

SOUTH AFRICA / JUDGMENT

Kerkhoff v Minister of Justice and Constitutional Development and Others (2011 (2) SACR 109 (GNP)) [2010] ZAGPPHC 5; 14920/2009 (10 February 2010) [2010] ZAGPPHC 5

COURT

North Gauteng High Court, Pretoria

BEFORE

B.R. Southwood, J. Hiemstra

CASE / FILE NUMBER

14920/2009

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IN THE HIGH COURT OF SOUTH
AFRICA(NORTH GAUTENG
HIGH COURT, PRETORIA)

Date: 2010-02-10

Case Number: 14920/2009

In the matter between: KERKHOFF, GEORG
WILHELM
Applicant
and
MINISTER OF JUSTICE AND
CONSTITUTIONAL
DEVELOPMENT First
Respondent
MINISTER OF
SAFETY AND SECURITY Second
Respondent
DIRECTOR OF
PUBLIC PROSECUTIONS Third
Respondent
ADVOCATE J
CRONJE Fourth
Respondent
CAPTAIN COLLIN
MORRIS, RANDBURG SAPS Fifth
Respondent

TEDDY BEAR
CLINIC
Sixth
Respondent
OMAR, SHAHEDA
Seventh
Respondent

JUDGMENT

SOUTHWOOD J

- [1] In his notice of motion the applicant seeks the following final relief:
- (1) An order that the second respondent and/or the third respondent and/or the fourth respondent and/or the fifth respondent, be found in contempt for his or her failure to comply with the Court Orders granted by their Worships, Mrs. Nong on the 12th of June 2008 under case number C488/08, and Mr. L. Mathee, on the 8th of October 2009 under case number SH184/08.
 - (2) An order sentencing the second respondent and/or the third respondent and/or the fourth respondent and/or the fifth respondent to
 - (i) imprisonment, suspended on condition that the second respondent and/or the third respondent and/or the fourth respondent and/or the fifth respondent forthwith comply with the court orders granted by their Worships, Mrs. Nong, on the 12th of June 2008 under case number C488/08, and Mr. L. Mathee, on the 8th of October 2008 under case number SH184/08;
 - (ii) a fine, suspended on condition that the second respondent and/or the third respondent and/or the fourth respondent and/or the fifth respondent forthwith comply with the court orders granted by their Worships, Mrs. Nong, on the 12th of June 2008 under case number C488/08, and Mr. L. Mathee, on the 8th of October 2008 under case number SH184/08.
 - (3) An order directing the sixth and seventh respondents to make the contents of the docket, such contents as are in their possession, that is the A, B and C sections of the docket, and the documents as contained in annexure 'A' which is attached to the notice of motion, available to the applicant.
 - (4) An order that the costs be paid by the second respondent and/or the third respondent and/or the fourth respondent and/or the fifth respondent, jointly and severally, the one to pay, the others to be absolved.
 - (5) An order that the costs be paid by the first respondent, sixth respondent and seventh respondent, in the event that he or she opposes the matter.

The applicant persisted in seeking this relief until the applicant's counsel informed the court, during argument, that the applicant no longer seeks relief against the second, third, fourth and fifth respondents. The merits of the applicant's cause of action must nevertheless be considered as the second, third, fourth and fifth respondents seek costs orders against the applicant on the scale as between attorney and own client.

- [2] The second to seventh respondents filed notices of opposition to the application as well as answering affidavits. The second to fifth respondents persist in their opposition to the grant of the relief sought but on 25 September 2009 the sixth and seventh respondents withdrew their opposition to the application and gave notice that they abide by decision of this court.
- [3] This is an opposed application for final relief. It is well-established that in such proceedings where there are disputes of fact the final relief sought will be granted only if it is justified by the respondent's allegations of fact together with the applicant's allegations of fact which are admitted by the respondent, subject to the court's power to reject on the papers bald or uncreditworthy denials or fictitious disputes of fact raised by the respondent or where the respondent's version is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it on the papers – see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 634G-635C; *Zuma v National Director of Public Prosecutions* 2009
- (1) SACR (SCA) para
- 26. In the present case there is no request that any of the respondents' denials or allegations of fact be rejected and the case must be decided on the facts admitted and alleged by the respondents.
- [4] The applicant, a Catholic priest, faces seven charges in the Brits regional court: three counts of sexual assault (contravening s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007) ('the Act'); three counts of compelling or causing children to witness a sexual act (contravening s 21(1) of the Act) and one count of assault. The state intends to call the five complainants, all boys aged 10 or 11, to testify against the applicant. The state intends to use the provisions of section 170A of the Criminal Procedure Act, 51 of 1977 ('CPA') to enable the five complainants to testify with the assistance of an intermediary. This means that at the commencement of the trial the state will request the court to appoint an intermediary or intermediaries to assist the complainants to give evidence. To assist the court to make its decision the state obtained intermediary reports from the sixth respondent's employee, Shaheda Omar (seventh respondent) who is a qualified social worker. The seventh respondent's reports indicate that the five complainants should testify through an intermediary. The applicant intends to oppose the appointment of an intermediary or intermediaries to assist the complainants. The applicant wishes the complainants to testify in open court without the protection that section 170A of the CPA affords to children, particularly those under the age of 14 years. The applicant intends to attack the seventh respondent's assessment of the five children and the reports which she

prepared. According to the applicant's attorney the applicant wishes to show, before the trial commences, that the evidence of the five complainants is neither competent nor admissible. For that reason the applicant seeks the seventh respondent's working papers containing the raw data from which she compiled her reports. These are the documents listed in the Annexure 'A' which is attached to the notice of motion. The sixth and seventh respondents refuse to make these documents available to either the prosecution or the defence.

- [5] To properly appreciate what the applicant intends to do the relevant procedure must be understood. The relevant provisions of section 170A of the CPA provide as follows:

'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any matter other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place –

- (a) which is informally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.'

- [6] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009

- (2) SACR 130 (CC) the Constitutional Court exhaustively considered the constitutionality, meaning and implementation of subsection (1) of section 170A read with subsection (3). With regard to the need for intermediaries to be appointed, particularly for young children, the court considered the effect of a trial on a child witness (paras 100-109) and was clearly of the view that in most cases involving sexual offences this would be essential to avoid undue mental stress or suffering. With regard to implementation the relevant parts of the judgment may be summarised as follows:

- (1) Ordinarily the procedure that would be followed in all matters involving child complainants in sexual offence cases is that the child would be assessed prior to testifying in court to determine whether the services of an intermediary should be used and, if the services of an intermediary are indicated, the state would apply at the commencement of the trial for the appointment of an intermediary (paras 111 and 112);
- (2) However, even where the prosecutor does not raise the question of the appointment of an intermediary the judicial officer must of his or her own accord, raise the need for an intermediary to assist the child complainant in a sexual offence case in giving his or her testimony (paras 111 and 113). This means that in every trial in which a child is to testify, the court must enquire

into the desirability of appointing an intermediary (para 114);

- (3) The nature of the enquiry that is required is not akin to a civil trial and there is no burden of proof. It is an enquiry which is conducted in the interests of a person who is not a party to the proceedings but who possesses constitutional rights. The overriding consideration at the enquiry is to prevent the child from exposure to undue stress that may arise from testifying in court. (This is comprehensively described by the court in paras 100-109.) What is required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed (paras 114-115);
 - (4) Following the approach outlined in the judgment not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. These special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all (para 116).
- [7] It is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed. It is not concerned with whether the child is competent to give evidence or whether the child's evidence is admissible, credible or reliable. These are issues which will arise in the trial and will be decided by the court in the light of all the evidence. It is significant that section 170A makes provision for a simple procedure for the appointment of an intermediary and essential jurisdictional fact: i.e. when it appears to the court that the relevant witness would be exposed to undue mental stress and suffering; and that no provision is made for the accused to oppose the appointment of an intermediary. While an accused must have a right to be heard on the issue it seems to me that in the case of a witness of ten or eleven it is very unlikely that a court would conclude that it is not in the interests of the witness to appoint an intermediary. As pointed out by the Constitutional Court the appointment of an intermediary will ensure that the trial is fair.

[8] To make out a case for contempt of court the applicant must prove the following beyond reasonable doubt:

- (1) that an order was made against the respondent;
- (2) that the respondent has knowledge of the order, either as a result of service or notice;
- (3) that the respondent has not complied with the order; and
- (4) that the respondent's non-compliance with the order is wilful and mala fide.

Once the applicant has proved that an order was made against the respondent, that the respondent has knowledge of the order and that the respondent has not complied with the order the respondent bears the onus of proving that he or she did not do so wilfully and mala fide. If the respondent fails to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. The applicant will then be entitled to a declarator and other appropriate remedies – see *Fakie NO v CC II Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 6-10.

[9] To make out a case for the other substantive relief sought (i.e. that the sixth and seventh respondents make available to the applicant the documents listed in annexure 'A' to the notice of motion) the applicant must demonstrate that he has a right to have access to the documents. In this regard, in the founding affidavit the applicant relies on the court order made by the regional magistrate, Brits, on 8 October 2008 and section 32(1)(b) of the Constitution. The applicant does not attempt to make out a case in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). As far as the court order is concerned the applicant regards the documents listed in annexure 'A' to the notice of motion as part of the docket which the district

court on 12 June 2008 ordered the prosecution to hand over to the applicant. The third and fourth respondents deny that these

documents form part of the docket.

[10] The applicant alleges that the police docket consists of three sections: section A, containing witnesses' statements taken by the investigating officer; expert reports and documentary exhibits: section B containing witnesses' reports and memoranda: and section C containing the investigation diary – see *Shabalala and Others v Attorney-General of Transvaal & Another* [1995] ZACC 12; 1996

(1) SA 725 (CC) para 10. The docket obviously includes the intermediary reports compiled by the sixth and seventh respondents which, it is not disputed, were handed to the applicant's legal representatives after the district court made its order on 12 June 2008 and before the regional court made its order on 8 October 2008. The documents listed in annexure 'A' are the seventh respondent's working papers containing the raw data used by the seventh respondent to compile the reports and have never left the possession of the sixth and/or seventh respondents. The sixth and seventh respondents regard these documents as

confidential and refuse to make them available to the fifth respondent (the investigating officer) or the fourth respondent (the prosecutor who is to conduct the trial in the Brits regional court).

[11] In *Shabalala* at 756I-757I the Constitutional Court stated the legal position with regard to disclosure of documents in the police docket to be as follows:

- ‘1. The ‘blanket docket privilege’ expressed by the rule in *R v Steyn* 1954 (1) SA 324 (A) is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purpose of enabling the accused properly to exercise his or her right to a fair trial in terms of s 25(3).
2. The claim of the accused for access to documents in the police docket cannot be defeated merely on the grounds that such contents are protected by a blanket privilege in terms of the decision in *Steyn’s* case.
3. Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.
4. Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such of the contents of a police docket as are relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. This will depend on the circumstances of each case.
5. The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secret or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
6. Even where the State has satisfied the Court that the denial of access to the relevant documents is justified on the grounds set out in para 5 hereof, it does not follow that access to such statements, either then or subsequently must necessarily be denied to the accused. The court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in para 5 (if such access is permitted) against the degree of the risk that a fair trial may not enure for the accused (if such access is denied). A ruling by the court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of

circumstances disclosed by the further course of trial.’

[12] The relevant facts may be summarised briefly as follows:

- (1) In February 2008 the applicant’s attorney, Ms. Renate Hertenberger, became aware that the applicant was being investigated for allegedly indecently assaulting four young boys who were members of his First Communion class. She immediately instructed counsel and made contact with the investigating officer (fifth respondent). She did this to convey to the investigating officer that there was no case against the applicant and that he was not a flight risk.
- (2) On 5 March 2008 Ms. Hertenberger and counsel met the investigating officer and were able to satisfy him that the applicant was not a flight risk and surrendered the applicant’s passport to the investigating officer. Thereafter Ms. Hertenberger and counsel unsuccessfully attempted to have the case against the applicant withdrawn.
- (3) On 5 June 2008 the applicant appeared in the Brits district court when the case was postponed for further investigation and for the state to obtain intermediary reports.
- (4) On 12 June 2008 the applicant applied to the Brits district court for an order that the whole police docket (i.e. sections A, B and C) be disclosed to the applicant. The public prosecutor (not the fourth respondent) opposed discovery of sections B and C. After evidence was led regarding the state’s reasons for not discovering the entire docket the district court ordered that the whole docket (i.e. sections A, B and C) be discovered. Immediately after the hearing copies of the documents in the docket were made and were handed to the applicant’s attorney.
- (5) The relevant part of the court order made on 12 June 2008 states simply – ‘Application to have B & C part of the docket granted’. There is no indication that the order was made against anyone other than the state and there is no indication that the parts of the docket to be discovered included the documents listed in annexure ‘A’ to the notice of motion.
- (6) On 12 August 2008 the applicant appeared in the Brits regional court and the case was postponed for trial on 8 and 9 October

2008. The state sought the postponement so that it could obtain intermediary reports.

- (7) On 8 October 2008 the trial was postponed to 23 March 2009. The trial was postponed because the German interpreter was not available. At the hearing, the applicant’s counsel applied to the court for the applicant to have access to the tests done on the complainants and handed in a list of the documents (annexure ‘A’) to which access was sought. The prosecutor (not the fourth respondent) had no objection to this request and the court ordered –

‘that defence be supplied with all the issues and documentation raised in the list annexed hereto annexure “A”’.

The prosecutor and the applicant's legal representatives then agreed that the state would supply the defence with the relevant tests mentioned in annexure 'A' on 17 October 2008. There is no suggestion that the documents listed in annexure 'A' formed part of the docket or were available at court on 8 October 2008. There is also no suggestion that the seventh respondent was present when the undertaking was given and agreed to make the documents available for the applicant.

- (8) The prosecutor in the Brits regional court (not the fourth respondent) did not make the documents listed in annexure 'A' available to the applicant's legal representatives on 17 October 2008.
- (9) On 11 November 2008 a meeting was held between the applicant's legal representatives and the Deputy Director of Public Prosecutions, Adv. Meintjies SC, and the fourth respondent who had been appointed to conduct the trial in the Brits regional court, to discuss inter alia discovery of the documents listed in annexure 'A'. The applicant's counsel requested Adv. Meintjies' assistance in obtaining the documents and Adv. Meintjies undertook to ascertain from the investigating officer (fifth respondent) when the documents would be provided. The applicant's counsel also requested permission to consult with the five complainants which Adv. Meintjies refused.
- (10) After the meeting the fourth respondent perused the docket and established that the documents listed in annexure 'A' did not form part of the docket and that they were not in the state's possession but were in the possession of the sixth and/or seventh respondents. The fourth respondent communicated with the investigating officer to establish what the situation regarding the documents was and was informed by him that the seventh respondent would not make the documents available as they were regarded as private and confidential. Nevertheless, the investigating officer did obtain pro-forma documents (structural questionnaires and anatomical drawings) and an explanatory note by the seventh respondent with regard to the techniques used to assess the complainants. The third respondent faxed these documents to the applicant's attorney on 1 December 2008 under cover of a letter pointing out that the state had never been in possession of the documents listed in annexure 'A' and that counsel for the state had been informed that the documents were private and confidential and would not be made available to the state or the defence.
- (11) On 30 May 2008 the seventh respondent was instructed by the state to ascertain whether the complainants would be competent to testify against the applicant in criminal proceedings and whether an intermediary was needed. On 9 June 2008 the seventh respondent conducted interviews with the complainants, recorded her observations and compiled the assessment reports. The seventh respondent then furnished the reports to the state's representative with the recommendation that the complainants would be competent to testify in the proceedings through an intermediary. Late in 2008 the investigating officer communicated with the seventh respondent and requested her to furnish him with all the documents relating to the tests which she had conducted on the complainants as well as the seventh respondent's process notes and summaries. The seventh respondent refused to furnish the investigating officer with these documents because of the sixth respondent's

policy in terms of which the relevant documents are considered to be private and confidential. This policy was formulated because children, their guardians and their parents, approach the sixth respondent accepting that their communications with the sixth respondent will not be disclosed. Such confidentiality is essential to maintain the relationship between the sixth respondent and the people who seek its assistance. The sixth and seventh respondents persist in the view that the documents sought are private and confidential.

(12) The sixth and seventh respondents have no knowledge of the court order made on 8 October 2008 and they were not parties to these proceedings.

[13] In view of these facts it is clear that no order was made against the second, fourth and fifth respondents to discover documents. At best for the applicant the fourth respondent, in a representative capacity, was ordered to discover documents. It is also clear that there was full compliance with the district court's order of 12 June 2008. Copies of all the documents in sections B and C of the police docket were made and handed to the applicant's legal representatives on 12 June 2008. Insofar as the third respondent, in a representative capacity, was, on 8 October 2008, ordered to make available the documents listed in annexure 'A', it is clear that the third respondent was not and never had been in possession of the documents and that because of the sixth and seventh respondent's refusal to make the documents available the third respondent could not comply with the order. The third respondent has shown that any non-compliance on his or her part was not wilful or mala fide. The applicant's claim for relief based on contempt of court therefore could not succeed. In the applicant's heads of argument the applicant's counsel did not make submissions in support of this relief and at the hearing the applicant's

counsel informed the court that the applicant was not persisting with this part of the case. It is clear that the applicant never had a case for relief for contempt of court and that the applicant has put the relevant respondents to considerable trouble and expense to oppose the application.

[14] With regard to the applicant's claim that the sixth and seventh respondents be ordered to make available the contents of the docket and the documents listed in annexure 'A' it is clear that the applicant has already received copies of the documents in sections A, B and C of the docket and that the sixth and seventh respondents are in possession of the documents listed in annexure 'A', regard them as privileged and confidential and refuse to make them available to the applicant or the prosecution.

[15] The issue is whether the applicant has demonstrated a right to disclosure of the documents listed in annexure 'A', which are in the possession of the sixth and seventh respondents which they refuse to make available to the applicant. In argument, consistent with the allegations in the founding affidavit, the applicant's counsel contends that the sixth and seventh respondents are obliged to make the documents listed in annexure 'A' available –

(1) in terms of the rules laid down in the Shabalala

judgment.

He argues that the documents form part of the docket even though they are not and never have been physically part of the docket;

(2) in terms of section 32 of the Constitution, the relevant part of which provides that –

‘Everyone has the right of access to –

(b) any information that is held by another person and that is required for the exercise or protection of any rights’

[16] The sixth respondent is a company incorporated in terms of section 21 of the Companies Act 61 of 1973 and the seventh respondent is an employee of the sixth respondent and a private person. Neither is part of the prosecution. The seventh respondent may become a witness simply for the purpose of establishing the need for the appointment of an intermediary or intermediaries to assist the complainants to give evidence. The documents listed in annexure ‘A’ which are in their possession are not covered by the rules in the Shabalala

judgment.

Applicant’s counsel contends that they are because they are part of the docket but was unable to refer to a judgment in which this has pertinently been decided. It is clear that the applicant is bound by the third and fourth respondents’ denial that these documents form part of the docket.

[17] As far as section 32 of the Constitution is concerned the applicant’s counsel did not provide any authority for the proposition that the applicant is entitled to simply rely on this section in the Constitution and ignore the provisions of PAIA which was enacted to give effect to section 32 of the Constitution. In *Institute for Democracy in South Africa v ANC* 2005

(5) SA 39 (C) para 17 the court found that ‘s 32 of the Constitution provides the underlying basis for and informs the rights contained in PAIA, but that the section itself is subsumed by PAIA, which now regulates the right of access to information’; that parties must assert the right via the Act and therefore that s 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA. In support of this conclusion the court quoted with approval the following passage from *The Promotion of Access to Information Act Commentary* by Iain Currie and Jonathan Klaaren para 2.12 at 25-26 –

‘When can the constitutional right of access to information be directly relied on? The answer is only in the exceptional case where a provision of the AIA, other legislation or conduct beyond the reach of the AIA is challenged as an infringement of s 32. This answer is in accordance with the principle of avoidance which dictates that remedies should be found in common law or legislation (interpreted or developed, as far as possible, so as to comply with the Constitution) before resorting to direct constitutional remedies. It is related to the principle that norms of

greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority that s 32(2) accords to Parliament to give effect to the constitutional right of access to information. This means that the Act must be treated as the principal legal instrument defining and delineating the scope and the content of the right of access to information, establishing the mechanisms and procedures for its enforcement and limiting the right where necessary. The Constitutional right therefore recedes to the background, indirectly informing the interpretation of the Act but rarely directly applicable.’

I respectfully agree with the views of the learned authors and the reasoning of the court in *Institute for Democracy in South Africa v ANC supra*.

[18] The applicant is therefore bound to seek access to the documents listed in annexure ‘A’ in accordance with the provisions of PAIA. The applicant has not attempted to do so and has simply relied on the provisions of s 32 of the Constitution. In argument the applicant’s counsel conceded that he had not considered the provisions of PAIA and he was uncertain as to whether the Act applied or not. First he submitted that PAIA does not apply and then he submitted that it does. If the Act does apply the applicant would have been obliged to request the access to the documents in the prescribed form and the sixth and seventh respondents would have had 30 days to decide whether or not to comply with the request. PAIA provides in s 65 that the head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement. In view of the sixth and seventh respondents’ response to the request it is more than probable that the respondent would have raised an objection based on s 65. If the Act does not apply, then the applicant cannot rely on its provisions or s 32 of the Constitution. He must use the other methods at his disposal,

which, according to his counsel, include a subpoena duces tecum, a subpoena to the seventh respondent and attempting to obtain the documents through her. If the seventh respondent refuses to make the documents

available the issue of whether the applicant is entitled to the documents could then be debated and the trial court would have to decide whether the sixth and seventh respondents are obliged to make the documents available.

[19] The applicant has therefore not demonstrated a right to access to the documents listed in annexure ‘A’ which are in the possession of the sixth and seventh respondents and his application must be refused.

[20] The second, third, fourth and fifth respondents seek an order for costs against the applicant on the scale as between attorney and own client. The reason for this is that the applicant’s application against them was vexatious as described in *In Re Alluvial Creek Limited* 1929 CPD 532 at

535. (A passage approved by the Appellate Division in *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and Another* 1997
- (1) SA 157 (A) at 177D-F subject to a rider which is not relevant for present purposes.) In my view the request is justified. The application was launched with little thought as to what had to be proved for relief based on contempt of court. Despite the fact that the facts did not support a cause of action against the second, third, fourth and fifth respondents the applicant persisted in seeking the relief until the decision was taken, during argument, not to seek the relief.
- [21] This application has served no other purpose than to delay the commencement of the trial by about one year. The one alleged purpose of the application is to obtain documents which would enable the applicant to challenge the complainants' competence to give evidence, credibility and the admissibility of their evidence at a trial within a trial during the proceedings in terms of section 170A(1) of the CPA. The other alleged purpose is to obtain the documents from the sixth and seventh respondents so that the applicant can make representations to the Director of Public Prosecutions regarding withdrawal of the prosecution. In my view both purposes are misconceived. As already pointed out, the enquiry in terms of section 170A(1) of the CPA is limited to determining whether or not an intermediary should be appointed to assist the witness to prevent the witness from being exposed to undue mental stress or suffering. The procedure envisaged does not allow for a trial within a trial of the nature contemplated by the applicant's legal representatives. The issues of competence, admissibility, credibility and reliability are issues decided by the trial court in the course of the trial or at the end of the trial. As far as representations are concerned the lack of the documents cannot prevent the applicant from making proper representations based on the evidence available and the views of the expert. In my view the comments in *Zuma v National Director of Public Prosecutions and Others* 2008
- (2) SA SACR 421 (CC) in para 65 are applicable.

Order

- [22] 1. The application is dismissed.
2. The applicant is ordered to pay the costs of the second, third, fourth and fifth respondents on the scale as between attorney and own client.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

CASE NO: 14920/2009

HEARD ON: 1 February 2010

FOR THE APPLICANT: ADV. M.S.M. BRASSEY SC

ADV. G.E. KERR-PHILLIPS

INSTRUCTED BY: Schwarz-North Inc.

FOR THE 1ST, 3RD AND 4TH RESPONDENTS: ADV. L PIENAAR

ADV. J. CRONJE

INSTRUCTED BY: Director of Public Prosecutions

FOR THE 2ND AND 5TH RESPONDENTS: ADV. D.J. JOUBERT

INSTRUCTED BY: State Attorney, Johannesburg

FOR THE 6TH AND 7TH RESPONDENTS: ADV. G. DAVIDS

INSTRUCTED BY: Eversheds

DATE OF JUDGMENT: 10 February 2010

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