

SOUTH AFRICA / JUDGMENT

Mohiudeen v Bara N.O and Others (521/2023) [2024]

ZAECQBHC 82 (5 December 2024)

[2024] ZAECQBHC 82

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Rossi, A Beyleveld

CASE / FILE NUMBER

521/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 521/2023

Matter heard on: 28 November 2024

Judgment

delivered on: 5 December 2024

In the matter between: -

SYED NADIR MOHIUDEEN First Applicant and MS BARA N.O First Respondent
DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent
MTHUTHUZELI SWARTZ Third Respondent

JUDGMENT

ROSSI AJ:

[1] This application concerns untermminated proceedings emanating from the Regional Court of the Eastern Cape in the Specialised Commercial

Crimes Court, Gqeberha, under case number CCC1/07/2019 (the “Commercial Crimes Court”) in which the applicant[1] stands accused of various offences. This application pertains to a ruling issued by the first respondent on 8 December 2022 in terms of which it was found that the second respondent had adequately replied to the applicant’s request for further and better particulars (the ‘request’) and furthermore, dismissing the applicant’s objection to the charge sheet.

[2] The applicant seeks an order reviewing and setting aside the said

ruling

and ancillary orders directing the second respondent to address and answer the request; amend the charge of fraud by removal of any reference to prejudice suffered by Transnet; and costs of the application.

[3] The application is opposed by the second respondent.

[4] The applicant, who was unrepresented at the hearing, sought, from the bar, a further postponement to obtain legal representation from the Legal Aid Board.[2] The application was opposed by the second respondent contending that these lengthy delays were a stratagem, and were causing prejudice in the criminal proceedings. The applicant, who was charged more than 5 years ago, has yet to plead. A postponement was already granted to the applicant for this very reason on 8 August 2024. The applicant enjoyed legal representation in not only the preparation of his application, but also with his heads of argument. Accordingly, I am not of the view that legal representation at this hearing would advance his case any further, nor that he would be unduly prejudiced in the presentation of his argument. As such the request for postponement was refused. I return to the present application.

[5] By virtue of the High Court's inherent power to restrain illegalities in inferior courts, this court may, in appropriate instances, by way of review, interdict or mandamus, grant relief against a decision of a magistrates' court given prior to conviction.[3] This, however, is a power which is to be sparingly exercised and only in circumstances where the court is satisfied that a grave injustice may otherwise result or where justice might not by other means be obtained.[4] The court's reluctance to interfere with unterminated proceedings stems primarily from: (i) the effect that such procedure has upon the continuity of proceedings in the court below;[5] (ii) the undesirability of hearing appeals and reviews piecemeal;[6] and (iii) the fact that redress by other means, such as review or appeal, will ordinarily be available in due course.[7]

[6] It is helpful from the outset to remind ourselves of the ambit of s 22 of the Superior Courts Act, 10 of 2013, which reads:

‘(1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are –

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and

- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or incompetent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in the Magistrates' Courts.'

Events leading to the present application

- [7] The applicant was arraigned before the Commercial Crimes Court on a charge of fraud, and in the alternative, theft. Reference is made to the provisions of s 51 of the Criminal Law Amendment Act, 105 of 1997, which pertain to the imposition of minimum sentences.[8]
- [8] For our purposes it is unnecessary to replicate the preamble and charge sheet verbatim. The gist of the preamble can be summarised as follows:
 - (a) The applicant is the sole director of Spanish Ice Logistics (Pty) Ltd ('Spanish Ice'), a corporate body as contemplated by s 332 of the Criminal Procedure Act, 51 of 1997 (the 'CPA'). The applicant has signing powers over the bank account of Spanish Ice.
 - (b) The third respondent was at all relevant times employed by Metrorail as regional manager.
 - (c) During September 2012 the applicant offered to sell to Adrian Samuels, a general manager in the employ of Akisisa (Pty) Ltd ('Akisisa'), 360 000 metric tons of used rail material, which applicant purported to have obtained from Metrorail; 25 000 metric tons of which was available and stored at Metrorail's yard in Cape Town.
 - (d) Adrian and his cousin, Cedric Samuels (collectively referred to as 'the Samuels'), travelled to the Western Cape to discuss the potential purchase and met with the applicant, who showed them documentation evidencing that he had a contract with Metrorail to purchase the said rail material and was in sale negotiations with a Turkish company.
 - (e) The Samuels were introduced to the third respondent. They were called upon to furnish a R5 million guarantee, which they did.
 - (f) Delays were encountered, and the Samuels expressed their dissatisfaction. A further meeting was scheduled with the applicant, wherein an advance of R1.5 million was requested in order to secure the release of the rail material. The said sum was deposited into Spanish Ice's bank account on 29 October 2012.
 - (g) Further delays were encountered and the applicant and Cedric travelled to the Sterkstroom and Maclear areas to identify rail material which could be uplifted pending the stock in Cape Town becoming available.
 - (h) The Samuels' mobilised a workforce and commenced uplifting the identified railway lines. They in turn had entered into contracts with buyers and part of the material was transported to the Durban harbour for export.
 - (i) On 8 February 2013 Transnet's security stopped the upliftment,

at which point approximately 42 000 metres of railway line had already been uplifted. The replacement cost is R58 872 975.00.

- (j) The railway line between Sterkstroom and Maclear was the property and in the lawful possession of Transnet and was in the process refurbishment.
- (k) At no stage did the accused have any rights to sell the rail material or authorise its upliftment.
- (l) At all times material the applicant acted in common purpose to defraud the Samuels and/or Transnet.
- (m) The misrepresentations although initiated in Cape Town were confirmed and completed during a trip to the Eastern Cape.

[9] Accordingly, the applicant was charged with fraud:

‘IN THAT during September 2012 to February 2013, and at or near Elliott (between Sterkstroom and Maclear), in the Regional Division of the

Eastern Cape, the [applicant] unlawfully, falsely and in the execution of a common purpose to defraud, gave out and pretended to

[the Samuels] and/or Akisisa, expressly or by implication that,

- [the applicant] had the right to uplift and sell rail material in the Eastern Cape and Western Cape; and/or
- [the applicant] and Spanish Ice had obtained the rights and title to disassemble and uplift railway line, identified by [applicant and third respondent] between Sterkstroom and Maclear; and/or
- [the applicant and third respondent] were entitled to authorise the Samuels and/or Akisisa to disassemble and uplift and the railway

line between Sterkstroom and Maclear and/or to sell same to prospective buyers for their own account; and/or

- The amount of R1.5 million already paid by [the Samuels], were to be regarded as part of the payment in the Eastern Cape transaction;

and

By means of the said misrepresentations, the [applicant] induced [the Samuels] and/or Akisisa, to disassemble and/or uplift the railway line between Sterkstroom and Maclear, to their actual prejudice as well as to the actual prejudice of Transnet, to the value of R58 872 975...’

[10] The alternative charge of theft reads:

‘IN THAT during September 2012 to February 2013, and at or near Elliot (between Sterkstroom and Maclear), in the Regional Division of the Eastern Cape, the [applicant] unlawfully and intentionally stole steel (the aforesaid railway line), the property of Transnet.’

[11] The applicant being dissatisfied with the formulation of the charge sheet, requested further particulars from the state in terms of s 87 of the CPA[9] on 22 February

2022. The request is detailed and comprises of 11 pages. The state responded to the request on 23 May 2022. A further request, this time purporting to be a request in terms of the Constitution, was formulated and is dated 28 February 2022. The further request was answered on 23 May 2022.

[12] By virtue of s 87(2) of the CPA, the charge is amended in conformity with such particulars furnished by the state.

[13] A notice of objection to the charges in terms of s 84(1) of the CPA[10] was delivered. It states that the charge of fraud was defective and should be amended by deletion of any reference to Transnet having suffered prejudice. This notice does not form part of the application papers nor the record but the nature of which can be gleaned from the documents serving before me.

[14] Following the submissions of heads of argument by the state, and after the hearing of comprehensive legal argument detailing not only the applicable legal principles but comprehensive submissions in respect of the queries raised and the responses thereto, the first respondent dismissed the applications. Ultimately, the first respondent found as follows:

“And in conclusion, the court finds that in terms of section 84 of the [CPA], that the particulars provided in the charge sheet by the state, they are reasonable [sic] sufficient to inform the accused of the nature charge. How the charge emanated, how the misrepresentation was made, and the results of the misrepresentation. Therefore the objection to the charge sheet is dismissed.

In terms of section 87 of the [CPA], the court is of the view that the evidence at the state’s disposal had [sic] been fully disclosed to the defence. And the allegations contained in the charge sheet have been elaborated upon in the state’s response to further particulars, as well as further and better particulars. And further documentation was also given to the defence, that was requested by the defence. The witness statements and entire contents of the docket, those were given to the defence. Therefore the accused has been placed, accused 1 has been placed in possession of sufficient details of the state’s case in order to formulate his defence and plead. And therefore the application is also dismissed.’

[15] It is this ruling, which forms the subject matter of the present review.

The review and its opposition

- [16] The applicant's review centres around five features, wherein he complains of a lack of particularity:
- (a) Common purpose and that the state failed to provide sufficient particulars regarding the nature of the agreement formed between applicant and third respondent.[11]
 - (b) Potential jurisdictional objections as the agreement evolved over time and had its origins in the Western Cape. The response being that the applicant and third respondent 'initially in the presence of each other in Cape Town, as well as during a trip to the Eastern Cape stated expressly with the other confirming expressly or tacitly by their failure to indicate to the contrary that the upliftment of the railway line in the Eastern Cape was part of the contract that was awarded to Spanish Ice.'[12]
 - (c) Precisely who made each and every representation, the response being that this was a matter for evidence and that the applicant has been furnished with the docket.[13]
 - (d) If the misrepresentation was contained in a document, such document was requested to be identified. Similarly, the response being that this was a matter for evidence.[14]
 - (e) In respect of Transnet's alleged prejudice, details were requested concerning the composition of the R58-odd million. Similarly, the response was that this is a matter for evidence.[15]
- [17] In concluding the applicant alleges that the first respondent misdirected herself in her ruling which is based on the finding that 'any evidence which the state intends to use to prove material facts is not further particulars and that the state is not obliged to disclose such evidence'.
- [18] The applicant submits that if the particulars sought are indeed matters for evidence, then taken to its logical conclusion it would mean that 'statements are in effect attached to the charge sheet. The same can be said for the response "It is in the docket"'. [16]
- [19] Regarding Transnet, the applicant contends that the charge is improper as no misrepresentations were made to Transnet which caused it to suffer prejudice.[17]
- [20] The applicant contends that he is left in a position where if the trial were to proceed on a defective charge sheet and on allegations of common purpose which have not been properly defined, a grave injustice would result.[18]

Interference with lower court proceedings

- [21] From the outset, I am mindful that the crucial enquiry in review proceedings is whether the decision-maker prevented a fair trial on the issues, and that such complaints are directed at the method or conduct of the proceedings, and not its result. Furthermore, the reasoning of the decision-maker must not be confused with the conduct of the proceedings.[19]
- [22] In Wahlhaus[20] the Appellate Division (as it then was) said:

‘(T)he prejudice, inherent in an accused being obliged to proceed to trial, and possible conviction, in a magistrate’s court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate’s decision overruling a preliminary, and perhaps fundamental, contention raised by the accused does not per se necessarily justify the Supreme Court in granting relief before conviction...As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.’[21]

[23] Intervention on review will be justified in the case of a gross irregularity which has caused or is likely to cause prejudice to an applicant.[22]

[24] In *Ismail and others v Additional Magistrate, Wynberg and another*[23] the court in assessing what constitutes a gross irregularity before conviction, stated:

‘[I] should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As point out in *[Wahlhaus supra]* at p119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate’s decision under appeal at a stage where no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in uninterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to “rare cases where grave injustice might otherwise result or where justice might not be by other means attained.” (*Wahlhaus’s case, supra* at p120).’[24]

[25] In *S v Mashinini and another*[25] it was said that:

‘Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trial by ambush.’

[26] The fact that the docket has been furnished to the applicant is another factor which informs the enquiry. Courts must guard against the abuse of s 87 of the CPA where the accused’s aim is not to advance the administration of justice, but rather to obfuscate the issues.[26] The purpose of a request for further particulars is not to allow the accused to search for possible loopholes or defences apart from the true facts and/or instructions given to legal representatives by the accused.[27]

- [27] The question that falls to be answered is whether the applicant has demonstrated that circumstances exist which justify interference in the unterminated proceedings.
- [28] An evaluation of the grounds of review reveal that same are more directed at the result of the proceedings and not the method. Reference to the role played by the decision-maker, and why it stands to be review, is framed in non-specific terms. The applicant seeks to draw legal conclusions of a grave irregularity and misdirection but the factual basis for such conclusions are absent. Where proceedings, in substance, amount to an appeal from the magistrate's decision, and in absence of circumstances justifying intervention, the courts are aligned that appeals will not be entertained piecemeal.[28] Matters must run their course and in the event of a guilty finding, the whole matter ought to be decided on appeal. [29]
- [29] The applicant fails to state: (i) what grave injustice may result, absent intervention by this court at this present stage; and (ii) in what manner the applicant is materially prejudiced, which prejudice cannot, in due course, be corrected on review or appeal.[30]
- [30] The Constitutional Court in Sidumo,[31] with reference to the distinction between the reasoning of the decision-maker and the conduct of the proceedings, a review not being competent in the former, had the following to say:

'Both Ellis and Goldfields make it plain that the crucial enquiry is whether the conduct of the decision-maker complained of prevented a fair trial of issues. The complaint must be directed at the method or conduct and not the result of the proceedings. And the reasoning of the decision-maker must not be confused with the conduct of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and at times it may be difficult to draw the line; there is nevertheless an important difference.'

- [31] There is no mention of how the conduct of the first respondent has prevented the applicant from having a fair trial of issues. Any reference to the first respondent is extremely scant. One should not conflate the two distinct concepts discussed in Sidumo, which the applicant appears to have done.
- [32] At a procedural level what is required of the state is to inform the accused of all the essential averments, and a charge sheet should contain all the essential allegations to be proven by the prosecutor in order to sustain a guilty verdict.[32] An accused should not be left speculating about an element of the offence.[33]
- [33] I am satisfied that the charge sheet, together with the preamble and further and better particulars, sets out the relevant elements of fraud, including the manner in which the offence was committed. Similarly, there is compliance in respect of the alternative charge of theft.
- [34] A further remark stands to be made regarding the complaint concerning common purpose. The doctrine is that 'if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the

execution of that purpose is imputed to the others.’[34] Where common purpose is founded on an agreement, the agreement may not be express, it may be implied in that it is inferred from the circumstances.[35] As such this is a factual question which is determined on the facts of, and in the circumstances of each case.[36] It is evident from a reading of the charge sheet, preamble and further particulars that the common purpose between applicant and his co-accused (third respondent) is adequately addressed for the purpose of pleading. Anything further is a matter for evidence. Jurisdiction, which appears to have been belatedly raised in this application for the first time, is similarly appropriately addressed and is a matter for evidence.

[35] The applicant’s concerns, which are articulated in this application, can all be addressed at trial through the course of cross-examination and evidence in rebuttal. The applicant does not find himself in the position where he does not know the charges that he is facing and is at risk of an ambush at trial. Nor do these alleged grounds of review lead to a conclusion that the conduct of the proceedings were such as to vitiate the applicant’s rights to a fair trial.

[36] After all, as was eloquently and fairly explained by Harms DP in *National Director of Public Prosecutions v King*: [37]

‘There is no such thing as perfect justice – a system where an accused person should be shown every scintilla of information that might be useful to his defence – and discovery in criminal cases must always be a compromise. Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused’s right should be subordinated to the public’s interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and ‘any new procedure can offer opportunities capable of exploitation to obstruct and delay.’ One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.’[38]

[37] There is no doubt that the first respondent considered the applicant’s objections and applied her mind thereto in determining the issues before her. This is clear from a reading of the ruling. There is nothing from the first respondent’s reasoning which suggests otherwise.

[38] Nor has an appropriate case been made out for an amendment to the charge sheet in terms of s 84 of the CPA. The applicant rather listlessly contends that as there was no misrepresentation to Transnet, reference to the alleged prejudice suffered by Transnet should be deleted. However, it is not required that the party that suffered the prejudice must be the party to whom the misrepresentation is made.[39] But again, and for the reasons stated above, this is a complaint directed at the result.

[39] Accordingly, I am not persuaded that the applicant has shown the presence of any of the grounds referred to in s 22 of the Superior Courts Act; nor has he demonstrated circumstances to satisfy this court that absent intervention, a grave injustice would result, which in due course would not be corrected on review or appeal.

[40] I am furthermore not of the view that the applicant has made out a case to warrant departing from the general principle that a High Court will not ordinarily interfere with untruncated proceedings in a lower court.

[41] Given the nature of these proceedings, I am of the view that each party should be ordered to pay their own costs.

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

1. The application is dismissed.
2. Each party is ordered to pay their own costs of the application.

T ROSSI

ACTING JUDGE OF THE HIGH COURT

I agree:

A BEYLEVELD

Appearances:

For the applicant:

Mr S N Mohuideen

Acting in person

Lansdowne

Cape Town

For the second respondent:

Mr B Mvinjelwa

Second respondent's counsel

Instructed by

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Gqeberha

Ref: 09/237/2023

- [1] Together with the third respondent, as co-accused, who is cited in these proceedings as an interested party although he has not entered the fray.
- [2] The Legal Aid Board had already refused his request, and this was subject to an appeal, although there were no guarantees that legal assistance would be afforded to him.
- [3] *Wahlhaus and others v Additional Magistrate, Johannesburg and another* ('Wahlhaus') 1959 (3) SA 113 (AD) at 119H.
- [4] *Ibid* 120A-B.
- [5] *Ibid*.
- [6] *Motata v Nair and another*
- [2008] ZAGPHC 215; 2009 (1) SACR 263 (TPD) par 12.
- [7] *Wahlhaus supra* 120A-B.
- [8] Section 51 provides for minimum sentences for certain serious offences.
- [9] Section 87(1) of the CPA reads 'An accused may at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars of further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered: Provided that the provisions of this subsection shall not apply at a stage when the accused is required in terms of section 119 or 122A to plead to a charge in the magistrates' court.'
- [10] Section 84 of the CPA which is titled 'Essentials of charge' reads as follows: '(1) Subject to the provisions of this Act and any other law relating to a particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge. (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge. (3) In criminal proceedings the description of any

statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.’

[10] Section 84 of the CPA which is titled ‘Essentials of charge’ reads as follows:

‘(1) Subject to the provisions of this Act and any other law relating to a particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.’

[11] Founding affidavit par 17 to 18. Reliance was placed on the second respondent’s response as follows – ‘The state witnesses were not privy to all communication between Accused 1 and Accused 2 and the exact nature of the agreement between the accused is unknown to the prosecutor. The trial court will be asked to find at the end of the case on the totality of the evidence that the accused formed an agreement over time in order to mislead the complainants into entering into an agreement as described in the charge sheet.’

[12] Founding affidavit at par 21.

[13] Founding affidavit at par 23 to 25.

[14] Founding affidavit par 27.

[15] Founding affidavit par 28 to 29.

[16] Founding affidavit par 35.

[17] Founding affidavit par 36.

[18] Founding affidavit par 38.

[19] Sidumo and another v Rustenburg Platinum Mines Ltd and others (‘Sidumo’) 2008 (2) SA 24 (CC) par 265 per Ngcobo J in a separate concurring

judgment.

[20] Supra at 120D.

[21] My own emphasis.

[22] Adonis v Additional Magistrate, Belville and others 2007 (2) SA 147 (C) par 22.

[23] Ismail and others v Additional Magistrate, Wynberg and another (‘Ismail’) 1963

- (1) SA 1 (A) 5G-6A.
- [24] My own emphasis.
- [25] 2012 (1) SA 604 (SCA) par 11.
- [26] A Kruger, Hiemstra's Criminal Procedure, Issue 7, 14-24.
- [27] Sithole and Others v S (25/2016) [2017] ZAFSHC 160 (12 September 2017) par 28.
- [28] African Paper Products (Pty) Ltd and another v Director of Public Prosecutions and another
- [2022] ZAECMKHC 90 (31 October 2022) par 31.
- [29] Lawrence v ARM of Johannesburg 1908 TS 525.
- [30] Ismail supra.
- [31] Sidumo supra at par 265.
- [32] S v Essop 2014 (2) SACR 495 (KZN) par 38.
- [33] Ibid par 42 and 47.
- [34] CR Snyman, Snyman's Criminal Law, 7ed, 225.
- [35] S v Moumbaris and others 1974 (1) SA 681 (T) 687A.
- [36] Tilayi v S 2021
- (2) SACR 350 (ECM) par 25.
- [37] National Director of Public Prosecutions v King 2010
- (2) SACR 146 (SCA) par 5.
- [38] Footnotes omitted.
- [39] R v Jones & More 1926 AD 350 354

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