the belief that there is some determinable level below which a quota is too small to be operated profitably. The short answer to this contention is that F the Economic Sectoral Fishery Profile Study (ESS), an investigation and report commissioned by the Department from Rhodes University, rejected the concept of the MVQ. It has not been adopted by the Department. Nor does it form part of the MLRA. The concept has been disregarded by scientists as of no scientific value. Consequently there is no basis on G which Bato may foist it on the Director-General.

[63] In any event, the fact is that small quotas are capable of successful exploitation. Experience shows that some holders of small quotas have put them to fruitful use by forming joint ventures, or concluding co-operative arrangements, or by buying additional quota from other holders. One of the hopes of the Department was that over H the medium period, 2002 to 2005, market forces would operate so that small quota holders would make better use of their quotas by merging, co-operating and so forth.

Legitimate expectation I

[64] Phambili claimed that it had a legitimate expectation of a 'substantial allocation and increase' in the allocation to it, in that it 'believed that the application for a right to catch 5 000 tons would be favourably considered'. Both Phambili and Bato relied on the policy guidelines and J

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a ministry media statement, each dating from 2001. In addition, Phambili relied on the Minister's speech in the A National Assembly in May 2001 and a further ministerial media statement. Bato further relied on a white paper in 1997 and two draft discussion documents. The general tenor of these documents was that the government intended doing something positive about transformation in the fishing industry. Phambili's case was based on the doctrine of legitimate expectation. Bato's case, which will be explained below, B had a different basis.

[65] Dealing first with legitimate expectation, the test to be applied has recently been restated in this Court in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) (2003 (4) BCLR 378), where Cameron JA stated at para [19]: C

> 'The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para [28]. He said:
>
> "The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the D expectation, include the following:
>
> (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell (op cit* [*Judicial Review of Administrative Action* 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public E administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
>
> (ii) The expectation must be reasonable: *Administrator, Transvaal v Traub (supra* [1989 (4) SA 731 (A)] at F 756I - 757B); *De Smith, Woolf and Jowell (supra* at 417 para 8-037).
>
> (iii) The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell (op cit* at 422 para 8-050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350*h* - *j*.
>
> (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot G be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.'"

[66] The numerous and disparate statements, by different persons, on which the respondents rely, cannot amount to a representation that is 'clear, unambiguous and devoid of relevant H qualification' - for instance statements such as 'broadening future participation'; 'a system which ensures greater access to the resources by those who have been denied access previously'; 'the achievement of equity in the fishing industry in addressing the historical imbalances'; 'broadening future participation'; 'an end product . . . which differs radically from the situation that obtains today'; 'the beginning of a fundamental I change in the fishing industry in South Africa'; the achievement of the twin objectives of 'stability and black economic empowerment'; and

> 'up to 25% of the "remaining" [remaining after what?] TAC will be set aside and will be allocated to deserving applicants in order to encourage transformation J

> and restructuring, *either through the internal restructuring of current rights holders*, or through the accommodation of new entrants' A

(emphasis supplied). How are the tonnages apparently expected by Phambili reasonably to be extracted from such statements? To arrive at tonnages is made even more difficult by the respondents' counsel's understandable unreadiness to suggest a percentage to replace 5% or a different starting point. They confine themselves to generalisations. The percentage should be considerably B higher and the starting point should be different (with some tentative suggestions as to where it should be). That is the argument.

[67] It should also be borne in mind that some of the documents and statements arose during discussions as to the future. To hold politicians and bureaucrats to every word uttered in the course of C negotiation might hamstring open discussion. Moreover, nothing that they say can alter the meaning of the MLRA, which does not always reflect earlier thinking which must be taken to have been abandoned. D

[68] Nor, to apply the second test in the *Phillips* case (above), was Phambili's reliance on what it thought had been represented reasonable.

[69] It is unnecessary to probe legitimate expectation further. Enough has been said to demonstrate that there is no substance in this ground of review. E

Fair administrative action

[70] As I have indicated Bato does not rely on legitimate expectation but presents an argument that is much akin to it and which is based on much the same material. The argument relies on s 33(1) of the Constitution, which entitles everyone to 'administrative action that F is lawful, reasonable and procedurally fair'. The complaint is that when the allocations were made there was an unheralded change in policy, which was procedurally unfair to applicants who had earlier relied on previous and oft-repeated statements as to how transformation would be treated in the allocation process. Reliance is placed on *Premier, Mpumalanga, and Another v Executive Committee,* G *Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) (1999 (2) BCLR 151) para [41] at 110C - D (SA):

> 'Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable H notice of the proposed change or an opportunity to make representations to the decision-maker.'

[71] The right that is relied upon is the right to be fairly treated. That an applicant has such a right is clear (see, for example, *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) paras [11] - [12] at 871F - G). This is so even though it had I no right to receive an allocation. But was the right violated? In order to answer this question one needs to ask what was it in the decision-maker's mind of which an applicant was not aware and which conflicted with earlier policy statements.

[72] In this connection reference needs to be made to the 'Evaluation of J

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applicants' section of the Policy Guidelines quoted in para [6] above. There applicants for quotas were expressly warned A that s 2 of the Act would be applied. That Act makes no mention of MVQ. Yet the first alleged subject of ignorance is said to be that applicants were not aware that that concept had been jettisoned. Not only did the Act not mention MVQ but applicants were expressly warned that no precedence, weighting or ranking was to be derived from the Guidelines themselves. Those Guidelines made it clear that the Minister B or his delegate was going to use his discretion, within the parameters of the Act. The second subject of which applicants were said to have been ignorant was that the decision-maker had abandoned the intention to award a 'notable proportion' of the TAC to hdp, as had been stated in para 2 of the relevant section of the Guidelines - see C para [6] above. The reference to 'notable proportion' is said to be to the percentage that was to be placed in the 'equity pool', but I do not think that that is the correct interpretation of what was said. The true meaning is that a notable proportion of the total TAC would be allotted to the hdp. The fact is that 23,86% of the hake deep D sea *quantum* for 2002 was allocated to rights holders which were 50% or more owned by hdp. More than 80% of the *quantum* in the longline sector was awarded to concerns similarly owned. Surely these are 'notable proportions'. And in any event, what constitutes a notable proportion is largely a matter of opinion and I do not think that Bato has succeeded in showing that E there was a departure from what had been previously foreshadowed. The third subject of ignorance was said to be that applicants did not know that the 'pioneers' would not lose tonnage, or a substantial tonnage. The fact is that they did. The fourth subject is that the decision-maker was claimed to have misunderstood the law. In the light of what I have said earlier he understood the law very well. The fifth F subject was that it was not known that the Department hoped that there would be consolidation, co-operation and so forth among smaller quota holders. I fail to see how the Department's failure to proclaim its hopes for the future (if indeed it did not so proclaim) can be presented as some form of trap for supposedly ignorant applicants. In sum I do not consider that there is any substance in any part of the G argument that prospective quota-holders were led into the dark and left there until it was too late.

[73] In any event, I am at a loss to see where the argument would lead if there were any substance to it. Bato concedes that, if it was brought under a misapprehension, that in itself did not entitle it H to receive a particular larger quota. But, it says, it should have been given a hearing on the intention to change the policy. In other words the whole cumbersome procedure would have had to be brought to a halt while representations were made as to why the Department's formerly stated policies (whatever they actually were) were better than the I Department's more recent thinking as to how its discretion should best be exercised having regard to what the MLRA required of it. This would, on the facts in this case, be taking the right to fair procedural action over the brink. I conclude that there is no substance in this point either. J

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[74] In the result I am of the view that there is not any merit in any of the respondents' review grounds. The Court *a* A *quo* should not have upheld the review. These huge reviews, running to some 45 volumes, were based upon a preconception that was not sustained by evidence and lacked all substance. The essential message of this judgment is that it is not the function of a Court to sit in appeal on decisions to grant fishing allocations, or to constitute itself as an authority as to how to make such allocations. That, B however much it is denied, is what the respondents are asking us to do.

[75] This conclusion makes it unnecessary to deal with two matters raised by the industry appellants in defence. The first was that, in terms of s 7(2) of PAJA, an action is not to be reviewed C unless any internal remedy provided for has first been exhausted. Section 80 provides for an internal appeal to the Minister and, although the respondents had appealed, the Minister had not reached his decision when the reviews

were brought. In the light of the appellants' successful opposition to the reviews on other grounds, it is unnecessary to deal with this point. Similarly, with the industry D appellants' request to admit the evidence of one Rory Williams.

Costs of the record

[76] A request that the two appeals now before us be treated as urgent was acceded to and they were set down for hearing on 2 and E 5 May 2003. The heads of the appellants were to be filed by 31 March and those of the respondents by 15 April. That meant that the Judges had to commence work on a combined record of 45 volumes without both sides' heads. This made it particularly imperative to comply with SCA Rules 8(6)*(d)*(ii) and 8(7). F The former provides that all references in the record to page numbers of exhibits shall be transposed to reflect the page numbers of such exhibits in the appeal record. This Rule was not complied with. Nor was the position alleviated by reflecting the old numbers in the index. That was also not done. Rule 8(7) requires that, where it is appropriate, a core bundle must be prepared. Before us are appeals in G which it was peculiarly appropriate to prepare a core bundle. The effects of its absence until a late stage were aggravated by the records being cluttered with large numbers of documents that were not relevant to the appeal. The combined effect of these lapses was that five Appeal Judges wasted a great deal of time trying to find their way through the record. Failure to comply with these Rules is a serious H matter at any time, but especially so when an appeal is urgent and the record long. Urgency is not an excuse for remissness. It is all the more reason for compliance. There is no excuse for the failure to comply with these two Rules. This Court has spoken often enough about the frequency and flagrancy of the flouting of the Rules. In some cases I it has made punitive costs orders. These appeals call for such an order. It is accepted that all the appellants are jointly responsible for the state of the record.

[77] I have mentioned already that there are many unnecessary documents contained in the records. There has not been a sufficient J

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compliance with Rule 8(9). The reason given for this state of affairs is, again, urgency. I have some sympathy for that resort in this A particular respect. The process of accurate winnowing of chaff is not made more easy by the need for haste. By agreement some parts of the record *a quo* were not included in the appeal record. The final state of that record bears the agreement of all parties. Accordingly, in these special circumstances I do not consider that a punitive order is warranted for this breach of the Rules. B

[78] There is further ground for complaint about the record. The indexes in the index volume and in the volumes following volume one in each case contain a repetition of the full heading of the case and the C names of all the attorneys, which take up a page and a half. It was made clear a long time ago that such a practice with regard to indexes should not be followed and that the adoption of it will lead to an appropriate disallowance of costs. Nor is it only a matter of costs. It wastes everybody's time having to plough through these pages and other totally unnecessary pages in the record. It is not uncommon to find page after page on each of the index pages of which the only D substantive item is, for instance, 'Smith. Evidence in chief (continued)'. This is a sloppy, cost-inflating practice not to be endured and attorneys should make it clear to those who prepare records that they will not pay for a defective product (this comment is not intended to be confined to indexes). In the appeals before us this E unnecessary repetition will also be taken into account in determining on a punitive order.

[79] Taking together the failure to insert the new numbers, the absence of a core bundle and the inflated indexes and lists of attorneys, I consider that the appropriate order would be to disallow F the recovery by the appellants' attorneys from the respondents on their clients' behalf, or from their own clients, the appellants, one third of the cost of preparing the record.

Replying affidavits G

[80] There is one other matter that I am compelled to mention - replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate H length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.

Result I

[81] The appeal is upheld with costs, including the costs consequent upon the employment of two counsel; save that the appellants' attorneys are forbidden to recover one third of the cost of preparing the record, either from the respondents or from their own clients, the appellants. J

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[82] The orders numbered 2, 3 and 4 in the judgment in each of case No 1171/02 and case No 1417/02 in the Court *a quo* are A set aside and replaced by an order in the following terms:

> 'The application is dismissed with costs, including the costs of two counsel.' B

Howie P, Mthiyane JA, Conradie JA and Jones AJA concurred.

Phambili Fisheries (Pty) Ltd appeal: First to Third Appellants' Attorneys: *State Attorneys*, Cape Town and Bloemfontein. Fourth to Eighteenth Appellants' Attorneys: *Mallinicks Inc*, Cape Town; *Israel & Sackstein* C *Inc*, Bloemfontein. Respondent's Attorneys: *Buchanan Boyes Inc*, Cape Town; *Webbers*, Bloemfontein.

Bato Star Fishing (Pty) Ltd appeal: First and Second Appellants' Attorneys: *State Attorneys*, Cape Town and Bloemfontein. Third to Eighteenth Appellants' Attorneys: *Mallinicks Inc*, Cape Town; *Israel & Sackstein Inc*, Bloemfontein. D Respondent's Attorneys: *Marais Müller Inc*, Kuils River, Cape Town; *Webbers*, Bloemfontein.

E

QOBOSHIYANE NO AND OTHERS v AVUSA PUBLISHING EASTERN CAPE (PTY) LTD AND OTHERS 2013 (3) SA 315 (SCA) A

2013 (3) SA p315

Citation	2013 (3) SA 315 (SCA)
Case No	864/2011 [2012] ZASCA 166
Court	Supreme Court Of Appeal
Judge	Mthiyane DP, Bosielo JA, Leach JA, Wallis JA and Plasket AJA
Heard	November 14, 2012
Judgment	November 21, 2012
Counsel	*RG Buchanan SC* (with *G Ngcangisa*) for the appellants. (Instructed by the State Attorney, Port Elizabeth and Bloemfontein. *J Brickhill* for the first respondent.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law — Access to information — Access to information held by C public body — Request — Refusal — Public-interest override — In all situations where access must or may be refused, public body obliged to afford access where record containing certain types of evidence and public interest in disclosure outweighing harm that would follow from disclosure — Public body refusing access in such cases having to show that it weighed harm from disclosure against public interest in disclosure — Promotion of Access to Information Act 2 of 2000, ss 33(1) and 46. D

Appeal — Peremption — Leave to appeal granted after compliance with order appealed against — Right of appeal abandoned where party unequivocally conveying intention to be bound by judgment — In present case, where appellant's unreserved and unequivocal compliance with court's order inconsistent with intention thereafter to challenge judgment on merits, E appeal perempted and dismissed.

Appeal — Generally — Power of court of appeal — Power to dismiss appeal where judgment or order sought would have no practical effect or result — Notwithstanding mootness, court having discretion to deal with the merits of appeal if discrete legal issue of public importance arose affecting F future matters requiring its adjudication — Supreme Court Act 59 of 1959, s 21A(1) .

Headnote : Kopnota

Avusa Publishing Eastern Cape (Pty) Ltd (Avusa) launched a successful high court application in terms of the Promotion of Access to Information Act G 2 of 2000 (PAIA) to be given access to a report, commissioned by the MEC for Local Government and Traditional Affairs in the Eastern Cape, into maladministration at the Nelson Mandela Metropolitan Municipality. The high court granted the order on the basis that, while the MEC had shown grounds for not disclosing the report in terms of s 44 of PAIA, it was nonetheless subject to mandatory disclosure in the public interest under H s 46 of PAIA. The MEC duly complied with the court order but thereafter sought and was granted leave to appeal. The 'point of principle' that the MEC claimed arose — as encapsulated by the Supreme Court of Appeal — was that the obligation on the information officer to make mandatory disclosure was subject to a limitation where there was an ongoing

investigation under s 106(1)*(b)* of the Local Government: Municipal Systems Act I 32 of 2000, and the disclosure of a record would tend to undermine that process or hamper its proper completion.
Held: Where, after judgment, a party unequivocally conveyed an intention to be bound by the judgment, any right of appeal is abandoned. In the present matter, where the only thing that the MEC had to do in terms of the court's order was done without reservation, his conduct was unequivocal and J

A inconsistent with an intention thereafter to challenge the judgment on its merits. The appeal was accordingly perempted, and had to be dismissed. (Paragraphs [3] – [4] at 318E – 319B.)
Although it could dismiss the appeal on the ground that disclosure of the report rendered any judgment or order by the court of no practical effect or result as between the parties, the court had a discretion — notwithstanding the B mootness of the issue as between the parties to the litigation — to deal with the merits of an appeal if a discrete legal issue of public importance arose that would affect matters in the future and on which its adjudication was required. In the present case the constitutional guarantee of the right of access to information arose. (Paragraph [5] – [6] at 319B – F.)
The language of s 46, as construed in the light of PAIA as a whole, and the broader C context provided by the Constitution, did not warrant the limitation upon the obligations of the information officer contended for by the MEC. Section 33(1), which sets out the grounds upon which it was permissible to refuse access to a record — expressed in categories of 'must' or 'may' — provided that the power to refuse access in each of them was exercisable 'unless the provisions of s 46 apply'. Section 46 contained an obligation to D make disclosure where the specified criteria were met; disclosure was not optional or discretionary. In all situations where access must or may be refused, there was an obligation to afford access where the record contained certain types of evidence (a substantial contravention of, or failure to comply with, the law; or an imminent and serious public-safety or environmental risk) and the public interest in disclosure outweighed the harm that would E follow from disclosure. Assuming that the grounds advanced by the MEC constituted grounds upon which he was entitled ('may') to refuse access, there was nonetheless an obligation on him to have weighed the harm that would have arisen from disclosure against the public interest in disclosure. It did not appear from the record that he undertook that exercise. The attempt to formulate a legal principle was in truth nothing more than a repetition of F the arguments before the judge, that the public interest in disclosure should not outweigh the harm that would be occasioned by disclosure in this particular case. No order having a practical effect would result from the appeal because the report had been disclosed. Accordingly the appeal fell to be dismissed as moot. (Paragraphs [12] – [15] at 321I – 323C.)

Cases Considered

G **Annotations**

Case law

Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and Others 2012 (1) SA 158 (ECP): upheld on appeal

Clear Enterprises (Pty) Ltd v SARS and Others [2011] ZASCA 164: referred H to

Dabner v South African Railways and Harbours 1920 AD 583: dictum at 594 applied

Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others 2012 (1) SA 453 (SCA): referred to

Geldenhuys and Neethling v Beuthin 1918 AD 426: dictum at 441 applied

I *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A): referred to

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) (2001 (9) BCLR 883): referred to

MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) (2008 (2) BCLR 99; [2007] ZACC 21): referred to

Minister of Trade and Industry v Klein NO [2009] 4 All SA 328 (SCA): J referred to

Mohamed and Another v President of the Republic of South Africa and Others A *(Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18): referred to

Natal Rugby Union v Gould 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258): referred to

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others B 2000 (2) SA 1 (CC) (2000 (1) BCLR 39; [1999] ZACC 17): dictum at fn18 applied

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34): referred to

Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA): referred to

Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another C 2005 (1) SA 47 (SCA): referred to

Rand Water Board v Rotek Industries (Pty) Ltd 2003 (4) SA 58 (SCA): referred to

Samancor Group Pension Fund v Samancor Chrome and Others 2010 (4) SA 540 (SCA): referred to

Standard Bank v Estate Van Rhyn 1925 AD 266: referred to D

The Merak S Sea Melody Enterprises SA v Bulktrans (Europe) Corporation 2002 (4) SA 273 (SCA): referred to.

Statutes Considered

Statutes

The Promotion of Access to Information Act 2 of 2000, s 46: see *Juta's Statutes of South Africa 2011/12* vol 5 at 1-241. E

Case Information

RG Buchanan SC (with *G Ngcangisa*) for the appellants. (Instructed by the State Attorney, Port Elizabeth and Bloemfontein.)

J Brickhill for the first respondent.

An appeal from the Eastern Cape High Court, Port Elizabeth F (Dukada AJ sitting as court of first instance).

Order

The appeal is dismissed with costs.

Judgment

Wallis JA (Mthiyane DP, Bosielo JA, Leach JA and Plasket AJA G **concurring):**

[1] In August 2009 the MEC responsible for the Department of Local Government and Traditional Affairs in the Eastern Cape appointed Kabuso CC to investigate concerns of maladministration in relation to H the affairs of the Nelson Mandela Bay Metropolitan Municipality. The MEC was acting in terms of s 106(1)*(b)* of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Kabuso CC's report (the Kabuso report) was handed to the MEC in February 2010. In November 2010 Avusa Publishing Eastern Cape (Pty) Ltd (Avusa), the I first respondent, which publishes *The Herald* and the *Weekend Post* newspapers in the Eastern Cape, sought access to the Kabuso report in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA). The refusal of that request, initially by the information officer and on appeal by

Mr Qoboshiyane, the first appellant and the present incumbent of the post of MEC for Local Government and J

A Traditional Affairs in the Eastern Cape, led Avusa to commence proceedings in terms of ss 78 and 82 of PAIA to obtain access to the report.

[2] The application was granted by Dukada AJ on the basis that, whilst B the MEC had shown grounds for not disclosing the report in terms of s 44 of PAIA, it was nonetheless subject to mandatory disclosure in the public interest under s 46 of PAIA. He ordered that the report be disclosed within five days. Such disclosure was duly made at a public ceremony at which the MEC handed the report to a representative of the newspaper. At the handing over the MEC made a public statement that, C although he disagreed with the judgment, he would deliver a copy of the report and its annexures as ordered by the court. Eight days later an application for leave to appeal was lodged. Some two months later the judge granted leave to appeal to this court on the basis that there were no decided cases on the application of s 46 of PAIA, and that the concept of disclosure in the public interest was important and likely to arise again in D other cases in the future. He did not address the fact that the report had already been disclosed.

[3] In their heads of argument the parties addressed questions of mootness. However, they overlooked the prior question, whether the appellant's unequivocal compliance with the terms of the court's order E perempted the appeal. Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment, any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways & Harbours*, [1] where Innes CJ said:

> F 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. G And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

That judgment has been consistently followed in this court. [2]

[4] The facts here are simple. The MEC was ordered to disclose a copy H of the report to Avusa within five days of the court's order. He did so. He did not indicate any reservation of rights or any intention to appeal at that time. The application for leave to appeal was delivered later. There was only one thing that the MEC had to do in terms of the court's order I and he did it without reservation. His conduct was unequivocal and

inconsistent with an intention thereafter to challenge the judgment on its A merits. The appeal was perempted and must be dismissed. In those circumstances it is strictly unnecessary for the court to reach the question of mootness. However, as it leads to the same result I shall briefly deal with it.

[5] The disclosure of the report means that any judgment or order by B this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone. [3] The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. [4] With C those cases must be contrasted a number where the court has refused to deal with the merits. [5] The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose. In exercising D its discretion the court is always mindful of the wise words of Innes CJ in *Geldenhuys and Neethling v Beuthin*, [6] that:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.' E

[6] The present case raises issues under the Constitution, because PAIA was enacted to give effect to the constitutional guarantee of the right of access to information. [7] There is no provision governing the business of the Constitutional Court similar to s 21A(1) of the Supreme Court Act. However, the court has itself developed jurisprudence around the issue of mootness that largely parallels that of this court under s 21A(1). Thus F in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[8] it was said:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.' G

A Although that is the basic principle, the Constitutional Court has held that, where it is in the interests of justice to do so, it has a discretion to consider and determine matters even if they have become moot. [9] There is little if any discernible difference between the approach of the Constitutional Court and that of this court. [10]

B [7] The starting point of the enquiry is therefore to identify the issue that the MEC says should be determined, notwithstanding the admitted mootness of this appeal. The reason he gave for withholding the report was that his predecessor initiated a process under s 106(1)*(b)* of the Systems Act that resulted in the production of the Kabuso report. He C said that this process was still incomplete because he had not yet decided what to do in relation to the report's contents. He engaged with the municipality, but that engagement was not complete. The municipality had not decided whether it would take steps pursuant to the report. Depending on its decision, he said he would have to decide whether to D exercise his powers to intervene in the affairs of the municipality in terms of s 139(1)*(a)* of the Constitution. He accordingly claimed that the process was incomplete.

[8] Insofar as disclosure of the report under PAIA was concerned the MEC said —

E 'the disclosure of the entire Kabuso report, together with all its annexures, at this stage, is inappropriate and would inevitably tend to undermine the process commenced by my predecessor and which is still underway'.

He went on to indicate that this did not rule out the disclosure of the F report in due course, 'once I have taken relevant decisions'. However, at the time it was asked for, and for the reasons he had given, he claimed to be entitled to withhold it in terms of ss 44(1)*(a)* and *(b)* of PAIA. He went on to submit that the disclosure of the report was not 'at present' in the public interest. He does not appear to have addressed his mind to s 46 of PAIA.

G [9] Section 46 is headed 'Mandatory disclosure in public interest' and provides that:

'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body H contemplated in section 34(1), 36(1), 37(1)*(a)* or *(b)*, 38 *(a)* or *(b)*,

39(1)*(a)* or *(b)*, 40, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(1) or (2), 44(1) A or (2) or 45, if —

(a) the disclosure of the record would reveal evidence of —

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; B and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

[10] The final stage in an information officer's consideration of a request for access to a record, if circumstances exist that would otherwise justify refusing access, must be

to consider whether nonetheless the record C must be disclosed under s 46. The section provides that the information officer is obliged [11] to disclose the record where two conditions are met. The first is that disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law. [12] The MEC accepted that this condition was met. The second condition is that the public interest in disclosure clearly outweighs the harm contemplated D in the provision under which the record could otherwise be withheld. The section applies where the record could otherwise legitimately be withheld for one of the reasons set out in PAIA and, as the heading makes clear, disclosure is mandatory where the conditions set out in the section are satisfied. If the information officer does not provide access, the court will order him or her to do so. That is what happened E here.

[11] The point of principle that the MEC claimed arose in this case was that the obligation on the information officer to make this mandatory disclosure is subject to a limitation where there is an ongoing investigation F under s 106 of the Systems Act, and disclosure of a record would tend to undermine that process or hamper its proper completion. It was submitted that it is better that MECs should be permitted to complete the process, and decide what they are going to do about the matters raised in a report furnished after an investigation under s 106(1)*(b)* of G the Systems Act, before being obliged to disclose the contents of such reports. On that footing it was submitted that the public-interest override in s 46 of PAIA is subject to a limitation that, after some debate, can be formulated in the following terms:

> 'Where an MEC has called for an investigation and report under s 106 of the Systems Act, the information officer must withhold the report until H such time as the MEC has taken a decision on the steps to be taken in respect of the contents of the report and no information officer (and by extension no court on appeal to it) is entitled in terms of s 46 to order disclosure of that report in the public interest.'

[12] There is no warrant in the language of s 46, as construed in the light of PAIA as a whole and the broader context provided by the Constitution, I

Wallis JA (Mthiyane DP, Bosielo JA, Leach JA and Plasket AJA concurring)

A for this limitation upon the obligations of the information officer. I will assume in favour of the MEC — without deciding, the matter being in dispute — that these considerations may provide a justification for refusing access to a record under ss 44 (1)*(a)* or *(b)* of PAIA. However, s 46 expressly operates *after* it has been decided that a record may B legitimately be withheld under, inter alia, ss 44(1)*(a)* and *(b)*. These provisions are part of ch 4 of PAIA, which deals with the grounds upon which it is permissible to refuse access to a record. Some of those grounds are expressed as mandatory ('must') and some are discretionary ('may'). Section 33(1), which commences the chapter, sets out these two C categories and adds that the power to refuse access in each of them is exercisable 'unless the provisions of s 46 apply'. That section contains an obligation to make disclosure where the specified criteria are met. Disclosure is not optional or discretionary. There is an obligation to D permit access.

[13] The structure of ch 4 of PAIA is a careful balance between the constitutional right of access to information in s 32(1) of the Constitution, and the protection from disclosure of information in certain defined circumstances. Those circumstances are in turn divided into two categories — those where access to a record must be refused and those where access may be refused. Finally, in all situations where E access must or may be refused, [13] there is an obligation to afford access where the record contains certain types of evidence and the public interest in disclosure outweighs the harm that will follow from disclosure.

[14] Counsel could not refer us to anything in either the language or the F context of PAIA that would justify the suggested restriction on the language of s 46. When examples were put to him in argument, in order to test the validity of the suggested construction, he repeatedly sought to justify it by reference to 'the facts of this case'. All that did was to highlight the point that the exercise that an information officer must undertake under s 46 is a careful balancing, on the facts of the particular G case, of the harm that would accrue from permitting disclosure of the record, and the public

interest in its disclosure. In other words, the enquiry in every case is a fact-sensitive one, the outcome of which will vary from case to case depending on the particular facts. Assuming, as I have done for the purposes of this argument, that the grounds advanced H by the MEC constituted grounds upon which he was entitled ('may') to refuse access, there was nonetheless an obligation on him to weigh the harm that would arise from disclosure against the public interest in disclosure. It does not appear from the record that he undertook that exercise. In any event, the judge held that the public interest in disclosure outweighed the harm that would be caused thereby and ordered him to I provide access to the Kabuso report. In another case the position may have been different.

Wallis JA (Mthiyane DP, Bosielo JA, Leach JA and Plasket AJA concurring)

[15] Once that conclusion is reached it follows that there is no point of A general importance in this case. The attempt to formulate a legal principle is in truth nothing more than a repetition of the arguments before the judge that the public interest in disclosure should not outweigh the harm that would be occasioned by disclosure in this particular case. The high court decided that issue on the facts before it B and held that the MEC was obliged to disclose the Kabuso report in terms of s 46 of PAIA. As he had not done so, the high court ordered him to do so. He complied with that order. Whether the judge was right in his conclusion — and I do not suggest that he was not right — will not affect the situation in any way. A decision that he was wrong would have no practical effect or result. Accordingly, the appeal is dismissed with costs. C

First Respondent's Attorneys: *Cheadle Thompson and Haysom Inc*, Johannesburg; *Webbers*, Bloemfontein.

1 *Dabner v South African Railways and Harbours* 1920 AD 583 at 594.

2 *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A – D; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258) at 443F – G; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) para 25.

3 Section 21A(1) of the Supreme Court Act 59 of 1959.

4 *Natal Rugby Union v Gould* supra at 441I – 445B; *The Merak S Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) para 4; and *Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others* 2012 (1) SA 453 (SCA) paras 43 and 44.

5 See, for example, *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7; *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 18; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2005 (1) SA 47 (SCA), and *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA) paras 16 – 17.

6 *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441.

7 Section 32 of the Constitution.

8 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39; [1999] ZACC 17) at fn18.

9 See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) (2001 (9) BCLR 883) para 11; *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) (2008 (2) BCLR 99; [2007] ZACC 21) para 32; *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18) para 70; *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) para 32.

10 *Clear Enterprises (Pty) Ltd v SARS and Others* [2011] ZASCA 164 paras 17 to 20.

11 The word is 'must'.

12 There is a second possibility, that it would reveal evidence of 'an imminent and serious public safety or environmental risk', a matter not relevant for present purposes.

13 There is an exception in relation to certain records of the South African Revenue Service. Access to those records must be refused under s 35(1), and s 46 does not provide for a public-interest override in relation to such refusal.

PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A)

Citation	1984 (3) SA 623 (A)
Court	Appellate Division
Judge	Corbett JA, Miller JA, Nicholas JA, Galgut AJA and Howard AJA
Heard	February 27, 1984
Judgment	May 21, 1984
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

I Interdict - Final interdict - Facts in dispute - When interdict to be granted - Qualification to general rule required - In certain cases the denial by respondent of a fact alleged by applicant may not be such as to raise real, genuine or bona fide dispute of fact - Respondent in such a case failing to apply for deponents concerned to be called for cross-examination - If the Court is satisfied as to inherent

A credibility of applicant's averments, Court may proceed on the basis of the correctness thereof - May be exceptions to this general rule, eg where allegations or denials so far-fetched that Court justified in rejecting them on the papers.

Trade and trade mark - Trade mark - Infringement of - Semble: s 2 of B Act 62 of 1963 - Definition of "trade mark" in section not appropriate to infringement proceedings.

Trade and trade mark - Trade mark - Infringement of - Semble: notional user test to determine infringement - Such test poses difficulties where actual proven user falls outside ambit of the plaintiff's monopoly.

C Trade and trade mark - Trade mark - Infringement of - Section 46 *(b)* of Trade Marks Act 62 of 1963 - Intention of Legislature to safeguard use by trader of words which are fairly descriptive of his goods, genuinely used for the purpose of describing character or quality of the goods - Such use must not be device to achieve some ulterior object. D

Headnote : Kopnota

The formulation of the rule in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G to the effect that where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order, or where it is clear that the facts, though not formally E admitted, cannot be denied and must be regarded as admitted, requires clarification and perhaps qualification. In certain cases the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) *(g)* of the Uniform Rules of Court and the Court is satisfied as F to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. There may be exceptions to this general rule, eg where the allegations or denials of the respondent

are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.
G *Semble:* where one is considering whether an alleged infringer of the rights of the proprietor of a registered trade mark has unauthorisedly used a mark "as a trade mark" within the meaning of s 44 (1) *(a)* of the Trade Marks Act 62 of 1963, in certain situations problems arise in the application of the statutory definition of "trade mark" in s 2 of the Act.
Semble: the application of the notional user test to determine infringement of a trade mark poses certain difficulties. If the H actual proven user by the defendant falls outside the ambit of the plaintiff's monopoly then it cannot be said that a notional fair and normal user of his mark - which had not in fact occurred - would trespass upon the plaintiff's monopoly.
What the Legislature intended to safeguard by means of the provisions of s 46 *(b)* of the Act is the use by a trader, in relation to his goods, of words, which are fairly descriptive of his goods, genuinely for the purpose of describing the I character or quality of the goods: the use of the words must not be a mere device to secure some ulterior object, as for example where the words are used in order to take advantage of the goodwill attaching to the registered trade mark of another.
The Court held *in casu* that the use by the respondent, a dealer in paints and allied products, of the name "Mikacote" was an infringement of appellant's (also a dealer in paints) registered trade mark consisting of the word "Micatex". The Court held furthermore that the word "Mikacote"

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was not a word in ordinary use but a fancy name which was not a fair description of the character or quality of the paint which A it sold and was accordingly not protected by the provisions of s 46 *(b)* of the Act.
The decision of the Full Bench of the Cape Provincial Division in *Van Riebeeck Paints (Pty) Ltd v Plascon-Evans Paints (Pty) Ltd* overruled.

Case Information

Appeal from a decision in the Cape Provincial Division (VAN DEN HEEVER J, BAKER J and SCHOCK J). The facts appear from the B judgment of CORBETT JA.

W H R Schreiner SC (with him *C E Puckrin*) for the appellant: The right conferred upon a registered proprietor of a trade mark is a statutory right and its ambit stems solely from his registration. In order correctly to assess the limits of the C right conferred by registration, the Court is entitled to postulate "notional use" of the mark; namely, any use of the trade mark in a fair and normal manner in relation to any of the goods in respect of which it is registered. This is the fundamental distinction between infringement of a trade mark and passing-off. In the latter case, an applicant's rights reside in the reputation which exists in respect of his goods D and which is created or arises solely as a result of the use which he has made of the mark or get-up in question. *adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co Ltd* 1976 (1) SA at 533H - 535D; *Organon Laboratories Ltd v Roche Products (Pty) Ltd* 1976 (1) SA at 197A; *Hudson and Knight v DH Brothers Industries* 1979 (4) SA at 224F and G; Chowles and E Webster *SA Law of Trade Marks* 2nd ed at 200 - 201. The general impression of the two marks should be considered. The enquiry is not whether there are differences, but whether the general appearance is such that a person looking casually at the marks would be likely to be deceived. *Chowles and Webster (op cit* at 85 para 1) and the cases there cited. The marks F should not be compared side by side but should be considered from the point of view of a person who might at one time see or hear one of the marks and later, possibly with an imperfect recollection of that mark, come across the other mark. *American Chewing Products Corporation v American Chicle Co* 1948 (2) SA at 744; *S Wainstein & Co v Buffalo Salt Works* 1966 (3) SA at G 285B - C; *adidas* case *supra* at 536A - B; *Zenith Clothing Industries (Pty) Ltd v Carducci Clothing Corporation (Pty) Ltd* 1981 (2) SA at 66E - 67C; *Searles Industrials (Pty) Ltd v International Power Marketing (Pty) Ltd* 1982 (4) SA at 123; *Chowles and Webster (op cit* para *j* at 84). Due allowance must be made for the imperfection of human recollection. *Rysta Ltd's* H *Application* (1943) 60 RPC 87 at 108 line 39. The comparison is one solely between the registered trade mark and the mark

used by the alleged infringer. It must be assumed that the respective products are identical as to their packing or get-up, the quality of the goods, the price at which they are sold and the trade channels through which they are marketed. I John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd 1977 (3) SA at 149D - H. The comparison between the marks involves postulating notional use of both the registered mark and also the allegedly infringing mark upon the relevant goods. *Lever Brothers, Port Sunlight Ltd v Sunniwite Products Ltd* (1949) 66 RPC at 89 lines 28 *et seq; Saville Perfumery Ltd v June Perfect Ltd and Another* (1941) 59

A RPC at 174; *British Petroleum Co v European Petroleum Distributors Ltd* (1968) RPC at 64. In regard to the notional use to be postulated, if the above Court should find that one of the marks had in fact been used in a particular manner it is no longer necessary to speculate as to whether such a manner of representation would ever occur to anybody in the trade. The B fact that it has occurred and has been adopted is of itself a sufficient indication that it is a fair and reasonable manner of representation. *Koyo Seiko Kabushki Kaisha's Application* (1958) RPC at 127 line 3; Venkateswaran *The Law of Trade and Merchandise Marks* at 190. In so far as word marks are concerned see *Pianotist Co Ltd's Application* (1906) 23 RPC at C 777 line 26; *Chowles and Webster (op cit* at 86 note 3) and the cases there cited. If confusion or deception is probable in either the sound, the appearance or the meaning of the two words, then they are deceptively similar within the meaning of s 44 of the Act. Deception in any one of these respects is sufficient. *Cavalla Ltd v International Tobacco Co of South Africa Ltd* 1953 (1) SA at 465G - H; *John Craig* case *supra* at D 515A. Both the idea conveyed by the marks as well as the dominant feature of the two marks should be taken into account. *Chowles and Webster (op cit* at 85 paras *(m)* and *(n)*). The question of the possibility of deception or confusion must be judged with reference to average purchasers of the types who would purchase texture coatings, and should not be limited to E very careful persons. *American Chewing Products Corporation v American Chicle Co* 1948 (2) SA at 743; *Chowles and Webster (op cit* at 83 para (i)); *Laboratoire Lacharte v Armour Dial Inc* 1976 (2) SA at 746. Any circumstances which render articulation difficult should be taken into account. Thus the danger of confusion arising out of orders placed over the telephone or in F writing should be taken into account. *Chowles and Webster (op cit* 86 para *(o)*); *John Craig* case *supra* at 152G - 153C. The first syllable of word marks is normally the most important part. There is a tendency for people to slur the termination of words. *Chowles and Webster (op cit* at 86 para *(o)*); Kerly *Law of Trade Marks and Trade Names* 10th ed paras 17 - 20 at 467 G and the cases there cited; *Cavalla* case *supra* at 470D - E. The notional use which must be postulated is notional use upon the goods for which registration has been obtained. Thus, although all matter extraneous to the two trade marks in use must be disregarded, the fact that both trade marks will be used in conjunction with the description of the goods must be H taken into account. A trade mark cannot be used *in vacuo.* Indeed, the very definition of trade marks contained in the Act is "a mark used or proposed to be used in relation to goods or services...". *S Wainstein & Co v Buffalo Salt Works* 1966 (2) SA at 285F - 286B; *Hudson & Knight's* case *supra* at 224F - G. This approach accords with the principle that all the I surrounding circumstances should be considered. *Pianotist* case *supra, loc cit*. The validity of the applicant's registration is not in issue and the only relevance of the fact that mica may be common to the trade is that the public may pay less attention to that part of the mark. It was incumbent upon the respondent to adduce evidence of the fact that mica is a word commonly used in the trade, but no such evidence was adduced. The fact that registration of

marks containing common parts has occurred carries no weight A unless there is evidence of actual use. *Chowles and Webster (op cit* at 86 para *(p)*); *Harrod Ltd's Application* (1935) 52 RPC at 70 line 39; *The County Chemical Co Ltd's Application* (1937) 54 RPC at 185.

L R Dison SC for the respondent: The use of the mark Mikacote by respondent was not used as a trade mark. The basic function of a trade mark is to identify and distinguish the goods of a B particular manufacturer and therefore to indicate the origin of the product. The use by respondent in no sense indicates the origin of the product but merely described it. It is a product name and not a brand name and is therefore not used as a trade mark. See 1970 *Patent Law Review* at 501 - 502. The brand name of respondent's product is Dekro. There is a C dispute on the papers on this very point. Accordingly it is incorrect that the only issue is whether the mark Mikacote so nearly resembles the mark Micatex as to be likely to deceive or cause confusion. Appellant is obliged to prove very much more than this, in regard to which additional proof it has made no submissions. Inasmuch as the matter falls to be decided on D the papers the Court is obliged, for present purposes, to accept the correctness of the facts deposed to on behalf of respondent together with the admitted facts in appellant's affidavits. *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA at 431A; *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA at 235; *Burnkloof Caterers (Pty)* E *Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA at 938. Appellant was required to satisfy the Court on the admitted or undisputed facts by the same balance of probabilities that is required in every civil suit of the facts necessary for the success of its application. *Nienaber v Stuckey* 1946 AD at 1054. This is particularly the case since appellant never sought oral evidence to resolve the disputed F issues, but submitted that they could be decided on the papers. On the other hand respondent submitted that appellant had not shown that *viva voce* evidence would not disturb any balance of probabilities that might exist in its favour and that accordingly respondent was not entitled to the final relief sought. *Sewmungal and Another NNO v Regent Cinema* 1977 G (1) SA at 820B - 821G; *Trust Bank van Afrika v Western Bank* 1978 (4) SA at 294. On the assumption that appellant's trade mark is valid, appellant is protected from an infringement action under s 46 *(b)* of the Act because its use of the name or mark "Mikacote" is a *bona fide* description of the character or quality of its product. A description relates to the character of a product if it has a meaning in connection with anything H that is associated with it or with any of the components of which it is made. In the *Leather Cloth* case the words "leather cloth" were held to be an advertisement of the "character or quality" of the product. *Leather Cloth v American Leather Cloth [* 1861 - 1873] All ERep at 1432 *per* Lord WESTBURY; *In re Linotype's Application* 14 RPC at 902. This defence succeeded in I relation to "Micatex" and "Mikacote" before the Court *a quo*. In Chowles and Webster *South African Law of Trade Marks* 2nd ed at 223 there is an attempt to limit the protection afforded by s 46 *(b)* of the Act to use other than as a trade mark, but this is a fanciful limitation. Cf *Baume & Co's* case *supra* at 123D - F. As to the rule

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A of interpretation that general words should not be limited unless generally so, see Steyn *Uitleg van Wette* 5th ed at 7 - 9; *Grant v Langston* 1900 AC at 397. There are further relevant considerations. One of these is that the protection is not available where the trade mark allegedly infringed is a fancy word, ie a word having no reference to the character or quality B of the goods. There is no protection against the mark "alligator"; *T B Stone Co Ltd v Steelace Mfg Co* 1927 (46) RPC at 417; similarly "Dan River" shirts: *Shalom Investments (Pty) Ltd v Dan River Mills Inc* 1971 (1) SA at 708. Indeed, the less distinctive the trade mark is, the more the room there might be for the use of the non-distinctive word as part of a name or C mark adopted by a rival trader. In trade mark law one of the recognised uses of a word that is in no sense adapted to distinguish it so as to point to its source of manufacture or resale is the use of a word that is an ingredient of the particular product. Callman *Unfair Competition, Trade-marks and Monopolies* para 70.1; *Demuth Trade Mark* case 65 RPC at 334; *Palmolive* case 49 RPC at 272 - 3; *American Jurisprudence* (2*d*) D "Trade Marks" para 51; *Pepsi-Cola Co Ltd v Coca-Cola Ltd* 1940 (1) DLR at 173; *Salton's Application* 40 RPC at 402. In *Hornsby Building Information Centre (Pty) Ltd v Sydney Building Information Centre (Pty) Ltd* (1978) 52 ALJR at 392 the High Court of Australia sounded a warning in relation to cases where E the descriptive material which the defendant had misappropriated was also applicable to other like businesses. This case was approved by the Privy Council in *Cadbury Schweppes (Pty) Ltd v Pub Squash Co*

(Pty) Ltd [1981] 1 All ER at 218. Under what circumstances is a trader entitled to make use of a descriptive name describing his product or any F ingredient thereof? Is it only when to do so is necessary for the purposes of his trade? *Callman* at 85 1 *(c) sv* "commercial necessity" points out that the American statute (similar to ours) does not refer to the "necessarily descriptive term" and therefore the trade mark is not restricted to words necessary to describe the product truthfully and he may resort to any ordinary common or usual descriptive term. Section 46 *(b)* of G the Act does not refer to any "*bona fide* necessary description" and therefore the competitor to the trade mark owner is not restricted to words necessary to describe his product truthfully, and he may resort to any ordinary, common or usual descriptive term. The real question is not whether it is necessary for the purposes of the trade that he use the name but whether the trader is entitled to use the ingredient "mica" H in its paint and to make use of the name of that ingredient in the name of the particular paint. The only question here was whether appellant was entitled to describe its paint by one of the constituents it had put into the paint, ie mica. Appellant had extensively advertised the quality and virtues of mica in I paint and this in all probability aroused a desire on the part of the public to buy paint with mica in it. Respondent as a manufacturer of paint was entitled to make paint with mica in it and the sole question is whether it is entitled to call attention to that constituent in the name of the product. The respondent is entitled to do so. See *Burland v Broxburn Oil Co* (1889) 42 RPC at 280 and also the *Demuth Trade Mark* case *supra* at 344; *Clark Equipment Co*

v *Registrar of Trade Marks* [1964] 111 CLR at 514; *Burland's* A *case supra.* The trade mark of appellant is a non-distinctive word that is not adapted to distinguish appellant's goods from those of another manufacturer. *Distillers Corporation (SA) Ltd v SA Breweries Ltd (supra* at 552). No-one can claim a monopoly in the word/prefix "mica". *Accutron Trade Mark* 1966 RPC at 155 and 157 - 8; *Waide's Application* (1916) 33 RPC at 320. In B England the word "mica", being the name of a well-known mineral substance or component, could not feature in a trade mark at all. Halsbury's *Laws of England* 3rd ed vol 38 paras 905, 955; Kerly's *Law of Trade Marks and Trade Names* 10th ed at 10 - 44; *Callmann (supra* at 70.1 *sub nomine* "The Rule of Law"); *Restatement of Torts* at 721 *sv* "Genetic and Descriptive C Designations". At the very least a disclaimer was required giving the public the right to use the word "mica" as a *bona fide* description of a constituent of any product containing mica. See s 18 of the Act (*Chowles and Webster* at 386). The disclaimer should have disclaimed any right to the exclusive use of the word "mica" apart from the mark. On this ground alone respondent was entitled to succeed in all Courts. D Alternatively, even if the trade mark "Micatex" was validly registered, appellant cannot be in a worse position than if a disclaimer has been added, which was necessary. If there had been such disclaimer, appellant's use of the name or mark would not have constituted an infringement. The notional use test in order to judge the likelihood of confusion or deception is E fallacious. The primary Court applied the notional use comparison and it did so upon a notional use of texture coatings. But the notional use is entirely irrelevant and all that the Court is concerned with is a comparison of the marks visually and phonetically. *Greenblatt v Hirschson* 1958 (4) SA at 375; *Carling National Breweries Inc v National Brewing Co (Pty) Ltd* 1979 (2) SA at 166. The notional use concept F expressed in *Chowles and Webster (supra* at 200) was followed in *adidas Sports-schuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA at 535G - H and also in *Organon Laboratories Ltd v Roche Products (Pty) Ltd* 1976 (1) SA at 197A (in this case it was common cause between the parties that the G notional use concept applied). It has since been held that in comparing the marks, use of the marks in conjunction with a generic description of the goods must be postulated. *Hudson & Knight (Pty) Ltd v DH Brothers Industries (Pty) Ltd* 1979 (4) SA at 226D - E. The result of this approach is that a comparison is made, not between the registered mark and the offending mark, but between the registered mark in conjunction with the H generic description of the goods and the offending mark in conjunction with the generic description of the goods. Thus not a comparison of "Crispa" and "Crisp-n-fri", but a comparison of "Crispa Frying Oil" and "Crisp-n-fri Oil". In the instant case not a comparison of "Micatex" and "Mikacote", but "Micatex I Texture Coating" and "Mikacote Texture Coating". Clearly

the result of such an approach is to render insignificant the difference between the actual contending marks. This approach, ie to postulate use in conjunction with a generic description of the goods - *Hudson & Knight's* case *supra* at 226D - E - is completely in conflict with what is contemplated by s 44 (1) *(a)* of the Act. Such an approach

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A does not merely make inroads into the rule that the whole mark and only the mark is to be compared (see at 226E of *Hudson & Knight's* case), it is the complete negation of the rule. Since this approach has developed as a result of the application of the concept of notional user in infringement proceedings, it is essential to consider whether such application is correct. The application of notional user in B infringement proceedings has occurred as a result of the statement in *Chowles and Webster (supra* at 200) followed in the *adidas* case *supra*. The statement in *Chowles and Webster* is drawn from the case of *Lever Bros Port Sunlight Ltd v Sunniwhite Products Ltd* (1949) 66 RPC at 89 (the *Sunniwhite* case); *Chowles and Webster* at 200 footnote 5. The *Sunniwhite* C case adopted the notional use approach in *Hack's* case (1958) RPC 91. But *Hack's* case was not an infringement case but a registration case. There is a substantial difference between a registration case and an infringement case and it is unsafe to adopt for infringement cases a notional user that may be appropriate for registration cases, but is not apposite for D infringement cases. In infringement proceedings in terms of s 44 (1) *(a)* of the Act, the issue is whether the defendant has in fact used a mark so nearly resembling the registered mark of the plaintiff as to be likely to deceive or cause confusion. Regard must therefore be had to what the defendant has actually done and not to "notional" or hypothetical situations. E Coca-Cola Co v William Struthers & Sons Ltd (1968) RPC at 242 (lines 35 - 36); *Greenblatt v Hirschson (supra* at 374E - F). That the comparison in infringement proceedings must be confined to the registered mark and the allegedly offending mark only, has been repeatedly stated and applied by the South African Courts. *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd (supra* at 240D - E); *adidas* case *supra* at F 535H - 536H; *John Craig (Pty) Ltd v Dupa Clothing Industries* 1977 (3) SA at 149C - H; *Juvena Produits de Beauté SA v BLF Import & Export* 1980 (3) SA at 217H and 219D - 220G. This comparison is not the same as in registration proceedings. In registration proceedings what has to be considered is not what the applicant has done or intends doing but what he will be G permitted to do if registration is granted. In terms of ss 16 (1) and 17 (1) of the Act it has to be determined whether any use which the applicant could fairly and honestly make of the mark would be likely to lead to confusion. *Jellinek's Application* (1946) 63 RPC at 78 (lines 18 - 34); *Bristol Laboratories Inc v Ciba Ltd* 1960 (1) SA at 871C - E and 874F - G. Therefore the concept of notional use is relevant in H registration proceedings. *Chowles and Webster (supra* at 98). To introduce the concept of notional user in infringement proceedings is to confuse the tests for comparison for purposes of registration with the tests for comparison for purposes of infringement. Accordingly, the only comparison that should be I made in the instant case is between the trade mark "Micatex" and the name or mark "Mikacote". The following legal principles are applicable to applicant's case in respect of the alleged infringement: The *onus* is on applicant to show a probability - as opposed to a possibility - of deception or confusion. *Greenblatt v Hirschson (supra* at 376F - H). "Deception" means causing someone to believe something which is false. "Confusion" means bewilderment,

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doubt or uncertainty. *John Craig* case *supra* at 150H. Confusion A or deception will be held to exist where there is a probability that a substantial number of people who buy or are interested in the products concerned will be confused as to whether respondent's product is the product of applicant or as to the existence or non-existence of a material connection between respondent's product and applicant as a manufacturer of B this type of product. *Oudemeester Groep Bpk and Another v SA Breweries Ltd* 1973 (4) SA at 160G; *John Craig* case *supra* at 150H; *adidas* case *supra* at 533D; *Hudson & Knight (Pty) Ltd v DH Brothers Industries (Pty) Ltd (supra* at

224B); the *Juvena* case *supra* at 217 *in fine-218A. The two marks are to be considered in relation to their sense, sound and appearance, and a* C *reasonable likelihood of deception or confusion in any one of these respects will suffice to discharge the onus* which applicant bears. *Hudson & Knight's* case *supra* at 224H; the *Juvena* case *supra* at 218B; the *Pianotist* case *supra* at 77. The section protects the registered trade mark and not the product or its get-up. The infringement, similarly, is an infringement of applicant's rights in its registered trade mark. The D comparison which the Court must make in order to decide whether or not there has been an infringement is accordingly a comparison between the marks themselves and not the get-up or the goods in question or anything else: *adidas* case *supra* at 531H - 532A and 535H; *Hudson & Knight* case *supra* at 224D; E Juvena case *supra* at 217H. The test is whether confusion is likely in the minds of ordinary purchasers with a normally imperfect recollection of the precise mark. The ordinary purchaser in this context does not mean either the very careful or the very careless and ignorant person, but someone between the two. *Pasquali Cigarette Co Ltd v Disconicoalas & Capsopolus* 1905 TS at 475; *American Chewing Products Corp v American* F *Chicle Co* 1948 (2) SA at 744; *John Craig* case *supra* at 153E; *Laboratoire Lachartre SA v Armour Dial Inc* 1976 (2) SA at 746B; *Zenith Clothing Industries (Pty) Ltd v Carducci Clothing Corp (Pty) Ltd* 1981 (2) SA at 66 *in fine* - 67A. The test is whether it is likely that a person, who has seen or knows one of the marks, will, by reason of the general impression made upon his G mind, think, when he sees the other, that they are or may be the same. *John Craig* case *supra* at 536F; *Zenith Clothing* case *supra* at 67B. The marks must be considered as wholes and one must look for the main idea or the general impression conveyed to the mind by each of the marks and at the essential features, rather than the exact details, of each: *adidas* case *supra* at H 536B; *Organon Laboratories v Roche Products (supra* 202G). For infringement to be proved applicant has to establish that there is a likelihood that a substantial number of people who buy or who are interested in the product will be confused or deceived. *Oudemeester* case *supra* at 160H; *John Craig* case *supra* at 150H. I The word "mica" is in common use in trade as denoting the fact that the commodity contains the substance "mica", which is wellknown in trade or industrial circles. Indeed, applicant's own registration provides that the trade mark can only be used where the product contains mica. The well-known principle enunciated by DE WET J in *Aktiebolaget Hjorth & Co v Aktiebolaget Optimus* 1932 TPD at 185

A was quoted with approval by the Full Bench in the *Oudemeester* case - on appeal from the *Oudemeester* case *supra* - see the *Patent Journal* March 1977 at 161. While it is true that each case must be judged on its own facts, it is interesting to note, by way of example, that in the following cases the Courts have held that there was no reasonable probability of confusion B or deception: *Corn Products Refining Co v African Products Manufacturing Co* 1922 WLD 163 ("Maizena" and "Maizeko"); *Automotive Products Co Ltd's Application* (1953) 70 RPC at 224 ("Micronic" and "Microvee"); *Helena Rubinstein Ltd's Application* (1960) RPC at 229 ("Skin Dew" and "Skin Deep"); *"Galvalloy" Trade Mark* (1963) RPC at 34 ("Galvafroid" and C "Galvalloy"); *Geigy AG v Chelsea Drug & Chemical Co Ltd* (1966) RPC at 64 ("Butazolidin" and "Butazone"); *Laboratoire* case *supra ("* Dial" and "Diatril"); *Fine Foods of Canada Ltd v Metcalfe Foods Ltd* - referred to in Fox *Canadian Law of Trade Marks and Unfair Competition* 3rd ed at 385 - 6 ("Garden Pride" and "Garden Patch"; and "Garden Pride" and "Summer D Pride"). It is submitted that the "Micronic" case is almost on all fours with the present one. In addition "mica" is a descriptive word and, as pointed out in the *Hornsby Building* case *supra* at 396, the more descriptive the word is that is used in the trade mark, the more difficult is the proof of the likelihood of confusion and deception. The claimant has only E itself to blame for this since he need not have chosen a descriptive word for inclusion in the trade mark. *Imperial Tobacco Co's Trade Mark [* 1918] 2 Ch at 212. As to the sense of the two marks, it is submitted that while "Micatex" has no meaning, "Mikacote" has one, viz "coat of mica". As to the sound of the two marks, it is submitted that the possibility of the two words being confused phonetically is extremely remote. F Automotive Products Co Ltd's case *supra* at 229. This was the conclusion of the Court *a quo* as well as that of the Full Bench of the Orange Free State in *Decro Paint v Plascon-Evans Paints (Pty) Ltd* 1982 (4) SA at 215 - 216A, 217C,

219D. As to the appearance of the two marks, it should first be pointed out that the first half of the two marks is spelt differently, as G appears from the names "Micatex" and "Mikacote". There would probably be no confusion in the mind of the probable purchaser of the products concerned from the point of view of appearance. When the two marks are considered as wholes, there is no reasonable likelihood of deception or confusion in any one of the aspects of the sense, sound and appearance of such marks H and respondent therefore failed to discharge the *onus* which it bore. See *Parkdale Custom Built-In Furniture (Pty) Ltd v Puxu (Pty) Ltd* 56 *ALJR* 715. It is important to note that the confusion postulated in s 44 of the Act is a confusion in the trade mark sense, ie it must relate to the origin of the goods. This is underlined in *Coca-Cola Co of Canada v Pepsi Cola of* I *Canada [* 1942] 1 All ER at 618 (PC). Confusion of this nature was in the circumstances out of the question in the present case. In all probability persons who purchased either of the rival products never as much as considered that they were produced by the identical manufacturer, but thought that there was some similarity in the composition of the paint. It is significant that appellant never called any evidence of confusion. Although such evidence is not essential if there is in any

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event a likelihood of confusion, where that likelihood has not A been proved to be probable or is evenly balanced, the presence or absence of confusion may well tip the scales. In this case its absence has tipped the scales in respondent's favour. Similarly no evidence was led to prove special circumstances in which appellant's mark will come to the notice of consumers which will render confusion more probable. *Decro Paint* case B supra 218B. A point of importance is that there is no evidence that persons wishing to buy this paint asked for "Micatex" or "Mikacote texture coating". They probably only associated the mark with paint. The probability of confusion could therefore not be predicted on the evidence.

Schreiner SC in reply.

C *Cur adv vult*.

Postea (May 21).

Judgment

D CORBETT JA: Appellant, a company dealing in paints and allied products, is the proprietor of a trade mark registered in terms of the Trade Marks Act 62 of 1963 ("the Act"). The trade mark in question consists of the word "Micatex". It was registered on 13 September 1971 in respect of the following goods falling within class 2 of the fourth schedule of the Trade Marks E Regulations 1963 (the regulations current at the time of registration):

"Paints, varnishes (other than insulating varnish), enamels (in the nature of paint), distempers, lacquers, preservatives against rust and against deterioration of wood and anti-corrosives, all containing mica."

Respondent is a company also carrying on business as a dealer in paints and allied substances.

F Early in 1980 appellant instituted motion proceedings against respondent in the Cape Provincial Division, alleging that respondent was using a mark which infringed appellant's registered trade mark and also was wrongfully passing off its goods as being those of the appellant; and claiming interdicts against infringement and against passing off and consequential G relief. The application was opposed by respondent, which also applied for the striking out of certain passages in a replying affidavit filed by appellant. The matter came in the first instance before VAN HEERDEN J. At the hearing appellant did not proceed with the cause of action based upon an alleged passing off. Further, it was agreed between the parties that certain H material in the replying affidavit should be struck out. The Court, having heard argument, granted an interdict restraining respondent from infringing appellant's trade mark, made an order for the delivery up for destruction of all goods etc bearing the offending mark and awarded appellant costs of suit (including the costs of two counsel), save for the costs I occasioned by the application to strike out, which costs were awarded to respondent.

Respondent appealed to the Full Bench of the Cape Provincial Division against the whole of this judgment and order, save for the portion relating to the costs of the application to strike out. Respondent also

CORBETT JA

A filed an application to place certain additional evidence on affidavit before the Court, tendering at the same time to pay the wasted costs arising from the application. The Full Bench (VAN DEN HEEVER J, BAKER J and SCHOCK J concurring) allowed the appeal with costs, save for the costs of the application to adduce additional evidence on affidavit, but failed, presumably B through oversight, to substitute any order for that of the Court of first instance. It would seem, however, from the tenor of the judgment of the Full Bench that it intended to substitute an order dismissing the application with costs. Appellant applied to the Full Bench for leave to appeal to this Court. The application was opposed by respondent. The Full C Bench granted leave and ordered respondent to pay the costs occasioned by its opposition.

Before I consider the issues and arguments raised on appeal, it is necessary that I should recount the salient facts, as they appear from the affidavits. In this connection I should mention two points. Firstly, at the commencement of the hearing before us appellant's counsel informed the Court that he did not D intend to argue the alleged passing off. I think counsel acted wisely for, in my opinion, appellant did not establish on the papers a cause of action for passing off. It is thus not necessary, in detailing the facts, to refer to the evidence relating solely to passing off.

Secondly, the affidavits reveal certain disputes of fact. The E appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:

> "... where there is a dispute as to the facts a final F interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point)* G *(Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the H general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts I alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858

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(A) at 882D - H). If in such a case the respondent has not A availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) *(g)* of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon B which it determines

whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent C are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A).

From the papers in this case it appears that as a result of various transactions, the details of which are not relevant, appellant acquired from other companies, whose assets now vest D in appellant, the rights to various trading styles, including "the Plascon Parthenon Paint Company", the "Crown Asbestos Paint Company" and "Crown Cebestos" and also the registered trade mark "Micatex". The latter was legally assigned to appellant on 3 January 1979 with effect from 15 November 1978.

E Some use had been made of the Micatex trade mark by appellant's predecessors in title, but it was only after appellant became entitled thereto (evidently some time before the formal assignment to appellant) that the trade mark was exploited on a large scale. Appellant used it with reference to a texture coating sold by it. The term "texture coating" F denotes to the trade and to the purchasing public a thick paintlike coating or paint primarily applied to the exterior surfaces of buildings. Because of its thick texture it produces a thick covering which hides surface imperfections, such as those encountered in prefabricated concrete slabs and off-shutter concrete, and fine cracks in imperfect plaster G finishes. It furthermore produces an extremely durable finish, which is not easily damaged or destroyed.

The desirable qualities of texture coatings have rendered them extremely popular in this country and they are produced by numerous paint manufacturers. All these manufacturers described their products as "texture coatings", "textured coatings", H "texture paints" or by minor variations of these terms. The term "texture coating" is also in general use in the building trade and contract specifications often stipulate for texture coatings of various kinds.

The texture coating sold by appellant under its Micatex trade mark contains the silicate known as mica. The mica ingredient in the texture coating constitutes approximately 9 per cent by I weight of the texture coating as a whole. It is what is termed a "filler". The other ingredients of appellant's texture coating are pigment and other fillers (not including mica) plus-minus 34 per cent; emulsion (resin) 19 per cent; and water 38 per cent. The use of mica as an ingredient is confined to speciality paints, such as texture finishes, to which it imparts additional

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A strength and resistance to checking and cracking. Another filler substance which Micatex contains is marble.

From the middle of 1978 appellant mounted a concentrated and costly promotional campaign, through the media of the press, the radio and television, in order to publicise its product Micatex and increase the sales thereof. In the course of this B campaign Micatex was portrayed as a particularly effective "textured exterior coating" or "exterior coating". Appellant also produced and distributed sales pamphlets and brochures. The total cost of the campaign over the period August 1978 to July 1979 exceeded R300 000. Sales figures over the period January 1978 to July 1979 for the Reef area, Natal and the Cape Province show that as from July/August 1978, when the campaign C commenced, there was a dramatic and sustained increase in the monthly sales of appellant's Micatex. This is demonstrated by the following figures, which are not seriously disputed:

Period	*Total sales (in litres) of Micatex*
January to July 1978	63 594

(7 months)	
D August 1978 to January 1979	603 863
(6 months)	
February to July 1979	835 170
(6 months)	

In about October 1978 it came to appellant's notice that E respondent was selling and offering for sale in the Cape Province a texture coating under the mark "Mikadek". Appellant immediately objected to the use of this mark as being, *inter alia*, an infringement of its trade mark Micatex. Without making any concessions respondent agreed to desist from further use of the mark Mikadek. Respondent thereafter filed applications for F registration in its name of the marks "Mikadecro" and "Mikacote" in respect of paints and similar products. The word "Dekro" is respondent's "housemark" and apparently this in part inspired the conception of the marks Mikadek and Mikadekro.

In about April 1979 appellant became aware of the fact that respondent was selling and offering for sale in the Cape Province a texture coating under the mark Mikacote. The container in which the product was marketed also bore the housemark "Dekro". This use of the mark Mikacote was not authorized by the appellant and, according to appellant, was an infringement of its rights as the proprietor of the registered mark, Micatex. Appellant's attorneys thereafter wrote on its behalf to respondent objecting to this use by respondent of the mark Mikacote, demanding that it cease and making various other demands, which need not be detailed. This elicited a reply from respondent's attorneys denying infringement and refusing to accede to appellant's demands. Respondent continued to use the mark Mikacote in this way and was evidently still doing so at the time of the hearing before Van Heerden J. During the course of a related appeal in the matter of *Plascon-Evans Paints (Tvl) Ltd* v *Decro Paint and Hardware (Pty) Ltd*[*] , which was heard by us on the day following the hearing of the present matter and in which the same issues arose, we were informed by counsel that respondent had ceased to market its products

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under the Mikacote mark. Though this renders the real issues A between the parties moot, it unfortunately does not relieve us of the task of deciding this appeal.

With regard to the use by respondent of the mark Mikacote, it is relevant to note that respondent's texture coating does contain mica, the breakdown of this product, shown as a percentage by weight, being the following: pigment and other B fillers (not including mica) 32,97 per cent; mica 8,72 per cent; emulsion (resin) 19,44 per cent; water 36,39 per cent; additives 2,48 per cent. Mikacote does not, however, contain marble, one of the ingredients of Micatex.

The goods in relation to which the marks Micatex and Mikacote were being used were offered for sale in hardware stores, C multiple stores, general dealer's stores and similar outlets. They were purchased, *inter alia*, by word of mouth, either over the counter or over the telephone, or by selection by appearance. The purchasers included not only persons skilled in the paint trade, but also persons having no specialized

knowledge and merely wanting to perform painting work D themselves or by means of unskilled employees. It is averred by respondent that such purchasers nevertheless "generally have a more than rudimentary knowledge of the products and the substances contained in them".

In order to substantiate its claim that respondent was passing off its product, Mikacote, as appellant's product, Micatex, E appellant adduced evidence of three "trap" approaches made to certain of respondent's retail outlets in the northern suburbs of Cape Town. Precisely what occurred on these three occasions is in dispute; but what does emanate clearly from the undisputed evidence in regard thereto is that the sales assistants at respondent's outlets sold and offered for sale F respondent's texture coating under the name Mikacote. Thus, for example, Mrs M Thacker, a saleslady employed by respondent at its shop in Goodwood, stated that -

> "... on number of occasions prospective customers have asked us whether we do stock Micatex, but we have always stated unequivocally that we do not, but that we in fact stock Mikacote, which is not the same product as Micatex, as the former does not contain marble, whereas the latter does".

G And, in another instance, Mr Cilliers, the manager of a retail store operated by respondent in Bellville, conceded that in an interview with Mr H E A Wesson, a director of one of appellant's subsidiaries, he (Cilliers) wrote on a Dekro data sheet relating to Mikacote the words "is presies dieselfde as Micatex". He explained that what he intended to convey was that H Mikacote fulfilled the same function as Micatex.

Prior to launching the notice of motion proceedings appellant caused a search to be made in the records of the Registrar of Trade Marks in regard to all trade marks containing the word "Mica". There were at the time five such marks. None of them I was registered in the same class as Micatex. Moreover, there was no other trade mark registered in class 2 of the fourth schedule, other than Micatex, which incorporated the word "Mica" or "Mika". In fact there is no evidence of any use in South Africa in respect of paint or allied products of any trade mark containing the word "Mica", save for the use by appellant

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A of the trade mark "Micatex" and the use by respondent of the marks "Mikadek" and "Mikacote".

On appeal to us the argument revolved mainly around three basic issues. These were:

(1) Whether the use by respondent of the mark Mikacote was use as a trade mark.

B (2) Whether the use by respondent of the mark Mikacote infringed appellant's rights as the registered proprietor of the trade mark Micatex.

(3) Whether the use by respondent of the mark Mikacote was protected by the provisions of s 46 *(b)* of the Act.

C In addition, respondent's counsel emphasized the disputes of fact raised by the affidavits and pointed out that appellant never sought to resolve these issues by means of oral evidence. I have already dealt with this aspect of the matter. The existence of disputes of fact does not, as I have indicated, D necessarily preclude a final interdict being granted. The main consequence is simply that, in terms of the abovementioned general rule, where the affidavits in this case raise real and *bona fide* disputes of fact, the appellant is bound to accept the respondent's version of the facts.

I proceed now to consider the three basic issues.

E *Use as a trade mark*.

It is provided by s 44 (1) *(a)* that subject to certain provisions of the Act, which are not immediately relevant, the rights acquired by registration of a trade mark shall be infringed by -

> "*(a)* unauthorized *use as a trade mark* in relation to goods or services in respect of which the trade mark is F registered, of a mark so nearly resembling it as to be likely to deceive or cause confusion."

(My italics.)

In the Court of first instance counsel then appearing on behalf of respondent (different counsel represented respondent before us) conceded that respondent had been unauthorizedly using the mark Mikacote as a trade mark in relation to goods in respect G of which appellant's trade mark was registered. In this Court, however, respondent's counsel partly withdrew this concession and submitted that the use of the mark Mikacote by respondent, although unauthorized and in relation to goods in respect of which appellant's trade mark was registered, did not amount to H use as a trade mark; Mikacote was a product name, not a brand name and was, therefore, not used as a trade mark.

Even if respondent's counsel were correct in this submission, I am not sure, in view of the provisions of s 44 (1) *(b)* - which deals with the unauthorized use of a mark otherwise than as a trade mark - that a finding that Mikacote was not used I as a mark would really assist respondent's case. Be that as it may, I do not think that the submission is sound.

In s 2 of the Act the following definition of "trade mark" is to be found:

> "'trade mark', other than a certification mark, means a mark used or proposed to be used in relation to goods or services for the purposes of -

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> *(a)* indicating a connection in the course of trade between the goods or services and some person having the right, either A as proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person; and
>
> *(b)* distinguishing the goods or services in relation to which the mark is used or proposed to be used, from the same kind of goods or services connected in the course of trade with any other person".

With this definition must be read the definition of "mark", B which includes -

> "a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof or a container for goods".

As the definition indicates, the purposes of a trade mark are to indicate a connection in the course of trade between the (in this case) goods, and some person having the right to use the C mark; and to distinguish the goods in relation to which the mark is used from the same kind of goods connected in the course of trade with any other person. The words "connection in the course of trade" convey a fairly wide concept and would clearly include the role of manufacturer of or dealer in the goods in question.

D Where one is considering the use or proposed use of a trade mark in relation to an application (in terms of s 20 of the Act) by the proprietor thereof for the registration of his mark or in relation to the rights of a registered proprietor, there is no difficulty in applying the statutory definition of "trade E mark", quoted above. Where, however, the question is whether an alleged infringer of the rights of the proprietor of a registered trade mark has unauthorizedly used a mark "as a trade mark" within the meaning of s 44 (1) *(a)*, then, as pointed out in Chowles and Webster *South African Law of Trade Marks* 2nd ed at 545, in certain situations problems arise in the application of the statutory definition. For example, where F A has knowingly used, in relation to goods sold by him, a mark which deceptively resembles the registered trade mark of B for the purpose of indicating a connection in the course of trade between the goods and, not himself, but B, the definition does not appear to apply, for B is not the proprietor of the mark used by A (see para *(a)* of the definition) and A has not used G his mark to distinguish his goods from the same kind of goods connected in the course of trade with other persons, but in order to create confusion as to the origin of the goods (see para *(b)* of the definition): yet in such a case there has clearly been an infringement of A's rights as proprietor of the registered mark. In Chowles and Webster *op cit* at 54 - 5 it is H suggested that in this type of case the statutory definition of "trade mark" may have to be "adapted" when used in relation to the phrase "use as a trade mark" in s 44 (1) *(a)*. Alternatively, the answer may be that in s 44 (1) *(a)* the words "trade mark" must be given not their statutory definition, but their ordinary meaning of a "badge of

origin" (see *Shalom* I *Investments (Pty) Ltd and Others v Dan River Mills Incorporated* 1971 (1) SA 689 (A) at 699 ff).

In the present case, however, it is not necessary to come to any decision on these matters for, as I understood the argument of respondent's counsel, it was that respondent's use of the mark Mikacote was not as a badge of origin at all or as in any way either indicating a connection

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A in the course of trade or distinguishing the goods to which the mark was applied. As counsel put it, Mikacote was a product name, not a brand name. The distinction between a "brand name" and a "product name" is not immediately apparent to me. Moreover, the evidence, to which I have already referred, shows that respondent's texture coating was normally sold under the B name Mikacote; that when customers came to respondent's retail outlets and asked for Micatex, they were told, so it is said by respondent's witnesses, that respondent did not stock Micatex, but that it did stock Mikacote; and so on. Moreover, at a certain stage, as already indicated, respondent made application in terms of the Act for the registration of the C word Mikacote as a trade mark. Generally, I am satisfied that respondent's use of the word Mikacote in relation to its goods was "use as a trade mark". This issue must accordingly be resolved in favour of the appellant.

Infringement.

I have already referred to the provisions of s 44 (1) *(a)*, which defines the infringement committed by the use of a mark D as a trade mark. As has been indicated, it is not disputed that respondent unauthorizedly used the mark Mikacote in relation to goods in respect of which appellant's trade mark is registered; and I have held that respondent used Mikacote "as a trade mark". The only remaining issue in regard to infringement E is whether the mark used by respondent so nearly resembled appellant's registered trade mark "as to be likely to deceive or cause confusion".

The meaning of these words and the general principles governing their application to the facts of a particular case have frequently been canvassed in our Courts. In the recent case of *International Power Marketing (Pty) Ltd v Searles Industrials* F *(Pty) Ltd* 1983 (4) SA 163 (T) MARGO J, delivering the judgment of the Transvaal Provincial Division, gave a full review of the legal principles applicable to such an issue and cited most, if not all, of the relevant cases. It is not necessary to repeat these citations of authority. The main legal principles relevant to the decision of the instant case may be briefly G summarized as follows.

In an infringement action the *onus* is on the plaintiff to show the probability or likelihood of deception or confusion. It is not incumbent upon the plaintiff to show that every person interested or concerned (usually as customer) in the class of H goods for which his trade mark has been registered would probably be deceived or confused. It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant's mark is used are the I goods of the proprietor of the registered mark, ie the plaintiff, or that there is a material connection between the defendant's goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection.

The determination of these questions involves essentially a com-

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parison between the mark used by the defendant and the A registered mark and, having regard to the similarities and differences in the two marks, an assessment of the impact which the defendant's mark would make upon the average type of

customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper B eyesight and buying with ordinary caution. The comparison must be made with reference to the sense, sound and appearance of the marks. The marks must be viewed as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks must not only be considered side by side, but also separately. It must be borne C in mind that the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this. If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. As it has been put, marks are remembered D rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole. And finally consideration must be given to the manner in which the marks are likely to be employed as, for example, the use of name marks in conjunction with a generic description of the goods.

In certain of the decided cases it has been held that the Court E should include in its comparison what has been termed the "notional use" of the registered mark and of the alleged infringing mark (see eg *adidas Sportschuhfabriken Adi Dassler KG v Harry Walt & Co (Pty) Ltd* 1976 (1) SA 530 (T) at 534A - 535H; *Hudson & Knight (Pty) Ltd v DH Brothers Industries (Pty) Ltd t/a Willowtown Oil and Cake Mills and Another* 1979 (4) SA 221 (N) F at 224F; *Juvena Produits de Beauté SA v BLP Import and Export* 1980 (3) SA 210 (T) at 218B - G; and see *Chowles and Webster (op cit* at 200 - 201)). As explained by *Chowles and Webster* (at the pages cited) this means that in making the necessary comparison the Court is not confined to the manner in which the parties have actually used their respective marks: it G may have regard to how they can use the marks in a fair and normal manner. Respondent's counsel contended that while the notional user test might be appropriate in cases of the opposed registration of a mark, it was not correct to apply it in an infringement case. I can well see that in considering the question of infringement the Court should have regard not only to the plaintiff's actual use of his registered mark, but also H to notional use, that is to all possible fair and normal applications of the mark within the ambit of the monopoly created by the terms of the registration (cf the remarks of BOTHA J in the *adidas* case, *supra* at 535B - D). I have some difficulty, however, in applying the notional user approach to I the use by the defendant of his mark, especially as regards the type of goods to which the mark is applied. If the actual proven user by the defendant falls outside the ambit of the plaintiff's monopoly, then I fail to see how it can be said to infringe merely on the ground that a notional fair and normal user of his mark - which had not in fact occurred - would trespass upon the plaintiff's mono-

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A poly. To take a pertinent example: suppose respondent in this case had used a mark which was deceptively similar to plaintiff's mark in relation to an insulating varnish (an item specifically excluded from the goods in respect of which appellant's mark was registered). I doubt whether the suggestion that the respondent's mark might also fairly and normally be used in relation to other varnishes would establish B infringement on respondent's part. It is not necessary, however, to express a final opinion on these points for the mark actually used by respondent in this case was applied to the same class of goods as the registered mark and, in my opinion, the issue of deceptive or confusing resemblance can be C decided on the basis of the actual user by both parties.

I come now to compare the marks in this case, Micatex and Mikacote. Viewed side by side the marks exhibit similarities and differences. They are both trisyllabic; they both have as their first two syllables the word "mica". (Though in respondent's case this is spelt "mika", phonetically the words D are identical.) On the other hand, the only similarity between the suffix "cote" and the suffix "tex" is that they are both monosyllabic.

As I have emphasized, however, the comparison must not be confined to a viewing of the marks side by side. I must notionally transport myself to the market place (see the E remarks of COLMAN J in *Laboratoire Lachartre SA v Armour-Dial Incorporated* 1976 (2) SA 744 (T) at 746D) and consider whether the average customer is likely to be deceived or confused. And here I must take into account relevant surrounding circumstances, such as the way in which the goods to which the marks are applied are marketed, the types of customer who would F be likely to purchase the goods, matters of common knowledge in the trade and the knowledge which such purchasers would have of the goods in question and the marks applied to them.

As I have already mentioned, the goods to which the Micatex and Mikacote marks were applied were offered for sale in hardware stores, multiple stores, general dealer's stores and similar G retail outlets. Potential purchasers included not only persons skilled in the paint trade, such as building and painting contractors, but also persons having no specialized knowledge and wanting merely to perform painting work themselves or by means of unskilled employees. I doubt very much whether the H former, ie persons skilled in the paint trade, would be deceived or confused by respondent's mark Mikacote, but the position of the latter, ie persons having no specialized knowledge, is by no means so clear.

In my opinion, the dominant impression or idea conveyed by each of the marks centres on the word "mica". "Mica" constitutes in each case the first two syllables of the mark. It is the I portion of the mark which makes the initial impact and on which stress is laid in pronunciation. It is a known word for a known substance. In the painting trade appellant's use of the word "mica" in its registered trade mark was unique among trade names, until respondent commenced using the mark Mikacote. The suffixes "tex" and "cote" make less of an impression, particularly as they appear to be derived from the term "texture

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coating" or, at any rate, would be understood by a substantial A number of interested customers as being so derived. As the evidence shows, the terms texture coating is one generally used in the trade to denote the products to which the marks Micatex and Mikacote were applied. Consequently, a potential customer, with no specialized knowledge in this field and an imperfect recollection of appellant's trade mark, would tend to recall it B as "Mica-something" or "a word starting with mica". At any rate, in my view, a substantial number of such customers would probably have this type of recollection. A person with such an imperfect recollection who went, say, to a hardware store to purchase appellant's product and encountered, or was offered, a tin of Mikacote could well, in my opinion, be deceived into C thinking that this was the product he was seeking; and it is likely that this could occur on a substantial scale. Moreover, I think that a substantial number of such persons, knowing that the product they were seeking was a "texture coating", would be likely to be confused between "Micatex", the D suffix being the first syllable of "texture", and "Mikacote", where the suffix is a phonetic transcription of the first syllable of "coating". At the very least, I consider that the resemblence between the marks is sufficient to cause a substantial number of such customers to be confused as to whether or not there was a material connection between E respondent's goods, bearing the mark Mikacote, and the proprietor of the Micatex mark.

The Court *a quo*, which decided the infringement issue adversely to appellant, appears to have based its decision mainly on a verbal comparison of the two marks and upon the conclusion (thereby differing from the Judge of first instance) that in practice the two marks would not be used in conjunction with F the generic description "texture coating". I am inclined to agree with this latter conclusion but, in my view, a purely verbal comparison is not enough. As I have said, in cases such as this the Court must transport itself to the market place and try to visualize how customers of the goods in relation to which the marks are used would react.

G The case is not an easy one. This is shown by the division of judicial opinion which has occurred in this case and in the parallel case in the Orange Free State Provincial Division (see *Decro Paint and Hardware (Pty) Ltd v Plascon-Evans Paints (Tvl) Ltd* 1982 (4) SA 213 (O)), the matter which came before us on appeal immediately after the present one. Having carefully H considered the matter, however, I am of the view, for the reasons stated, that appellant established an infringement of its registered trade mark Micatex by the use by respondent of its mark Mikacote.

Section 46 (b) of the Act.

Section 46 of the Act provides -

> I "No registration of a trade mark shall interfere with -
>
> *(a)* any *bona fide* use by a person of his own name or of the name of his place of business, or of the name of any of his predecessors in business, or of the name of any such predecessor's place of business; or
>
> *(b)* the use by any person of any *bona fide* description of the character or quality of his goods or services."

1984 (3) SA p644

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A It was submitted by respondent's counsel that respondent was protected from an infringement action by s 46 *(b)* of the Act because its use of the mark Mikacote was a *bona fide* description of the character or quality of its product.

Appellant's counsel, on the other hand, contended that s 46 *(b)* B does not afford protection where the person concerned has used so-called descriptive words (which *prima facie* infringe a registered trade mark) as a trade mark and he referred in this connection to what is said by *Chowles and Webster (op cit* at 223 - 4). While there may be something to be said for this viewpoint, I do not find it necessary to decide this issue and will assume in respondent's favour that the fact that it used C the word Mikacote as a trade mark does not prevent it from availing itself of the defence provided by s 46 *(b)*.

In *Shalom Investments (Pty) Ltd and Others v Dan River Mills Incorporated* 1971 (1) SA 689 (A) this Court had occasion to consider the meaning of s 46 *(b)*. OGILVIE THOMPSON JA, who D delivered the judgment of the Court, referred to with approval, and adopted as being equally applicable to the provisions of s 46 *(b)* of the Act, certain remarks of LAWRENCE LJ, made with reference to the identically-worded s 44 of the English Trade Mark Act of 1905 in the well-known case of *J B Stone & Co Ltd v Steelace Manufacturing Co Ltd* (1929) 46 RPC 406 at 417. The learned Lord Justice said:

> E "In my opinion the object of s 44 was to safeguard traders in cases where the registered trade mark consisted of more or less descriptive words forming part of the ordinary English language, without the use of which other traders would find some difficulty in describing certain qualities of their goods; but was never intended and does not operate to enable a trader to make use of a rival trader's registered trade mark F consisting of a fancy word having no reference to the character and quality of the goods in order more readily to sell his own goods."

In the *Shalom Investments* case *supra* the respondent was the proprietor of the mark "Dan River", registered in regard to, *inter alia*, cotton goods and articles of clothing. The respondent operated a large textile mill in the USA and the Dan G River mark was used in relation to its textile products. Without respondent's consent, appellant obtained material manufactured by respondent, made it up into ladies' dresses and marketed them, each with a label indicating that it was made from a Dan River fabric. Appellant was held by the trial Judge to have infringed respondent's mark. On appeal to this Court, in addition to attacking the infringement finding, appellant H sought to rely on s 46 *(b)*. After the quotation from the *J B Stone* case *supra*, OGILVIE THOMPSON JA went on to deal with the applicability of s 46 *(b)* at 708E - G:

> "In the present case, respondent's registered trade mark 'Dan River' does not fall within the category of 'more or less descriptive words': it consists of words of a geographical connotation having no reference to the character or quality of the dresses. I agree with Mr *Welsh's* submission that, had the I appellants indeed wished to describe the character or quality of their dresses, they might have said that they were manufactured out of cotton material imported from the United States; and, further,

that there was no necessity for appellants to use the registered trade mark 'Dan River' unless they intended to make use of the goodwill attaching to that particular mark. In my opinion the circumstances point irresistibly to the appellants having indeed had the intention to make use of the goodwill attaching to respondent's mark."

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A In *Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) the Court was concerned with an application, in terms of s 136 of the Designs, Trade Marks and Copyright Act 9 of 1916 (the corresponding provision in the Act is s 36), for a trade mark to be taken off the register on the ground that for a period of five years there had been no "*bona fide* user" thereof by the registered proprietor in respect of B certain goods. With reference to the meaning of the phrase "*bona fide* user", as used in s 136, TROLLIP J stated (at 24E) that it -

> "means a user by the proprietor of his registered trade mark in connection with the particular goods in respect of which it is registered with the object or intention primarily of protecting, facilitating, and furthering his trading in such goods, and not for some other, ulterior object".

C The decision of TROLLIP J was confirmed on appeal by this Court (see *Rembrandt Fabrikante en Handelaars (Edms) Bpk v Gulf Oil Corporation* 1963 (3) SA 341 (A)) and, in delivering the judgment of the Court, STEYN CJ endorsed the interpretation of TROLLIP J in the following words (at 351E):

> D "The question is whether the evidence shows that the user was not *bona fide* in the sense contemplated in s 136. I do not propose to attempt a comprehensive definition of what the expression 'no *bona fide* user' means in this section. Whatever the full meaning of the phrase may be, it seems clear that user for an ulterior purpose, unassociated with a genuine intention of pursuing the object for which the Act allows the registration of a trade mark and protects its use, cannot pass as a *bona fide* user."

E It seems to me that some assistance may be derived, by way of analogy, from this case in regard to the interpretation of s 46 *(b)* of the Act.

Having regard to the aforegoing and without attempting to give an exact or comprehensive definition of what constitutes a *bona fide* description for the purposes of s 46 *(b)*, it seems to me F that what the Legislature intended to safeguard by means of the provisions of the subsection is the use by a trader, in relation to his goods, of words, which are fairly descriptive of his goods, genuinely for the purpose of describing the character or quality of the goods: the use of the words must G not be a mere device to secure some ulterior object, as for example where the words are used in order to take advantage of the goodwill attaching to the registered trade mark of another.

In the case before us the evidence establishes that the word "mica" is not one generally used in the paint trade to describe paint products (cf *Coca-Cola Co of Canada Ltd v Pepsi-Cola of Canada Ltd* (1942) 59 RPC 127 at 133). Appellant's predecessor H in title hit upon the idea of using the word "mica" to create the composite word "Micatex" for use as a trade mark; and appellant used this mark for its texture coating. By dint of a vigorous marketing and advertising campaign and, no doubt, also because it was a good product, appellant established a substantial market for Micatex and consequently considerable I goodwill attached to the trade mark. Until respondent commenced using the marks Micadek and, later, Mikacote, no other paint manufacturer had used the word "mica", either by itself or in combination, as a trade mark for his goods.

It is true that mica is, by percentage of weight, a minor ingredient of

CORBETT JA

A both appellant's and respondent's products, and the products of other manufacturers as well. Had respondent genuinely wished by means of some description to draw the attention of the purchasing public to the fact that its product contained mica, there are several obvious ways in which it could have done so without in any way infringing appellant's trade mark. Yet B respondent chose to do so by

incorporating the word "mica" (spelt "mika") in a trade mark which bore a deceptive resemblance to appellant's trade mark.

Mikacote is not a word in ordinary use. It is a fancy name, and the way in which it was composed would not necessarily be apparent to an uninitiated person reading the word on the label C attached to the tin containing respondent's texture coating. There would be no reason for him to think that it was a word descriptive of the character or quality of the paint in the container. A person who genuinely wished to communicate to the reader that his paint contained mica and that it was a texture coating would not use the spelling "Mika" and "cote". D Clearly the respondent used the word as his trade name for the paint contained in the tin and not as a fair description of the character or quality of the paint. Moreover, all the circumstances emphasized above indicate the probability that the name was devised so as to resemble appellant's trade mark Micatex; and that respondent used the name not for purposes of E description, but with the ulterior object of deceiving or confusing and of making use of the goodwill attaching to the Micatex mark.

Accordingly, I am satisfied that respondent's use of its mark Mikacote did not constitute the use of a *bona fide* description of the character or quality of its goods, within the terms of s 46 *(b)* of the Act.

F During the course of his argument respondent's counsel argued strenuously that appellant could not claim a monopoly in the word or prefix "mica", a well-known mineral substance often used as an ingredient of paint; that appellant was not entitled to describe its product by means of a trade mark which included the word "mica", a nondistinctive word; and so on. He referred G in this connection to cases such as *Corn Products Refining Co v African Products Manufacturing Co* 1922 WLD 163 and *Aktiebolaget Hjorth and Co v Aktiebolaget Optimus* 1932 TPD 177. In so far as counsel's argument is aimed at the validity of the original registration of appellant's trade mark, it is off target because the trade mark has been registered in part A of H the register for more than seven years (see s 42 of the Act) and neither of the requisites posed by ss *(a)* or *(b)* of s 42 is present; and in so far as the argument is really directed at the defence provided by s 46 *(b)*, it has already been dealt with.

In the result, therefore, it is ordered as follows:

(1) The appeal is allowed with costs, including the costs I of two counsel.

(2) The order of the Court *a quo* is set aside and there is substituted therefor the following: "Appeal is dismissed with costs".

MILLER JA, NICHOLAS JA, GALGUT AJA and HOWARD AJA concurred.

1984 (3) SA p647

CORBETT JA

Appellant's Attorneys: *Spoor & Fisher*, Pretoria; *Israel &* A *Sackstein, Bloemfontein. Respondent's Attorneys: Scher Webner & Co*, Cape Town. *Lovius, Block, Meltz, Steyn & Yazbek*, Bloemfontein.

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* *Vide* below at 647 - Eds.

B

TORWOOD PROPERTIES (PTY) LTD v SOUTH AFRICAN RESERVE BANK 1996 (1) SA 215 (W)

Citation	1996 (1) SA 215 (W)
Case No	18513/89
Court	Witwatersrand Local Division
Judge	Zulman J,
Heard	May 17, 1994; May 18, 1994; May 19, 1994
Judgment	June 17, 1994
Counsel	M D Kuper SC (with him D N Unterhalter) for the applicant. J W Louw SC (with him J H Dreyer) for the respondent.
Annotations	Link to Case Annotations

H

Flynote : Sleutelwoorde

Exchange control - Order by Reserve Bank for attachment of applicant's immovable property under s 9(2)*(b)*(i) of Currency and Exchanges Act 9 of 1933 - When order lapsing by effluxion of time under s 9(2)*(g)* - Interpretation of 'prosecution' and 'any other law' in s 9(2)*(g)*(i) - Word I 'prosecution' to be restrictively interpreted - Applicability of s 2 of Interpretation Act 33 of 1957 - 'Any other law' in s 9(2)*(g)*(i) not including common law - In any event alleged prosecution not such as to fall within s 9(2)*(g)*(i) - Alternative application by respondent under s 9(2)*(g)*(ii) for determination of period of validity longer than 36 months J - Onus on Reserve Bank.

A to show 'good cause' - What is good cause - Prejudice to applicant relevant in considering whether respondent has established good cause - Respondent not discharging onus.

Headnote : Kopnota

The word 'prosecution' in s 9(2)*(g)*(i) of the Currency and Exchanges Act 9 of 1933 (the Act), which provides that an order of attachment of property B made under s 9(2)*(b)*(i) of the Act shall lapse at the end of a period of 12 months after a final judgment 'in every prosecution for any contravention of the regulations or any other law in relation to the money or goods concerned or in which such money or goods are relevant to any aspect of such prosecution', must be restrictively interpreted, since the attachment of a person's property represents a serious invasion of his rights. The decision to prosecute must be conveyed to the accused in a formal manner as also the fact that he is prosecuted on a charge defined C with some particularity. (At 224D/E-H, paraphrased.)

The words 'any other law' in s 9(2)*(g)*(i) of the Act do not include the common law by virtue of s 2 of the Interpretation Act 33 of 1957, since it is clear that 'law' does not include the common law in the absence of an intention to the contrary. The essential enquiry is whether the context of s 9(2)*(g)*(i) 'otherwise requires', to use the opening words of s 2 of the Interpretation Act, and, if anything, the context requires an D interpretation which would exclude the common law since that subsection, by the very nature of its purpose, requires a restrictive rather than a wide meaning. (At 226A/B-F.)

Where the Court is asked, under s 9(2)*(g)*(ii) of the Act, to determine a period of time longer than 36 months for the validity of an attachment order, the *onus* is on the Treasury to show 'good cause' for the indulgence it seeks. The mere mistaken belief that a party may have as to the legal position in which he finds himself does not excuse a failure to take steps E to protect his position in the event of his view being proved to be wrong. To regard a mere belief in the correctness of one's case as being good cause for a failure to take steps to protect oneself against the eventuality that that view might be held to be wrong is not tenable. A matter of considerable importance in considering the question of 'good cause' is prejudice to the other party and there is substance in the contention that the *onus* rests on the Treasury to show that the other party would not be prejudiced. (At 230H/I-231B/C.)

F The respondent had on 9 May 1989 attached the immovable property of the applicant under s 9(2)*(b)*(i) of the Currency and Exchanges Act. In terms of s 9(2)*(g)* of the Act that order of attachment would have lapsed 36 months later, namely at midnight on 8 May 1992, unless *(a)* there was a prosecution for any contravention of the regulations or any other law in relation to that property or in which the property was relevant to any aspect of the prosecution, in which case the order would lapse only 12 months after the final judgment in such prosecution; or *(b)* a longer G period than 36 months was determined by the Court. In response to an application in a Local Division for an order declaring that the attachment order had lapsed at midnight on 8 May 1992, the respondent contended that there had been a prosecution within the meaning of s 9(2)*(g)*(i) which had not reached finality and accordingly that the attachment order had not lapsed. The respondent relied on three events as constituting a prosecution: (i) the laying of a complaint with the Commercial Crime Unit H of the South African Police; (ii) the issue of a warrant of arrest of one H in connection with the alleged fraudulent manipulation of the financial rand system, the respondent alleging that the applicant was 'an example of a corporate entity which was formed to benefit H and his family and that all the assets of applicant were to be treated as if they were the assets of H; and (iii) an indictment, *The State v Hill*, alleging the common-law offences of forgery, uttering and fraud, being lodged with the Registrar of the Supreme Court. It appeared from the papers that the attorney I acting for H had asked the Attorney-General for a copy of the warrant of arrest but that the latter had refused the request and that the indictment had never been served on H or his attorney or the other two people mentioned in the indictment. In the alternative, the respondent applied for the determination by the Court of a period longer than 36 months under s 9(2)*(g)*(ii). The apparent reason for the respondent's delay in making an application under this subsection was the mistaken belief of its senior officials that there was a 'prosecution' within the meaning of s 9(2)*(g)*(i) and that therefore no application under subpara (ii) was J necessary.

ZULMAN J

A *Held*, that in order that there might be a prosecution within the meaning of s 9(2)*(g)*(ii) the decision on the part of the prosecutor had to be conveyed to the accused and the fact that he was prosecuted on a charge defined with some particularity; that none of the three events relied on by the respondent constituted a prosecution; and that, accordingly, no prosecution had taken place within the 36-month period. (At 224D/E-H and 225F-G.)

Held, further, that, assuming that there had been a prosecution, it was B not one which was relevant to s 9(2)*(g)*(i) in that *(a)* the indictment alleged only common-law offences and these were not included under the words 'other law' in the section by s 2 of the Interpretation Act inasmuch as the section had to be restrictively construed and the context did not require those words to be given the wider construction which would include the common law (at (2)); and *(b)* the fact that money which might have been 'tainted', in the sense of its having been acquired by H or by others from illegal dealings and might thereafter have been used directly by H or through a company controlled by H to effect payment of a liability on a C bond due by the applicant to a third party, did not make the applicant's immovable property 'goods' which were 'concerned' with or relevant to any aspect of a prosecution for a contravention of the

Exchange Control Regulations or other statutes relating to money or goods. (At 226H-227B.)
Held, further, that the respondent, who was seeking an indulgence, had the *onus* of showing good cause for the determination of a period longer than D 36 months and that it had failed to do so, in that its mistaken belief as to its legal position, and its failure to take steps to protect itself against the eventuality that its belief might be proved to be wrong, did not amount to 'good cause'; further, that prejudice to the other party was important in considering 'good cause' and the applicant was plainly affected adversely by having its property under attachment. (At 230H/I-231B/C.)
Declaratory order granted and counter-application refused.
E The following decided cases were cited in the judgment of the Court:
Hleka v Johannesburg City Council 1949 (1) SA 842 (A)
Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A)
Madnitsky v Rosenberg 1949 (1) PH J5 (W)
Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A)
Minister of Law and Order v Kader 1991 (1) SA 41 (A)
F *R v Detody* 1926 AD 198
R v Friedman 1948 (2) SA 1034 (C)
R v Priest 1931 AD 492
R v Venter 1907 TS 910
Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A)
Smith v Desai 1903 NLR 329
G *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337
United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A).

Case Information

Application for the review and setting aside of an attachment order made under s 9(2)*(g)* of the Currency and Exchanges Act 9 of 1933 and a counter-application for the extension of the duration of such attachment H order. The facts appear from the reasons for judgment.

M D Kuper SC (with him *D N Unterhalter*) for the applicant.

J W Louw SC (with him *J H Dreyer*) for the respondent.

Cur adv vult.

I *Postea* (17 June 1994)

Judgment

Zulman J: There are two applications before this Court. The first, in chronological sequence, is an application brought by Torwood Properties (Pty) Ltd (Torwood) against the South African Reserve Bank as respondent (the Reserve Bank). This application seeks to review and set aside an J attachment order made by the Reserve Bank against Torwood

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ZULMAN J

A on 9 May 1989 attaching an immovable property in Forest Town, Johannesburg, owned by Torwood. I will refer to this application as 'the review application'. The second application is one brought by Torwood against the Reserve Bank for an order declaring that the attachment order in question lapsed by the effluxion of time at midnight on 8 May 1992 in B terms of s 9(2)*(g)* of the Currency and Exchanges Act 9 of 1933 (the Act) and is of no further force or effect. I will refer to this application as 'the time bar application'. By agreement both applications were argued together before this Court.

If the time bar application succeeds, then it becomes unnecessary to consider whether there is merit in the review application. It is C accordingly convenient first to consider the time bar application.

Fundamental to a consideration of the time bar application is a proper understanding of the meaning and effect to be given to s 9(2)*(g)* of the Act. This is so since, if indeed the attachment which the Reserve Bank made of the applicant's immovable property is no longer of force and effect, then there is no warrant for the property to remain under D attachment. In this connection it is to be borne in mind that the attachment was made pursuant to the provisions of s 9(2)*(b)*(i) of the Act read with the relevant regulations framed thereunder, more particularly regs 22A and 22C. The proper interpretation of these regulations formed E much of the argument addressed to this Court in the review application.

Section 9(2)*(g)* of the Act now reads as follows:

> *(g)* The period referred to in para *(b)*(i) shall be a period not exceeding 36 months or such longer period -
>
> (i) as ends 12 months after the final judgment (including an F appeal, if any) in every prosecution for any contravention of the regulations or any other law in relation to the money or goods concerned or in which such money or goods are relevant to any aspect of such prosecution; or
>
> (ii) as may be determined by a competent court in relation to the money or goods concerned on good cause shown by the Treasury.'

It is to be noted that s 9(2)*(g)* was added to the Act by s 1*(b)* of Act 48 G of 1988. In its original form the Act, which was enacted as far back as 1933, simply gave the Governor-General the power to make regulations applying 'any sanctions therein set forth which he thinks fit to impose, whether civil or criminal'.

The first amendment to s 9(2) of the Act of consequence to the matter in H issue herein came about when s 9(2) of the Act was amended by s 1 of Act 23 of 1987. In terms of this amendment detailed matters were set forth in regard to what the regulations promulgated pursuant to the section might provide for. Of particular importance in regard to the time bar application is the fact that in s 1(1)*(b)* of the amending Act of 1987 provision was made to the effect that any regulation promulgated 'may I provide for: (i) the blocking, attachment and obtaining of interdicts for a period *not exceeding 12 months* by the Treasury . . .'. (The emphasis is mine.)

In 1988 and by virtue of the provisions of s 1*(b)* of Act 48 of 1988, as I have already mentioned, s 9(2)*(g)* was further amended. The effect of the J further amendment was to delete the words 'not exceeding 12

A months' from s 9(2)*(a)*(i) and to add a new subsection, namely s 9(2)*(g)*, wherein, in effect, the period of 12 months was substituted with a period 'not exceeding 36 months or such longer period' as is spelled out in the body of the new added subsection which I quoted *in extenso*.

At the end of the day, s 9(2)*(g)* of the Act makes provision for three B situations. The first is a situation which obtains at the end of a period of 36 months. The second is a period which ends 12 months 'after the final judgment (including an appeal, if any) in every prosecution . . .'. The third is a period 'as may be determined by a competent Court . . . on good cause shown by the Treasury'.

C As to the first of these periods it is common cause that, if the period of 36 months applies in this case, then the attachment would have fallen away in or about May 1992.

The Reserve Bank contends, however, that this did not occur since it relies upon the fact that a 'prosecution' occurred within the period of 36 D months, thereby bringing into operation the second time period to which I have referred. In the alternative, the Reserve Bank contends that, even if a 'prosecution' did not take place within the 36-

month period, this Court should nevertheless determine an appropriate period as provided for in s 9(2)*(g)*(ii) of the Act.

Section 9(2)*(g)*(i) can in turn be broken up into four distinct parts.

E The first deals with the period ending 12 months after a final judgment (including an appeal, if any) 'in every prosecution for any contravention of the regulations'. Fundamental to deciding whether this period is of application in a particular case, it is necessary to give meaning to the phrase 'in every prosecution' in this portion of the subsection, regard being had to the context in which the phrase is used in the subsection. F Mr *Louw*, who appeared with Mr *Dreyer* for the Reserve Bank, contended that in the particular circumstances of this matter there had indeed been a 'prosecution' within the period in question. In this latter regard reliance was placed upon three events which occurred in this matter and which it is contended constituted the 'prosecution' referred to. The G first was the laying of a complaint with the Commercial Crime Unit of the

South African Police on 23 July 1987. The fact that a complaint might or might not have been laid as alleged by the Reserve Bank is not, the way I understand the replying affidavit of Torwood, put in issue.

H The second fact relied upon by the Reserve Bank as constituting a 'prosecution' is that a warrant of arrest was issued for the arrest of a certain Hill by the additional magistrate, Johannesburg, on 10 May 1989, this being within the 36-month period. I should interpose to mention here that it is the case for the Reserve Bank that Hill directly and indirectly through trusts, holding companies, shareholding and directorships I manipulated the financial rand system, committed frauds and benefited therefrom. It is furthermore submitted on behalf of the Reserve Bank that Torwood 'is an example of a corporate entity which was formed to benefit Hill and his family' and that from the shareholding and directorships it is clear that Hill 'remained in charge throughout'. It was argued that it J followed from this that all of the assets of Torwood were

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A to be treated as if they were the assets of Hill. This argument was addressed principally in support of the Reserve Bank's case in the review application. Mr Groenewald, a Senior Deputy Governor of the Reserve Bank, deposed to an affidavit to the effect that the warrant for Hill's arrest was issued on 10 May 1989. Mr Evans, who is the deponent to the principal B affidavits filed by Torwood in both the review application and in the time bar application, states in reply that it is admitted that Hill was not at the time present in the Republic of South Africa (when the warrant was issued) and that he resides in London at a flat situated at 1 Belgrave Place, Belgravia, London. The allegation in Groenewald's affidavit to the effect that Hill 'is aware of the warrant for his arrest' is put in issue. C It is furthermore contended in Evans's affidavit that the warrant of arrest referred to by Groenewald has in any event 'not been effective since 21 November 1990, having allegedly been substituted by a later warrant issued on that date', and that, as far as the latter warrant of arrest is concerned, the Attorney-General of the Transvaal 'refused to D furnish' attorneys acting on behalf of Hill with a copy of the warrant of arrest. Such a copy was only furnished to Torwood by the Reserve Bank in response to a notice in terms of Rule 35 (12) filed in these proceedings.

The final fact relied upon by the Reserve Bank for contending that a relevant 'prosecution' took place within the relevant period is that on 10 E May 1989 an indictment was handed to 'or lodged with the Registrar'.

The Registrar who is referred to was the then Registrar of the Witwatersrand Local Division of this Court, a certain Mr Lourens, who has since retired. In an affidavit deposed to by Mr Lourens on 14 January 1994, Mr Lourens refers to a certificate which he issued in his capacity F as Registrar of the Witwatersrand Local Division of the

Supreme Court of South Africa on 11 February 1993. In para 2 of that certificate Mr Lourens certifies that:

> 'I issued a criminal summons and hold an indictment which was lodged with me on 10 May 1991 and allocated the number CC 306/91 to the matter.' G

Reference was also made in argument by Mr *Louw* to an oath sworn to by Mr Lourens on 10 May 1991, apparently in support of certain extradition proceedings which were being launched in regard to Hill, to the effect that in para 2 of such oath Mr Lourens stated:

> 'I hereby acknowledge receipt of the original signed indictment in the H matter of *The State v (1) Robert Oliver Hill* (ii). . . .'

In a further affidavit deposed to by Mr Lourens on 16 May 1994 which was handed in, without objection from Torwood, at the commencement of argument before me, Mr Lourens seeks to clarify certain facts relating to the receipt by him of the indictment and the opening of a file. This I affidavit was filed to deal, presumably, with certain information put before the Court by an attorney, Mr Tugendhaft, who acted on behalf of Hill at the relevant time. In my view, no matters of any consequence turn upon any possible differences between the versions deposed to by Mr Lourens and Mr Tugendhaft insofar as there may be differences between what J they say took place in regard to the question of

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A the records kept by Mr Lourens relating to the handing over of the indictment and the lodging of same as contended for by the Reserve Bank.

The essential question which needs to be answered, in my view, is whether one or all of the aforementioned facts relied upon by the Reserve Bank add

up to a 'prosecution' within the meaning of s 9(2)*(g)*(i) of the Act. This B in turn involves a determination as to what meaning is to be attributed to the word 'prosecution' where it is used in the subsection.

Mr *Louw* referred me to the decision in *Smith v Desai* 1903 NLR 329 at 332 in support of his argument that a criminal prosecution is instituted when the law is set in motion. The case was a case concerning an alleged malicious prosecution. Bale CJ, delivering the judgment of a Court C consisting of three Judges (Bale CJ, Finnemore J and Beaumont J), stated the following at 332:

> 'I think I may take it that a person may be said to prosecute when he sets the law in motion. The law was undoubtedly set in motion by Mr Ensor Smith; that is to say, a criminal charge was preferred, and he expressed a D desire that Desai should be prosecuted. As a result, certain steps were taken towards prosecution. These steps were not completed, but the initial steps were taken.'

In my view *Smith's* case is not of much assistance in the resolution of the present problem. This is so since the case does not concern the E definition of the word 'prosecution' in the statutory enactment with which I am concerned or indeed with the definition of the word 'prosecution' in any statutory enactment. The remarks are relevant only to the common-law delict of malicious prosecution. In deciding whether the delict of malicious prosecution is committed, it is obviously necessary to determine whether steps were taken from an early stage in relation to a prosecution of the aggrieved plaintiff. As pointed out by Mr *Kuper*, who appeared with F Mr *Unterhalter* for Torwood, it is often a standard defence in such cases for the defendant to plead that he did not act maliciously in bringing about the 'prosecution', but that any 'prosecution' of the plaintiff took place at the behest of a prosecutor or similar State authority and not at the behest of the individual who laid the charge. Such a defence is of G plain relevance in the delict of malicious prosecution. It has no relevance, in my view, in determining whether a 'prosecution' takes place for the purposes of evaluating a time bar provision such as that contained in the subsection of the Act with which I am concerned.

Mr *Louw* also relied upon the provisions of s 76(1) of the Criminal H Procedure Act 51 of 1977 in support of his contention that, even although an indictment was never

served on Hill, there was nevertheless a 'prosecution' because of the fact that the indictment was served on the Registrar of the Court or, more accurately, lodged with him.

Section 76(1) of the Criminal Procedure Act, 1977, reads as follows:

> I 'Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and in the case of a superior Court, by serving an indictment, referred to in s 144 on the accused and the lodging thereof with the Registrar of the Court concerned.'

A copy of the indictment in the instant matter appears in the papers J before this Court. It is undated. It nevertheless indicates that the

ZULMAN J

A proceedings against Hill and two other persons are to take place in the Witwatersrand Local Division of the Supreme Court of South Africa at the instance of the Attorney-General for that Division. It is plain, therefore, that the proceedings in question are proceedings which are to take place in a superior Court and not in a lower court. Accordingly B those provisions of s 76(1) which deal with the commencement of proceedings at a summary trial in a lower court which are commenced by lodging a charge-sheet with the clerk of the court have no application whatsoever to proceedings in a superior Court. Indeed the section makes it clear that in the case of superior Courts, proceedings only commence by 'serving an indictment referred to in s 144 on the accused and the lodging C thereof with the Registrar of the Court concerned'. Accordingly a mere lodging with the Registrar of the Court concerned without service of the indictment upon the accused does not amount to the commencement of proceedings in a superior Court. Whilst it is true, as pointed out in the 5th edition of Hiemstra *Suid-Afrikaanse Strafproses* at 186 in commentary D on s 76(1), it is necessary to make a distinction between institution of proceedings and commencement of proceedings, certainly insofar as this concerns proceedings in an inferior court, such distinction does not assist in resolving the question of at what point in time one is able to say that proceedings commence in a superior Court. The passage relied upon by Mr *Louw* at 174 of the 4th edition of the work again does not, to E my mind, assist in the analysis. This is so since that passage deals with the issue of a summons and summary trials in inferior courts, where the learned authors state that 'die instelling plaasvind op die oomblik van indiening van die klagstaat by die klerk van die hof'. They do not deal with the position in the Supreme Court. The clerk of an inferior court F certainly does not, for the purposes of this analysis, correspond to the Registrar of the Supreme Court in regard to the receipt of an indictment as opposed to the service of the summons.

Both Mr *Louw* and Mr *Kuper* referred me in support of their respective contentions to *R v Priest* 1931 AD 492. That was a case where the word 'prosecution' in s 10 of Act 46 of 1882, which provided that G

> 'no prosecution shall be commenced against any person for the publication of any defamatory libel after the lapse of a period of six months from the date of such publication',

fell for interpretation. It was held that the word 'prosecution' must be given its general and usual meaning of criminal proceedings and that a H prosecution is commenced at the time when the preparatory examination begins and not when the indictment is served upon the accused. No question arises in this case of any preparatory examination having commenced. However, it is clear from an analysis of the judgment of Wessels ACJ, who delivered the judgment of the Court in *Priest's* case, that the Court was there concerned only with the meaning of the word I 'prosecution' within the context of the criminal libel statute in question. It is plain to me that the Court was not seeking to lay down a definition of the word 'prosecution' which was to be of universal application to all statutes dealing with the need for a 'prosecution' or even those dealing with time bar situations. The nature of the statute and the purpose for which it was enacted, or, more accurately, the J mischief that it was sought

A to deal with, are important when it comes to matters of interpretation (cf *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) at 852-3 and *Venter v R* 1907 TS 910 at 915). The mischief sought to be dealt with in the Currency and Exchanges Act with which I am now concerned is plainly different to that of the statute considered in *Priest's* case. It is B apparent to me, particularly from the remarks of Wessels ACJ at 496, that the six-month period provided for in the statute there being considered might well elapse before an indictment could be served, which would result in a possible escape from prosecution. In these circumstances the Court was of the view that the intention of the Legislature was to regard as sufficient the holding of a preparatory examination. No such position C obtains in regard to the alleged breaches of the law suspected in this matter. In my own researches into the matter I came across a decision of Price J in *Madnitsky v Rosenberg* 1949 (1) PH J5 (W) where the Court in an action for malicious prosecution was required to give a meaning to the phrase 'instigating a prosecution'. Price J put the matter in these terms:

D

> '(W)hat is "instigating a prosecution"? The law on this point seems to draw a very fine distinction, and in a borderline case the precise meaning of the phrase and its application to the facts can present acute difficulty, as is apparent from the cases. The English law (which must be examined with circumspection because the law is affected by the fact of E private prosecutions being customary or at least very numerous in England) is that a person who instigates the prosecution is liable for damages in a proper case. This merely serves to throw the enquiry back upon the meaning of the word "instigates". It is clear that giving information on the strength of which a prosecution is undertaken is not "instigating" the prosecution (Salmond on *Torts*, 1945 ed at 621 and the case there cited). On this point our law is the same.' F

This case serves to illustrate the important distinction which needs to be drawn and to which I have previously referred of a case where it is relevant to determine whether the delict of malicious prosecution has been committed or not and is not concerned with a determination of the meaning of the phrase 'prosecution' in a statute. G

A case of more assistance is that of *Minister of Law and Order v Kader* 1991 (1) SA 41 (A). In that case the respondent had been arrested in terms of s 29 of the Internal Security Act 74 of 1982. After his arrest he had made a statement to the police in which he admitted participating in an offence under s 54 of the Act in question. Section 64 of the Internal Security Act provided that the detention of the respondent for a H further period after his first appearance in the regional court could only take place if the Attorney-General authorised, in writing, the prosecution of the respondent for an offence referred to in s 54 of the Act. The Court held in regard to this aspect of the matter that the institution of a prosecution 'in the context of s 64 of the Internal Security Act' did not bear a wide meaning which would include any step in the criminal I proceedings against an accused. It is apparent from an analysis of the judgment of the Court delivered by Grosskopf JA that in coming to the conclusion that the institution of a prosecution in the context of s 64 of the Internal Security Act did not bear a wide meaning so as to include any J step in the criminal proceedings against the accused turned upon an

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A analysis of the context in which the phrase was used in that particular statute. The learned Judge put the matter in these succinct terms at 51E-G:

> 'What is meant by the institution of a prosecution depends on the context in which the expression is used (cf *R v Priest* 1931 AD 492 and *R v* B *Friedman* 1948 (2) SA 1034 (C).) The purpose of s 64 is to ensure that the decision to prosecute a person for a contravention of s 54 is a responsible one, taken by the person who, in terms of s 3 of the Criminal Procedure Act, has the authority to prosecute in the name of the Republic in criminal proceedings. This purpose cannot be achieved if the Attorney-General is required to arrive at a decision on incomplete or C preliminary information. Institution of a prosecution in this context cannot, therefore, bear a wide meaning which would include any step in the criminal proceedings against an accused. I do not propose attempting to define it with any precision in the present case. What is required at the very least, in my view, is a decision on the part of the prosecutor, conveyed to the accused in a formal manner, that he is to be prosecuted on a charge defined with some particularity (cf *R v Priest (supra* at 495)).' D

(It is to be noted that *R v Friedman* referred to by Grosskopf JA was a case relating to proceedings in the magistrate's court where a summons had been served.)

Applying the remarks of Grosskopf JA to the Currency and Exchanges Act, it seems to me to be plain that the intention of imposing a time bar at the E end of a period of 12 months after a final judgment (including an appeal, if any), in every prosecution, is to place a limitation upon the time during which a person's property, in the present case, is to remain under attachment. The attachment of a person's property obviously represents a serious invasion of his rights. A statute which seeks to impose such a limitation must be restrictively interpreted (cf *Transvaal Investment Co* F *Ltd v Springs Municipality* 1922 AD 337 at 342). Furthermore, such a person is entitled to know with a degree of certainty when the 12-month period would run out. This renders it important at least to ensure that such person is made aware of a decision to prosecute him. Such person should also be given an objective basis for ascertaining when the G prosecution has been commenced. He can hardly be expected to delve into records of the registrar of a Court which, in any event, it would seem, in this case were kept away from the interested parties and certainly from Hill's attorney. The decision on the part of the prosecutor must be, to use the words of Grosskopf JA in *Kader's* case, 'conveyed to the accused in a formal manner' as also the fact that he is prosecuted 'on a charge H defined with some particularity'. The conduct of the Attorney-General in the instant case, when met with an enquiry from the attorney acting on behalf of Mr Hill, requires to be examined in this regard. On 16 August 1991 Mr Tugendhaft wrote to the Attorney-General requesting a copy of the 'new warrant of arrest' which had apparently been issued in November 1990 I for the arrest of Hill. On 28 August 1991 a reply was received from the chief clerk of the Attorney-General enquiring as to the 'legal basis' upon which the request for the copy of the warrant was made. The letter furthermore added:

> 'In relation to the circumstances of this matter it is an important J consideration that your client still remains a fugitive of justice.'

ZULMAN J

A In a letter dated 8 October 1991 Mr Hill's attorneys replied, *inter alia*, that:

> 'We consider it extraordinary that you should refuse to make available to the legal representatives of an accused a copy of the warrant of arrest issued in respect of that person. It is no less extraordinary that you should classify our client as a "fugitive of justice", which he is not, B and yet refuse to disclose the warrant of arrest. We would have expected of the Attorney-General's office to subscribe to the principle that an accused is presumed to be innocent until proven guilty and that he has a right to legal representation.
>
> It is noteworthy that the warrant of arrest issued against our client in May 1989 was not furnished to us but rather produced by opponents of our client in civil proceedings in the Supreme Court. It would seem therefore C that the Attorney-General and/or the South African Police have no difficulty in furnishing copies of the warrant of arrest to all and sundry with the exception of the accused's legal representative. . . .
>
> We again request a copy of the warrant of November 21st.'

This letter solicited the following terse response, from the chief clerk D of the Attorney-General, in a letter dated 12 November 1991:

> 'I am directed by the Attorney-General to acknowledge receipt of your letter dated 8 October 1991 and to inform you that your request for a copy of the warrant is refused.'

E As I have indicated previously in dealing with the history of this matter, it is apparent that the indictment as such was never served upon Hill or the other two persons mentioned therein or even upon Hill's legal representatives, whose existence and whereabouts were at all times known to the Attorney-General.

In all of these circumstances I do not believe that, in the context of s F 9(2)*(g)*(i) of the Act, a 'prosecution' took place within the 36-month period. In addition it seems to me that it cannot be correct to say that the steps taken by the Reserve Bank which I have outlined above could ever have ended in a 'final judgment' being granted as is contemplated in s 9(2)*(g)*(i).

G Assuming that I am wrong in my conclusion that a 'prosecution' did not take place, is it correct to say that such prosecution was a relevant prosecution, for the purpose of the subsection? In this latter regard it is important to note that in order to satisfy the requirements of the subsection it is necessary for such prosecution to be for either 'any contravention of the regulations' or in regard to 'any other law in H relation to the money or goods concerned', 'or in which such money or goods are relevant to any aspect of such prosecution'.

It is common cause that the prosecution relied upon by the Reserve Bank is not a prosecution for a contravention of the regulations. The indictment refers only to the common-law offences of forgery (counts 1-599), uttering I (counts 600-998) and fraud (counts 1199-1797). It was contended by Mr *Louw* that this did not necessarily mean that, if and when Hill was extradited and returned to South Africa, he could not then be charged with a contravention/s of the regulations. This might well be so, but it can hardly be said that such a prosecution would have commenced with a mere J issue of the indictment in relation to the

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ZULMAN J

A common-law offences that I have referred to and before any indictment was served, or even issued, in respect of contraventions of the regulations.

Mr *Louw* also relied upon the words 'or any other law' where they appear in the subsection. In this regard he referred me to the provisions of s 2 of B the Interpretation Act 33 of 1957, where the word 'law' is defined as meaning 'any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law'. Mr *Louw* argued that this definition of law did not limit the word 'law', particularly in s 9(2)*(g)*(i), to statute law, but that the phrase 'other law' also embraced a contravention C of the common law. This submission is, in my view, plainly wrong. In dealing with the meaning to be attributed to the word 'law' where it is used in s 2 of the Interpretation Act authorities extending back as far as *R v Detody* 1926 AD 198 at 201 make it clear that, in the absence of an intention to the contrary, 'law' does not include the common law. (See D also, for example, Steyn *Die Uitleg van Wette* 5th ed at 168 and especially the numerous authorities cited in footnote 154, as also Devenish *Interpretation of Statutes* at 243 and the authorities referred to in footnote 30.) The essential enquiry is only as to whether the context of s

9(2)*(g)*(i) 'otherwise requires', to use the opening words of s 2 of the Interpretation Act. In my view, the context of the subsection certainly E does not 'otherwise require'. If anything, the context requires an interpretation which would exclude the common law since by the very nature of the purpose of the subsection to which I have made previous reference one needs to give the subsection a restrictive rather than a wide meaning (cf *Transvaal Investment Co Ltd v Springs Municipality (supra* at 347)). It would have plainly been a simple matter for the Legislature to have F enacted in clear terms words to the effect that the common law was also embraced.

Mr *Louw* also sought support for his argument from the wording of s 9(3) of the Act. This section refers to the power of the Governor-General to make regulations which suspend the whole or part of the Currency and Exchanges Act and or G

> 'any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges . . .'.

In my view, if anything, s 9(3) supports the view that the phrase 'or any other law' in s 9(2) refers not to common law but to matters of statute.

H A further hurdle in the way of the interpretation contended for on behalf of the Reserve Bank lies in an application of the words 'in relation to the money or goods concerned or in which such money or goods are relevant to any aspect of such prosecution', where they appear in the concluding part of s 9(2)*(g)*(i). In my view, the fact that money which might have been 'tainted' in the sense of it having been acquired by Hill or by I others from illegal dealings and thereafter having been used either directly by Hill or indirectly through a company controlled by him to effect

payment of liability on a mortgage bond which Torwood had to a third party (R M S Syffrets) does not make the immovable property of Torwood 'goods' which are 'concerned' or indeed relevant to any aspect of J a prosecution for a contravention of the Exchange Control

ZULMAN J

A Regulations or other statutes relating to money or goods. The fact that the 'tainted' money might have been used to discharge the bond liability also does not, to my mind, have any bearing upon any sentence which might be imposed in respect of a prosecution instituted, not against Torwood, but for example against Hill, for breaches of the statute in question. The immovable property of the company Torwood, as such, is in no way B concerned or relevant to such prosecution. It is of course the immovable property of Torwood which is the subject-matter of the attachment about which Torwood complains. No attachment has been made of money which has been paid over already to a third party, namely R M S Syffrets, in reduction of the bond liability of Torwood. There is, in my view, substance in the contention advanced on behalf of Torwood to the effect C that it has not been alleged, or indeed established, in the papers filed that the immovable property of Torwood is relevant to any aspect of the prosecution of Mr Hill. In an affidavit filed on behalf of the Reserve Bank in the time bar application it is simply said that a prosecution

> D '. . . in relation to the money or goods concerned has not been finalised because a final judgment . . . has not been given'.

Nowhere does the Reserve Bank seek to address the fact that the prosecution in question is unconnected with the immovable property as such.

E In all of these circumstance I am of the view that there is no sound basis for extending the 36-month period in accordance with the provisions of s 9(2)*(g)*(i) of the Act.

In these circumstances it becomes necessary to examine the application made by the Reserve Bank in terms of s 9(2)*(g)*(ii) of the Act for the F determination of a longer period than the period of 36 months.

It is plain from a reading of this subsection that an *onus* rests upon the Reserve Bank to show 'good cause' for the determination of such longer period.

It was contended by Mr *Kuper* on behalf of Torwood that it was now too late for the Reserve Bank to make the application in question since for any G such application to be successful it had to be made before the expiry of the 36-month period and that, in effect, no retrospective application could be made. There may well be substance to this argument. However, I will assume, without deciding the matter, in favour of the Reserve Bank that the application can indeed be competently made even at this late H stage. Having said this, this does not mean that such application should necessarily be granted. Crucial to a proper decision as to whether to grant the application is to examine whether the Reserve Bank, upon whom, I repeat, the *onus* rests, has indeed shown 'good cause'.

The phrase 'good cause' is a phrase which is well known in our law and I practice. The need to consider whether 'good cause' exists often arises, for example, in regard to a non-compliance with Rules of Court and particularly in regard to the timeous prosecution of applications for leave to appeal. So, for example, Rule 49(6)*(b)* of the Uniform Rules of Court provides that a Court to which an appeal is made may, on application J of the appellant or cross-appellant, and upon good cause shown, reinstate

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A an appeal or cross-appeal which has lapsed. Our Courts have, as is pointed out by Erasmus *Supreme Court Practice* (1994) at 1-360,

'deliberately refused to attempt framing any comprehensive definition of what constitutes good or sufficient cause for the granting of condonation for procedural shortcomings in appeals'.

B The overriding consideration is that the matter rests in the judicial discretion of the Court, which discretion is to be exercised having regard to all the circumstances of the case. The principles upon which a Court exercises its discretion have been succinctly stated in these terms by Holmes JA in *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) C at 720E-G:

'It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of D success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.' E

Furthermore it is plain from numerous authorities (see, for example, *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264A and *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E) that condonation for the non-observance of Rules is by no F means a mere formality. It is for the applicant to satisfy the Court that there is sufficient cause for excusing him from non-compliance.

What then are the facts upon which the Reserve Bank relies in the instant case for the indulgence which it seeks? In para 15.5 of the heads of argument submitted on behalf of the Reserve Bank it is contended that the grounds relied upon by the Reserve Bank upon which it submits that this G Court should exercise the discretion vested in it to determine a period longer than 36 months are summarised in the answering affidavit of Groenewald, more particularly in para 71 thereof. This paragraph reads as follows:

'71.*Extension of s 9(2)(g)* period H

71.1 On the facts and for the reasons set out above as well as for the reasons that follow, the respondent contends that, in any event, the Court will properly exercise its discretion in favour of an extension of the period beyond the prescribed 36 months mentioned in s 9(2)*(g)* of the Act and those further facts are:

I 71.2.1 If the attachments were made on a reasonable suspicion that contraventions of the Exchange Control Regulations had been committed.

71.2.2 The decision to forfeit was delayed by the prosecution of the Court proceedings both in the Court of first instance and on appeal to the J Appellante Division of the above honourable Court, in the matter of the Francis George Hill Family Trust

A v South African Reserve Bank, Phoenix Chemicals (Pty) Ltd and Hahn Family Trust under cases Nos 15350/89 and 259/90.

71.2.2.1 Judgment was given by the Appellate Division of the above honourable Court on 30 March 1992.*

71.2.2.2 Referred to the application in that matter B would have been to nullify the attachments, if successful.

71.2.2.3 It would therefore have been presumptuous to take a decision on forfeiture of the attached money and/or goods before the final judgment by the Appellate Division of the above honourable Court.

71.2.2.4 Because of the far-reaching effect of a C decision to forfeit, it is essential to state that before

deciding to forfeit, it is prudent to take into account all the facts which confirm the existence or non-existence of the grounds for attachment and forfeiture of the money and/or goods.

71.2.2.5 Such facts would appear from the record of D the proceedings during a criminal prosecution. In this case Hill is stifling the prosecution through his absence.

71.2.2.6 The South African Police have investigated Hill's actions with regard to the commission of offences relating to the E suspicion formed as set out above. Certain information to which the South African Police only is privy will become public knowledge during the pending criminal proceedings. Upon such information becoming available to me, I will be placed in a better position to make a prudent decision on forfeiture of goods and/or money.' F

In argument before me Mr *Louw* sought to elaborate upon these grounds by contending that the real reason for the delay in question was the fact that in reality the Reserve Bank, presumably represented by its senior officials, was of the opinion that an application in terms of s 9(2)*(g)*(ii) of the Act was unnecessary since the 36-month period fell to be extended by reason of the belief which they held as to the existence of G the factors necessary to bring into operation the provisions of s 9(2)*(g)*(i) of the Act. Mr *Louw* also sought to stress the strength of the case which the respondent, so he contended, had against Mr Hill and which case is set forth in great detail in the voluminous papers filed in these proceedings and which are not really answered by Torwood. As to the point H made in the affidavit of Mr Groenewald to the effect that proceedings in the two cases referred to in para 71.2.2 of his affidavit, namely cases Nos 15350/89 and 259/90, only came to a conclusion, as it were, when judgment was given by the Appellate Division on 30 March 1992, it seems to me that there was no sound reason why, if it was thought necessary for an I application to have been launched for an extension of the time period, this was not done shortly after 30 March 1992. Had this taken place, this would have been within the period of 36 months from the date of the attachment on 9 May 1989.

ZULMAN J

A The mere fact that there might be a strong case against Hill does not, of itself, entitle this Court simply to extend the period of an attachment of property which on the face of it does not belong to Mr Hill but which belongs to the company, Torwood. The shareholders of Torwood are two family trusts for the children of Mr Hill. Mr Hill is not a director of B Torwood. The property was purchased as long ago as 15 January 1968 by Mr Hill acting as trustee for a company to be formed for a purchase price of R15 900. This price was paid to the seller, who was Mr Hill's father. The applicant adopted the contract upon its incorporation on 26 June 1968 and has held the property uninterruptedly since then. There is nothing in the affidavits to contradict the statement made that in terms of an oral C arrangement the Hill family occupied the property and was responsible for the payment of all rates and taxes and moneys payable to Syffrets under a mortgage bond, which amounts were payable in lieu of rental. On 17 June 1982 Hill and R O Hill Family Holdings (Pty) Ltd transferred their shares in Torwood to the children's trusts. It is of some significance, in my D view, in relation to the application made by the Reserve Bank for extension of the time period, to note that, although the Reserve Bank was aware, at least on 14 January 1991, of the need to apply for an extension of time, it deliberately declined to do so. This fact emerges from a letter of that date from the Reserve Bank's attorneys to the applicant's E attorneys. In an affidavit deposed to by Mr Groenewald he attempts to explain the attitude taken by the Reserve Bank to the letter in question. The effect of this explanation is that it always was, and still apparently is, the respondent's contention that the 36-month period prescribed in s 9(2)*(g)* of the Act has not expired, and

'because of this attitude it was never considered to be necessary to bring F an application for an extension of the three-year period. It was, however, foreseen that, pending the final determination of the *Francis George Hill Family Trust v South African Reserve Bank and Others* case in the Appellate Division of the above honourable Court, it was possible that the prosecution of Hill could have been finalised, including all procedures on appeal, which would then have left one year in time for the respondent within which to take a decision to forfeit or not forfeit any G of the attached assets. It was envisaged that the respondent would then require an extension of this one-year period. It must be pointed out that at that stage no trial date for the appeal of the matter of *Francis George Hill Family Trust v South African Reserve Bank and Others* had been allocated.'

It is necessary to point out in this regard that the matter in the H Appellate Division in no way concerned the attachment of the immovable property of Torwood in issue in this matter. Furthermore Torwood was not a party to those proceedings. It seems to me that the mere mistaken belief that a party may have as to the legal position in which he finds himself of itself does not excuse a failure to take steps to protect his position in the event of his view being proved to be wrong. To regard a I mere belief in the correctness of one's case as being good cause for a failure to take steps to protect oneself against the eventuality that that view is held to be wrong is not tenable. It has been held in a number of cases that the mere fact that a party has a strong case is not of itself sufficient cause to grant condonation. See, for example, *Immelman v Loubser en 'n Ander* 1974 (3) SA 816 (A) at 824B-C, where Muller JA put the J matter in these terms:

ZULMAN J

A 'Redelike vooruitsigte op sukses by appèl is natuurlik ook 'n belangrike oorweging. Maar hoewel dit 'n belangrike oorweging is, is dit nie noodwendig in elke geval 'n deurslaggewende oorweging nie.'

A matter of considerable importance, to my mind, in considering the queston of 'good cause' is the prejudice suffered by Torwood if the extension suggested by the Reserve Bank should now be granted. In this B regard I believe that there is much substance in the argument that the *onus* rests upon the Reserve Bank, which is seeking an indulgence, to show that Torwood would not be adversely affected. Plainly an owner of immovable property is adversely affected if his property is laid under attachment. Furthermore it seems to me that, if regard is had to the C totality of the matter, the applicant's property, which at best, although the matter is not debated in these terms in the voluminous papers before this Court, probably does not have a value which would exceed R1 million, can have any significant bearing in the contemplated proceedings against Hill and the two other persons referred to in the indictment. I might mention that these proceedings have, in any event, apparently still not D commenced. They are said to involve a shortfall of the order of R70 million. If Torwood's role in the matter is limited to the extent of the repayments which were made on the bond over its property, these payments amount to a relatively insignificant amount, namely some R116 087,90. These payments took place during the period 2 December 1986 to 22 February E 1989. I am therefore of the view that the Reserve Bank has not discharged the *onus* of showing 'good cause' for the extension sought by it.

Having come to the conclusion that Torwood is entitled to the relief which it seeks in the time-bar application and that the Reserve Bank is not entitled to succeed in its counter-application for an extension of the F time period, it becomes unnecessary to consider the merits of the review application brought by Torwood to set aside the attachment.

Counsel were agreed that costs should follow the result and that, even if there were a decision only in regard to one of the two applications, such costs should nevertheless include costs of both applications that were G argued together. Counsel were furthermore agreed that the costs occasioned by the employment of two counsel were warranted.

In all of the circumstances I grant an order in terms of prayers 1 and 2 of Torwood's notice of motion dated 10 August 1993 in the time-bar application, namely an order:

H 1. Declaring that the order made by the respondent against the applicant on 9 May 1989 in terms of the notice, annexure DF2 to the founding affidavit, lapsed by effluxion of time at midnight on 8 May 1992 in terms of s 9(2)*(g)* of the Currency and Exchanges Act 9 of 1933 and is of no force or effect.

2. The respondent is ordered to pay the costs of both the time-bar I application and the review application, such costs to include costs attendant upon the employment of two counsel by the applicant.

Applicant's Attorneys: *Moss-Morris, Mendelow, Browde Inc.* Respondent's Attorneys: *Rooth & Wessels*, Pretoria.

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* See 1992 (3) SA 91 (A) - Eds.

SOUTH AFRICAN RESERVE BANK v TORWOOD PROPERTIES (PTY) LTD 1997 (2) SA 169 (A) A

1997 (2) SA p169

Citation	1997 (2) SA 169 (A)
Case No	626/94
Court	Appellate Division
Judge	Harms JA, HEFER JA, VIVIER JA, MARAIS JA and PLEWMAN JA
Heard	September 3, 1996
Judgment	September 25, 1996
Counsel	J W Louw (with him JH Dreyer) for the appellant M D Kuper (with him DN Unterhalter) for the respondent
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Exchange control - Order by Reserve Bank for attachment of immovable property under s 9 (2)*(b)*(i) of Currency and Exchanges Act 9 of 1933 - Attachment of 'other' (untainted) property pursuant to reg 22C(1) of Exchange Control Regulations made under s 9 of Act 9 of 1933 - In terms of subpara (iii) C of reg 22C(1) shortfall can only be recovered if, as fact, person benefited or enriched as result of contravention of Exchange Control Regulations - Suspicion not enough - Such subregulation presupposing that shortfall actual and not merely suspected albeit on reasonable grounds.

Headnote : Kopnota

The respondent, a private property-holding company, had one asset, namely erf 778 ('the property') situated in the D township of Forest Town in Johannesburg, which had been the family home of H. H, together with his wife, had been the original directors and shareholders of the respondent whose shares had been transferred (respectively in E 1982 and 1976) to R O Hill Holdings (Pty) Ltd and from there (also in 1982) to four so-called children's trusts. H's wife and one E were the directors of the respondent and H and his wife were neither trustees nor beneficiaries of any of the trusts. The arrangement between H and the respondent had been that H and his family would occupy the home and be liable for its upkeep and expenses, including the bond payments due to Syfrets Mortgage Nominees ('Syfrets'). Over the period December F 1986 to February 1989, a company, Phoenix Management Services (Pty) Ltd ('Phoenix'), had made the necessary bond repayments on behalf of H's family. H had been involved in exchange control contraventions since about 1974 until approximately 1987 and it was alleged that during 1986 to 1987 he had made immense profits mainly through financial rand round-tripping using forged loan stock certificates. A portion of G these gains had been transferred to Phoenix. Although H had been a declared insolvent he had been living in some opulence in London and New York and it had to be assumed that he was a fugitive from the South African justice system. On 9 May 1989 the appellant had attached the respondent's immovable property held under a deed of transfer dated 6 September 1968. The attachment had been effected pursuant H to the provisions of regs 22A and/or 22C of the Exchange Control Regulations ('the regulations') which had been made under s 9 of the Currency and Exchanges Act 9 of

1933 ('the Act'). In terms of reg 22A read with s 9(2)*(b)*(i) of the Act, no money or goods of any person other than the offender or suspected offender could be blocked, attached, interdicted, forfeited and disposed of if such money or goods had been I acquired by such person *bona fide* for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations. Regulation 22C provided that the Treasury could recover money involved in the contravention of the regulations by attaching and forfeiting such money and if there was a shortfall it could be recovered by the attachment of 'other' (untainted) money or goods of the person who had committed the J

contravention (subpara (i)) or who the Treasury on reasonable grounds suspected of A having committed the contravention (subpara (ii)) or the person who had benefited or had been enriched as a result of the contravention (subpara (iii)) or if more persons had committed the contravention, or if the Treasury on reasonable grounds suspected that more persons had committed any such contravention, or if more persons had been B benefited or enriched as a result of the contravention, the Treasury could recover the money or goods separately or jointly from those persons (subpara (iv)). The respondent had instituted review proceedings against the appellant for the attachment of its property but they had been left dormant after the appellant had filed answering affidavits. In August 1993 the respondent had launched another application against the C appellant for a declaratory order to the effect that the attachment had lapsed due to the effluxion of time ('the time lapse application'). The respondent had relied upon s 9(2)*(g)* of the Act which provided that the period of an attachment should not exceed 36 months. The appellant had in turn relied upon subpara (i) of s 9 (2)*(g)* which prolonged the 36-month period until one year after the final judgment in criminal proceedings related to the exchange control contravention that gave rise to the D attachment. As an alternative, and by way of a counter-application, the appellant had applied for an extension of the 36-month period in terms of subpara (ii) of s 9(2) *(g)*. These cases had been consolidated and the Court *a quo* found that *(a)* the attachment had lapsed, *(b)* the appellant had not been entitled to an extension and *(c)* it was unnecessary to decide the merits of the review application. The Court *a quo* had E accordingly issued the declaratory order sought by the respondent. On appeal, *Held*, that the validity of the attachment had to be decided as a material jurisdictional issue in the appeal on the time lapse application. That meant that if the attachment had been invalid the Court *a quo* ought to have upheld the review or issued a declaratory order to the same effect in the time lapse application. (At 173I/J-174A/B.) F

Held, further, as to reg 22A, that the respondent was neither an offender nor a suspected offender: the property had been acquired many years before H had committed any contravention of the regulations and there was no suggestion in the papers filed on behalf of the appellant that the respondent's purchase of the property G had not been *bona fide*, that the purchase price paid by the respondent had not represented reasonable consideration or that the purchase had not taken place in the ordinary course of business. Accordingly the attachment had been invalid insofar as it had been based upon reg 22A. (At 176I-177B.)

Held, further, as to subparas (i) or (iv) of reg 22C(1), that it was common cause that H the respondent was not a person defined in either subparagraph. (At 178D/E.)

Held, further, as to subpara (ii) of reg 22C(1), that the provision was clear that a claim might be made against a person suspected of having committed the contravention and that the respondent was not such a person: the respondent was also not, on the evidence, a front for H. The money paid on behalf of the respondent to Syfrets was I money to which the respondent had been entitled. (At 178E/F-F.)

Held, further, as to subpara (iii), that a suspicion was not enough. The shortfall could only be recovered if, as a fact, the respondent had benefited or had been enriched as a result of a contravention and that had not been the basis of the attachment notice: it had merely recorded that 'the bank on reasonable grounds suspects' the property to be 'goods . . . by which (the J

respondent) has been benefited or enriched as a result of any such contravention . . .' A and the affidavits also said no more. (At 178H-I.)
Held, further, that the attachment of untainted goods in terms of reg 22C(1) had been premature: the subregulation presupposed that the shortfall was actual and not merely suspected. If a shortfall was suspected, albeit on reasonable grounds, the remedy was to be found in subreg (2) which permitted a type of interdict. Accordingly the appellant had misconceived its remedy. (At 178J-179B.) B
Held, further, that it could not be said that the respondent had 'benefited' or had been 'enriched' as a result of any contravention of the regulations: Phoenix had received tainted funds but also had untainted income and the money used by it to pay the respondent's bond obligation to Syfrets might or might not have been tainted. Phoenix C had made those payments on behalf of Mrs H who had been entitled to director's fees from Phoenix. She and H had been contractually obliged towards the respondent to make those payments and Syfrets and the respondent had accordingly received nothing to which they had not been legally entitled. In the light of all this there was no real link between H's contraventions and the reduction of the respondent's bond obligations, ie the benefit or enrichment had not been the 'result of' the contravention. D (At 179B/C-E.)
Held, accordingly, that the appellant, in authorising the attachment of the immovable property of the respondent, had not acted in accordance with the relevant provisions of the regulations and had not had reasonable grounds for taking that action (s 9(2)*(d)*(i) of the Act). Consequently the attachment order made by the appellant was E null and void and of no legal effect. Appeal dismissed. (At 179G-H, read with 179I-180A/B.)
The decision in the Transvaal Provincial Division in *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 confirmed.

Cases Considered

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

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A) F

Francis George Hill Family Trust v South African Reserve Bank and Others 1990 (3) SA 704 (T)

Torwood Properties (Pty) Ltd v South African Reserve Bank 1996 (1) SA 215 (T)

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A) G

Statutes Considered

The following statute and regulations were considered by the Court:

The Currency and Exchanges Act 9 of 1933, ss 9(2)*(d)*(i), 9(2)*(g)*, 9(2)*(g)*(i): see *Juta's Statutes of South Africa 1995* vol 2 at 1-6 and 1-7

The Exchange Control Regulations, regs 22A(1), 22C(1), (2), (3). H

Appeal from a decision in the Transvaal Provincial Division (Zul-man J). The facts appear from the judgment of Harms JA.

J W Louw SC (with him *J H Dreyer SC*) for the appellant.

M D Kuper SC (with him *D N Unterhalter*) for the respondent.

In addition to the cases cited in the judgment of the Court, counsel on both sides referred to the following authorities: I

MV Achilleus *v Thai United Insurance Co Ltd and Others* 1992 (1) SA 324 (N) at 335B-D

Ex parte Bennett 1978 (2) SA 380 (W) at 384C-D

Brebner v Seaton 1947 (3) SA 629 (E) at 640

De Wet and Others v Villiers NO and Another 1953 (4) SA 124 (T) J

Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819I A

Ferreira en Andere v Die Staatspresident en Andere (TPD, unreported, case No 9457/87)

Galant v Du Toit 1946 CPD 247

Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A) at 824B-C

Mahomed v Kazi's Agencies (Pty) Ltd and Others 1949 (1) SA 1162 (N) B

Market Furnishers v Reddy 1967 (1) SA 528 (A) at 533

Marks v Port Elizabeth Tramway Co 1939 EDL 35

Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 797E-G

Menell, Jack Hyman and Co v Geldenhuys 1972 (1) SA 132 (C) at 136G-H C

Millman NO v African Eagle Life Assurance Society Ltd 1981 (4) SA 630 (C)

Minister of Finance and Another v Law Society, Transvaal 1991 (4) SA 544 (A) at 547D-J

Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 578F-579I D

Minister of Law and Order v Kader 1991 (1) SA 41 (A)

Ex parte Neethling and Others 1951 (4) SA 331 (A)

Nimed Medical Aid Society v SEIPP and Others NNO 1989 (2) SA 166 (D) E E

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C

R v Detody 1926 AD 198

R v Friedman 1948 (2) SA 1034 (C)

R v Maharaj 1950 (3) SA 187 (A) at 194A-E F

R v Rathanji and Another 1950 (4) SA 170 (N) at 172C-E

R v Priest 1931 AD 492

S v Mills 1980 (4) SA 223 (ZA) at 227H-228B

S v Scher 1968 (1) SA 239 (C) at 241E-242E

S v Temple 1978 (3) SA 185 (W) at 186F-188B G

Shabaan Bin Hussein and Others v Chong Fook Kam and Another [1969] 3 All ER 1626 (PC) at 1630

Sinovich v Hercules Municipal Council 1946 AD 783 at 804

Smith v Desai 1903 NLR 329 at 332

Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another 1989 (4) SA 31 (T) at 33F-40J H

Devenish *Interpretation of Statutes* at 243

Du Toit *et al Commentary on the Criminal Procedure Act* at 12-13

Hiemstra *Suid-Afrikaanse Strafproses* 4th ed at 174

Hiemstra *Suid-Afrikaanse Strafproses* 5th ed at 186

McKerron *The Law of Delict* 7th ed at 261 I

Steyn *Die Uitleg van Wette* 3rd ed at 103-5

Steyn *Die Uitleg van Wette* 4th ed at 168

Steyn *Die Uitleg van Wette* 5th ed at 154-5, 168.

Cur adv vult.

Postea (September 25). J

Judgment

Harms JA: This appeal is concerned with an attachment by the appellant, the South A African Reserve Bank (the 'Reserve Bank'), of immovable property held by the respondent, Torwood Properties (Pty) Ltd ('Torwood'), under a deed of transfer dated 6 September 1968. The attachment occurred, nearly 21 years later, on 9 May 1989 and was effected pursuant to provisions of the Exchange Control Regulations ('the regulations'). These were made under s 9 of the Currency and Exchanges Act 9 B of 1933 ('the Act'). As far as this case is concerned, the regulations permit the attachment and forfeiture of money and goods involved in exchange control contraventions and provide a mechanism for the recovery of certain shortfalls upon forfeiture. C

Torwood, in due course, instituted review proceedings against the Reserve Bank in the Transvaal Provincial Division. After the filing of answering affidavits by the Reserve Bank, that application was left dormant. Much later, on 10 August 1993, Torwood launched another application (the 'time lapse application') against the Reserve Bank in the same Court. This time it applied for a declaratory order to the effect that the D attachment had lapsed due to the effluxion of time. In this regard Torwood relied upon s 9(2)*(g)* of the Act - it provides that the period of an attachment shall not exceed 36 months. In opposing this application, the Reserve Bank in turn relied upon subpara (i) of s 9(2)*(g)* which prolongs the 36-month period until one year after the final judgment in criminal proceedings related to the exchange control contravention E that gave rise to the attachment. As an alternative, and by way of a counter-application, the Reserve Bank applied for an extension of the 36-month period, something permitted by its subpara (ii). For this purpose it had to show 'good cause'. These cases were by agreement consolidated and heard as such by Zulman J. He found that *(a)* the attachment had lapsed, *(b)* the Reserve Bank was not entitled to F an extension and *(c)*, in consequence of the first finding, it was unnecessary to decide the merits of the review application. He accordingly issued the declaratory order sought by Torwood and ordered the Reserve Bank to pay the costs of both applications. The matter is before us by reason of leave to appeal granted by Zulman J. G

The fact that Zulman J did not decide the review application caused difficulties during the hearing on appeal. There was no 'judgment or order' in that application against which an appeal could have been noted. Both parties invited us, depending on the outcome of the appeal on the time lapse application, to consider the merits of the review application and to make an order on it. It is arguable that what Zulman J in H effect did by disposing of the issues in the manner set out, was to dismiss by implication the review application. This would be so because the time lapse application was based upon the assumption that the attachment had been in order. On the other hand, without a judgment or order, there was nothing against which Torwood could I cross-appeal. Something similar happened in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214A-G. But, as will be apparent, the validity of the attachment has to be decided as a material jurisdictional issue in the appeal on the time lapse application. This means that, if the attachment were invalid, Zulman J ought to have upheld the review J

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or issued a declaratory order to the same effect in the time lapse application, something A he could have done since the review papers were incorporated into and formed part of that application.

The notice of attachment B

The notice of attachment was signed by Dr J A Lombard in his capacity as Deputy Governor of the Reserve Bank. He acted in terms of powers vesting in the Treasury delegated to him in this capacity. References to the Treasury should therefore be taken to include a reference to the Reserve Bank and *vice versa*. The attachment purportedly took place pursuant to the provisions of regs 22A and/or 22C. The cause C for the attachment was that the Reserve Bank had reasonable grounds to suspect that, '*inter alia*', regs 1, 2, 3, 6, 7, 10, 14, 14A and/or 22 had been contravened. In addition, the suspicion was that these contraventions were 'in respect of' the property of Torwood; that the property had been 'involved' therein; that the property had been D obtained due to the contraventions, and/or that Torwood had 'been benefited or enriched' as a result of these contraventions.

The regulations referred to in the notice restrict the purchase and sale of foreign currency (reg 2) and the export of currency (reg 3); require of residents to transfer their rights to foreign currency to the Treasury (reg 6) and to declare their foreign assets and liabilities (reg 7); restrict the export of capital (reg 10), dealings in securities E belonging to non-residents (reg 14), and limit the purchase and sale of financial Rand (reg 14A). Regulation 1 contains definitions and reg 22 provides that a contravention of the regulations is an offence punishable with a fine and/or a term of imprisonment. The Treasury may, under prescribed conditions, attach money and goods involved in F any such contravention (reg 22A). The money or goods attached may be forfeited to the State (reg 22B) and the Treasury may recover certain 'shortfalls' upon the realisation of the money or goods forfeited (reg 22C).

Torwood and its property G

Torwood is a private property-holding company with one asset, namely the fixed property mentioned, that is erf 778 situated in the township of Forest Town in Johannesburg. The property can be described as the family home of one Robert Oliver Hill ('Hill'). Hill is said to be the main perpetrator of the exchange control H contraventions that gave rise to this attachment (and to many other attachments of money and, presumably, goods in the hands of parties other than Torwood).

The property belonged initially to Hill's father. Hill, acting as a trustee for a company to be formed, purchased the property from his father at the beginning of 1968. Torwood I was then incorporated and took transfer, all in the same year. Alterations and additions were effected during the period 1967 to 1984 and these were mainly financed by way of loans by Syfrets Mortgage Nominees ('Syfrets'), secured by way of participation mortgage bonds over the property. The arrangement between Hill and Torwood was that he and his family would occupy the J

home and be liable for its upkeep and expenses, including the bond payments due to A Syfrets. Important to this case is the fact that a company, Phoenix Management Services (Pty) Ltd ('Phoenix'), had, over the period December 1986 to February 1989, made the necessary bond repayments on behalf of the Hill family to Syfrets, totalling R116 087,90. Some of the payments were made from attached Phoenix funds released by the Reserve Bank for some or other purpose, but nothing turns on this. B

The original directors and shareholders of Torwood were Hill and his wife. Their shares were transferred (respectively in 1982 and 1976) to R O Hill Holdings (Pty) Ltd and from there (also in 1982) to four so-called children's trusts. Mrs Hill and one C Mr Evans are the directors of Torwood. Hill and his wife are neither trustees nor beneficiaries of any of these trusts. I may add that it is not alleged that Evans, Mrs Hill or the Hill children were in any way involved in any illegalities committed by Hill. More need not be said in this regard because the shares in Torwood have not, as far as we D know, been attached and the propriety of the acquisition of the shares by the trusts involved has not been raised as an issue.

The exchange control contraventions

For purposes of this matter it must be accepted that Hill had been involved in exchange E control contraventions since about 1974 until approximately 1987. The detail is not now of any concern. A summary of some of the allegations against him are to be found in *Francis George Hill Family Trust v South African Reserve Bank and Others* 1990 (3) SA 704 (T). Many allegations have no bearing at all on Torwood or its property. Relevant to this case is the allegation that during 1986 to 1987 Hill had made F immense profits mainly through financial Rand round-tripping. In this process, it is said, he used forged Escom loan stock certificates. Most of the illegal dealings took place in the name of trusts or companies under his control. In particular, Advanced Farming Ventures SA (Pty) Ltd, later known as Securities Investments Corporation G (Pty) Ltd, fraudulently dealt with financial Rand and manipulated its mechanism. In the financial year ending on 28 February 1986 it generated an income in excess of R9 million. A significant portion of this ill-gotten gain was transferred to Phoenix. (I have mentioned that Phoenix had made the payments in issue to Syfrets of Torwood's bond indebtedness towards Syfrets.) H

It has also to be assumed that Hill is a fugitive from the South African justice system. Although a declared insolvent, he lives in some opulence in London and New York. A warrant for his arrest on charges of fraud and the contravention of the regulations was issued on 10 May 1989. An application for his extradition from the USA, based on I this warrant, was unsuccessful and the warrant was subsequently withdrawn. Conscious of the fact that it was unlikely that a foreign country would extradite someone on charges of the contravention of the regulations, the Attorney-General of the WLD withdrew all such charges and drew an indictment based solely on the common-law crimes of forgery, uttering J

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and fraud relating to the use of forged Escom loan stock certificates in the purchase A and sale of financial Rands. A new application for extradition - now from the UK - was prepared. In it the Attorney-General undertook not to prosecute Hill for any contraventions of the regulations. This new indictment was entered by the Registrar in the case register of the WLD on 10 May 1991 and the Attorney-General on the same B day took the first steps towards the extradition of Hill. When this case was heard in the Court below, some three years later, the indictment had not yet been served on Hill. We have been informed from the bar that the extradition proceedings have not been finalised.

Regulation 22A C

As mentioned, the attachment was based in part upon this regulation. According to its title, it deals with the 'attachment of certain money and goods and also with the blocking of certain accounts'. It is a lengthy and convoluted provision and abounds with alternatives but its essence, for present purposes, can be gleaned from this extract: D

> '22A (1) Subject to the provisions of the proviso to subpara (i) of para *(b)* of s 9(2) of the Act, the Treasury may in such manner as it may deem fit -
>
> *(a)* attach -
>
> (i) any . . . goods, notwithstanding the person in whose possession it is, in respect of which a contravention of any provision of these regulations E has been committed or in respect of which an act or omission has been committed which the Treasury on reasonable grounds suspects to constitute any such contravention, . . .;
>
> (ii) any . . . goods, notwithstanding the person in whose possession it is -
>
> *(aa)* which the Treasury on reasonable grounds suspects to be involved in a contravention of any provision of these regulations . . .;

F

(bb) which have been obtained by any person or are due to him, whether by virtue of any personal right or otherwise and which would not have been obtained by him or would not have been due to him if any such contravention or failure or any such act or omission had not been committed;

(cc) by which any person has been benefited or enriched as a result G of any such contravention or failure or any such act or omission, ...'

The proviso referred to in the opening lines of reg 22A(1) reads as follows:

'Provided that, in the case of any person other than the offender or suspected offender, H no such money or goods shall be blocked, attached, interdicted, forfeited and disposed of if such money or goods were acquired by such person *bona fide* for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations.'

The proviso applies *prima facie* to Torwood because it is neither an offender nor a suspected offender. The question is then simply whether Torwood had acquired the I attached immovable property *bona fide* for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations. The answer is not in doubt and I did not understand counsel for the Reserve Bank to argue otherwise. The property had been acquired by Torwood many years before Hill committed any contravention of the Regulations. J

HARMS JA

There is no suggestion in the voluminous papers filed on behalf of the Reserve Bank A that Torwood's purchase of the property had not been *bona fide*, that the purchase price paid by Torwood did not represent reasonable consideration or that the purchase did not take place in the ordinary course of business. Evidently, in issuing the notice of attachment, the Reserve Bank had completely overlooked this important proviso. This conclusion disposes of the attachment insofar as it was based upon reg B 22A - it was clearly invalid.

Regulation 22C

The attachment was also based upon reg 22C. I am not bold enough to paraphrase it and have to quote it. C

'Recovery of certain amounts by Treasury

22C (1) When the Treasury has, under reg 22B, forfeited to the State money or goods referred to in para *(a)*, *(b)* or *(c)* of reg 22A(1) and such money and the proceeds of the realisation of such goods, if any, are less than an amount equal to an amount -

D

(a) in respect of which a contravention or failure or act or omission referred to in subpara (i) of reg 22A(1)*(a)* has been committed;

(b) which was involved in a contravention or failure or act or omission referred to in subpara (ii)(*aa*) of that regulation;

(c) which has been obtained by any person or is due to him as referred to in subpara (ii)(*bb*) of that regulation;

E

(d) by which any person has been benefited or enriched as referred to in subpara (ii)(*cc*) of that regulation,

or when no money or goods have been forfeited for the State under the said reg 22B, the Treasury may recover an amount equal to the difference between the last-mentioned amount and the first-mentioned amount of money and proceeds or an amount equal to the last-mentioned amount, as the case may be -

F

(i) from the person who committed the contravention or failure or act or omission in question;

(ii) from the person who the Treasury on reasonable grounds suspects to have committed the contravention or failure or act or omission in question;

(iii) from the person benefited or enriched as a result of the contravention or failure or act or omission in question;

G

(iv) if more persons have committed the contravention or failure or act or omission in question or if the Treasury on reasonable grounds suspects that more persons have committed any such contravention or failure or act or omission or if more persons have been benefited or enriched as a result of the contravention or failure or act or omission in question, separately and jointly from those persons,

H

by attaching in such manner as it may deem fit any other money, including money in a blocked account referred to in reg 4, or other goods of the person or persons concerned.

(2) The Treasury may, if it on reasonable grounds suspects that it will be necessary in due course to recover under subreg (1) any amount from the person or persons concerned, at any time on or after the date on which money or goods referred to in I para *(a)* of reg 22A(1) have or could have been attached, issue or make an order in such manner as it may deem fit in or by which any person is prohibited -

(a) to withdraw or cause to be withdrawn any money held in any account or not more than an amount of it determined in its discretion by the Treasury, with J

HARMS JA

due regard to the amount which in the opinion of the Treasury will in due A course be recovered, or to appropriate in any manner any credit or balance in that account;

(b) to deal in any manner as may be determined by the Treasury with any goods as may be determined by the Treasury of the person or persons concerned,

without the permission of the Treasury and in accordance with such conditions (if any) B as may be imposed by the Treasury.

(3) The provisions of -

(a) subreg (1) and (3) of reg 22B shall apply *mutatis mutandis* to any money or goods referred to in subregs (1) and (2) of this regulation as if such money or goods were money or goods referred to in reg 22A;

(b) subreg (3) of reg 22A shall apply *mutatis mutandis* to an order issued or made under subreg (2) of this regulation.' C

What is contemplated by the regulation, in very general terms, seems (by way of an example) to be this: A contravention of the regulations is committed. The amount involved is Rx. That amount may be recovered by the Treasury. It may recover by attaching and declaring forfeit, for example, the money 'involved' in the contravention. D If that Rx cannot be found, the shortfall may be recovered by the attachment of 'other' (untainted) money or goods from the persons mentioned in subpara (i) to (iv) of reg 22C(1). Turning then from the general to the specific: Torwood is not a person defined in either subpara (i) or (iv). That is common cause. Counsel for the Reserve E Bank, rather faintly I thought, argued that subpara (ii) might apply. The submission was that the Court had to lift the corporate veil shrouding Torwood and would find Hill lurking beneath it. I reject the argument. The provision is clear. A claim may be made against a person suspected of having committed the contravention. Torwood is not such a person. Torwood is also not, on the evidence, a front for Hill. The money paid on behalf of Torwood to Syfrets was money to which Torwood was entitled. Fraud is F not alleged in relation to any aspect of the business of Torwood, nor has a case of the misuse of its separate legal personality been suggested

in the affidavits (cf *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 802H-804E). That leaves for consideration subpara (iii): Is Torwood a G person who 'benefited or (was) enriched as a result of *(a)* contravention . . . in question'? The wording of this provision stands in contrast to that of subpara (ii) and (iv). In those two cases the Reserve Bank is entitled to act on a suspicion based on reasonable grounds. In the category under consideration (and under (i)) a suspicion is H not enough. The shortfall can only be recovered if, as a fact, Torwood has benefited or been enriched as a result of a contravention. That was not the basis of the attachment notice. It merely recorded, in this context, that 'the Bank on reasonable grounds suspects' the property to be 'goods . . . by which (Torwood) has been benefited or enriched as a result of any such contravention . . .'. The affidavits also say I no more. In fact, the reason why nothing attached as a result of Hill's activities has yet been declared forfeited, is because of the desire of the Reserve Bank to obtain more information at the criminal trial. It was said during argument that without that additional information it cannot make a responsible decision.

In any event, it seems to me that the attachment of untainted goods in J

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terms of reg 22C(1) was premature. This subregulation presupposes that the shortfall A is actual and not merely suspected. If a shortfall is suspected, albeit on reasonable grounds, the remedy is to be found in subreg (2). It permits of a type of interim interdict. This means that, in the special circumstances of this case, the Reserve Bank misconceived its remedy. The appropriate 'order' may have been one made under B subreg (2) - but that was not issued.

In conclusion on this part of the case, I do not accept that it can be said that Torwood 'benefited' or was 'enriched' as a result of any contravention of the regulations. To recall some facts mentioned earlier with some additions: Phoenix received tainted funds. It also had untainted income. It paid Torwood's bond obligations to Syfrets. The C money so used may or may not have been tainted. It made these payments on behalf of Mrs Hill. She was entitled to director's fees from Phoenix. She (and/or Hill) was contractually obliged towards Torwood to make these payments. Syfrets and (indirectly) Torwood received nothing to which they were not legally entitled. In the D light of all this it seems to me that there is no real link between Hill's contraventions and the reduction of Torwood's bond obligations, ie the benefit or enrichment was not the 'result of' ('as gevolg van') the contravention (cf s 9(2)*(b)*(i)(*cc*) of the Act, the enabling provision of this regulation). Any other interpretation would mean that if an E offender under the regulations rents, say, an apartment from a third and innocent party and he pays his rental with tainted money, all the landlord's assets can be forfeited in order for the Reserve Bank to recover any shortfall (expected in this case to be approximately R40 million) under reg 22C. This bizarre result could never have been intended by any relevant lawgiver, and, if intended, it should have been stated F unequivocally. The laws of Draco were severe, but at least the citizens of Athens had no doubts about their meaning.

Conclusion

It follows from the aforegoing that I am satisfied that the Deputy Governor of the Reserve Bank, in authorising the attachment of the immovable property of Torwood, G did not act in accordance with the relevant provisions of the regulations and that he did not have reasonable grounds for taking that action (s 9(2)*(d)*(i) of the Act). This means that Torwood was entitled to an order to that effect, either in the review or the time lapse application. It does not matter which. This result requires an amendment of the H order of the Court below. The position of the Reserve Bank is not affected thereby. The conclusion makes it unnecessary and inadvisable to express any views in relation to the respective merits of the many issues raised in the time lapse application. The costs of the appeal, in consequence, fall to be paid by the Reserve Bank. I

The following order is made:

1. The appeal is dismissed with costs, including the costs of two counsel.
2. Paragraph 1 of the order of the Court below is amended to read: J

'It is declared that the attachment order dated 9 May 1989 A made by the South African Reserve Bank of the immovable property of the applicant was null and void and of no legal effect.'

Hefer JA, Vivier JA, Marais JA and Plewman JA concurred.

Appellant's Attorneys: *Rooth & Wessels*, Pretoria; *Rosendorff & Reitz, Barry*, B Bloemfontein. Respondent's Attorneys: *Bloch, Gross & Associates*, Pretoria; *Lovius-Block*, Bloemfontein.