

SOUTH AFRICA / JUDGMENT

Nel v Le Roux NO and Others
(CCT30/95) [1996] ZACC 6; 1996 (4)
BCLR 592; 1996 (3) SA 562 (4 April 1996)
[1996] ZACC 6

COURT

Constitutional Court

BEFORE

Ackermann, Chaskalson, Mahomed, Didcott,
Kriegler, Langa, Madala, Mokgoro, O'Regan, Sachs

CASE / FILE NUMBER

CCT30/95

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 30/95

NEL Applicant v LE ROUX NO First Respondent THE ATTORNEY-GENERAL OF THE
WITWATERSRAND LOCAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA Second
Respondent THE MINISTER OF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA Third
Respondent THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent
Heard on: 20 February 1996 Delivered on: 4 April 1996 _____

JUDGMENT _____

[1] ACKERMANN J: Pursuant to a referral from the Witwatersrand Local Division of the Supreme Court in terms of section 103(4) of the Constitution [1] we are called upon to decide the constitutionality of section 205 of the Criminal Procedure Act (CPA) [2] which is in the following terms:

- (1) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear

before a judge, regional court magistrate or magistrate.

- (2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).
 - (3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
 - (4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.
- [2] One Hoogakker was charged in the Johannesburg Magistrates' Court on various counts of fraud and of contravening the Exchange Control Regulations (ECR) promulgated under section 9 of the Currency and Exchanges Act. [3] In March 1995 a subpoena in terms of section 205(1) of the CPA was served on the applicant requiring him to appear in the Magistrates' Court to be examined in connection with information relating to the offences with which Hoogakker had been charged. The subpoena indicated that information was required from the applicant concerning, *inter alia*, the acquisition of a property by him in Spain and his association with Hoogakker. On presenting himself to the examining magistrate (the first respondent) on 13 April 1995, but before being sworn, the unconstitutionality of section 205 was raised on the applicant's behalf by his attorney.
- [3] The issue referred to this Court is whether section 205 of the CPA is consistent with the provisions of sections 8(1), 11(1), 11(2), 13, 15(1), 23, 24 and 25(3)(a), (c) and (d) of the Constitution. Sections 189(1) and (3), [4] 203 [5] and 204 [6] of the CPA are relevant to the construction of section 205. Sections 189 and 204 are incorporated therein by reference. Although section 203 is not similarly incorporated by reference, it was held in *S v Waite* [7] that an examinee at a section 205 examination is fully entitled to claim the privilege against self-incrimination.
- [4] In view of the transactional indemnity and use immunity provisions in section 204(2) and (4) respectively of the CPA, the applicant could not validly (and did not) object to answering self-incriminating questions. [8] His complaint was that if he answered questions foreshadowed in the subpoena he would risk exposing himself to the civil forfeitures provided for in paragraphs 22A, 22B and 22C of the ECR. This contention formed the point of departure for a substantial part of the attack on section 205 of the CPA.

The attack based on sections 8(1) (equality); 13 (privacy); 15(1) (freedom of speech and expression); 25(3)(c) (an accused's right to be presumed innocent and to remain silent) and 25(3)(d) (insofar as it entrenches an accused's right against self-incrimination)

- [5] It is unnecessary for purposes of deciding this case to consider the ambit of these rights and the extent to which, if any, they are facially infringed when the provisions of section 205 of the CPA are enforced. The arguments advanced on behalf of the applicant did not take adequate account of the implications of the qualification to section 189(1) of the CPA as it applies to section 205, namely, that the examinee is not obliged to testify or to answer any particular question put or to produce any book, paper or document if he/she has “a just excuse” for refusing or failing so to answer or to produce. In my view the proper application of this provision affords the complete answer to the applicant’s contentions on this score.
- [6] In *Bernstein v Bester* [9] we considered the meaning and implications of the provisions of section 418(5)(b)(iii)(aa) of the Companies Act, [10] which provide that a person who, having been duly summoned under section 417 or 418 of the Act to an examination,

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

We found[11] that:

There is no other provision in section 417 or 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 the examinee’s Chapter 3 rights. It must in my view follow from this that the provisions of sections 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 Chapter 3 rights. Fidelity to section 35(2) of the Constitution requires such a construction and fidelity to section 35(3) read with section 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 Chapter 3 right.

Applying this analysis to the above quoted provisions of section 418(5)(b)(iii)(aa) of the Companies Act we concluded: [12]

Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee’s Chapter 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 section 33(1) scrutiny. By the same token 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 section 417 or 418 of the Act which is inconsistent with the examinee’s right to privacy in terms of section 13 of the Constitution now under consideration.

- [7] There is, in the context of what we are presently examining, no material difference between the expression “a just excuse” in section 189(1) of the CPA and “sufficient cause” in section 418(5)(b)(iii)(aa) of the Companies Act. If the answer to any question put to an examinee at

an examination under section 205 of the CPA would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute a "just excuse" for purposes of section 189(1) for refusing to answer the question unless the section 189(1) compulsion to answer the particular question would, in the circumstances, constitute a limitation on such right which is justified under section 33(1) of the Constitution. In determining the applicability of section 33(1), regard must be had not only to the right asserted but also to the state's interest in securing information necessary for the prosecution of crimes. We are not alone in adopting a procedure such as that embodied in section 205. Other open and democratic societies based on freedom and equality do the same. In the United States it is accepted that the investigative authority of the grand jury rests largely on "the longstanding principle that 'the public has a right to every man's evidence'" [13] There is nothing in the provisions of section 205 read with section 189 of the CPA which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. This disposes of the present part of the applicant's complaint.

- [8] The foregoing conclusion has important procedural implications for section 205 enquiries which were adumbrated in *Bernstein v Bester*. [14] It is for the presiding officer at the section 205 examination to determine, when the objection is raised, whether the examinee has a "just excuse" for refusing to answer the question in issue. A considerable body of case law has already developed on the meaning of "just excuse". [15] It is not in the first place our task, but that of other courts, including the Supreme Court, to construe what this means, but in doing so they must bear in mind the duty imposed on them by section 35(3) of the Constitution to "have due regard to the spirit, purport and objects" of Chapter 3 "[i]n the interpretation of any law and the application and development of the common law ...". [16] What we do hold herein is that sections 189 and 205 of the CPA can and must be construed in the way suggested above so that their application does not unjustifiably infringe or threaten to infringe any of the examinee's chapter 3 rights.
- [9] This is what the magistrate in the present case should have done in the first instance. If he had found that in answering any of the questions the examinee's Chapter 3 rights would be infringed, he should have held that this constituted a "just excuse" for the examinee's refusal to answer, unless of course he came to the conclusion in respect of any particular question that the section 189 compulsion to answer constituted, in the context of the section 205 enquiry, a limitation on the examinee's right which was justified under section 33(1) of the Constitution. If he had concluded that there was no such infringement nor any other just excuse for refusing to answer, he should have compelled the applicant to answer. In particular the magistrate should have applied this approach to the applicant's specific objection that answering certain questions would expose him to the civil forfeitures provided for in paragraphs 22A, 22B and 22C of the ECR.

The attack based on sections 25(3) and 11(1)

- [10] It was contended that certain of the applicant's rights to a fair trial in terms of section 25(3) and his right in terms of section 11(1) "not to be detained without trial" were infringed by the summary compulsion mechanism of section 189(1) of the CPA (incorporated into section 205) which provides for the recalcitrant witness to be sentenced to imprisonment for a period of up to two years after the court has only enquired in "a summary manner" into the examinee's failure or refusal to testify or answer questions. There was a considerable overlap between these arguments.
- [11] The section 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of section 189(1) is not, in my view, an "accused person" for purposes of the protection afforded by section 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to the section 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution. The section 189(1) proceedings are not regarded as criminal proceedings, [17] do not result in the examinee being convicted of any offence [18] and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; [19] in American parlance such examinees "carry the keys of their prison in their own pockets." [20] The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee. This disposes of the attack directly based on the section 25(3) fair trial right.
- [12] In the attack based on section 11(1) of the Constitution it was contended that the section 205(3) procedure (incorporating the summary incarceration procedure of section 189) did not constitute a "trial" for purposes of section 11(1) and in any event infringed the requirement of "fairness" or "due process" or "natural justice" which is implicit in the "trial" component of this right. I have no doubt that this latter requirement, however one wishes to label it, is implicit in this right.
- [13] It was argued that the "trial" contemplated in section 11(1) was the "fair trial" provided for in section 25(3) of the Constitution and which entitles the applicant more specifically in terms of paragraph (a) of the latter subsection to "a public trial" before "an ordinary court" and in terms of paragraph (b) "to be informed with sufficient particularity of the charge". It is difficult to understand how, without any textual link between the "trial" referred to in section 11(1) and the "trial" referred to in section 25(3), such a conclusion can possibly be reached.
- [14] The section 11(1) right relied upon by the applicants is the "right not to be detained without trial." The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards. In its most extreme form, the

mischievous exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly inadequate, procedural safeguards. The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The “trial” envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state.

- [15] It is unnecessary for purposes of this case to decide whether this “entity” to which I have referred must in all cases be a judicial officer who ordinarily functions as such in the ordinary courts. As far as section 205 of the CPA is concerned the entity is indeed a normal judicial officer who ordinarily functions in the ordinary courts. The “court” before which the section 205 enquiry takes place is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the “ordinary court of law” envisaged by section 25(3) of the Constitution. On no basis can this leg of the section 11(1) attack succeed.
- [16] It was also argued, as part of this and the wider section 11(1) attack, that the summary section 189 imprisonment proceedings (incorporated into the section 205 proceedings) denied the applicant his right to a “public” trial by analogy with the section 25(3)(a) right and his right “to be informed with sufficient particularity of the charge” by analogy with the section 25(3)(b) right. This was so, it was argued, because of the summary nature of the section 205(3) imprisonment proceedings and in particular the fact that the section provides that the examination “may be conducted in private” and makes no express provision for the examinee to be informed at any stage, whether orally or in writing, of what awaits the examinee if he/she persists in refusing to answer the question.
- [17] As far as the first of these two complaints is concerned it is not necessary, for this case, to decide what fair or due process or natural justice requires in this regard. It cannot in principle require more than an ordinary criminal trial requires. There are well recognised exceptions in our criminal procedure to the general rule that criminal proceedings are to be conducted in open court. [21] In the United States, grand jury secrecy is seen by the courts as contributing in several ways to the grand jury’s dual roles as both “the shield and the sword” of the criminal justice process. [22] In the United States of America, although the right to attend criminal trials is held to be implicit in the First Amendment protection of speech, press and the right to assemble, there are nevertheless circumstances when closing a trial to the public does not infringe this right. [23] The section 205 procedure is an evidence-gathering mechanism; the examinee is not, as it were, giving evidence in a trial; this is a preparatory step and the examinee’s evidence might never be utilised in the end. There are obvious and legitimate inhibitions to furnishing evidence in that context in public. Having the section 205 examination in public serves much less of a public interest and could in fact be severely damaging to both the examinee and to the administration of

justice. There are accordingly important and justified policy grounds for holding the section 205 enquiry in private. In any event the provision for holding the section 205 enquiry “in private” is permissive, not mandatory. It is a discretion which must be exercised judicially, taking into account all the relevant facts. One of the relevant facts would be the interests of the examinee. In many cases it would be in the interests of the examinee, and the examinee’s express wish, to have the enquiry conducted in private. But before the first respondent in this case has exercised his discretion in favour of conducting the enquiry in private, the question of an infringement of any right of the applicant in this regard simply does not arise.

- [18] This illustrates a conceptual confusion which characterised the applicant’s argument in other respects as well. The only issue before us is whether, on a proper construction of section 205, it expressly or by necessary implication infringes any of the rights relied upon by the applicant. If the section, properly construed, compels the presiding officer to act or apply the provisions in a way which would infringe any of the rights relied upon, then the constitutionality of the section in respect of that right is properly before us. This would also be the case if the presiding officer were prohibited by the section from acting or intervening in a way which would prevent a particular infringement which would inevitably follow in the absence of such intervention. What is certainly not before us is a consideration of a multitude of questions relating to hypothetical decisions or rulings which may (not must) be made in applying the provisions of section 205 and the question whether such rulings or decisions would or might infringe any of the examinee’s Chapter 3 rights or not. We are also not called upon to decide whether the examinee is entitled as of right to legal representation or how precisely the unrepresented examinee must be treated and what must be explained to him/her. Judgments concerning the proper application and construction of section 205 which were delivered before the Constitution came into operation [24] will not necessarily correctly reflect the post-constitutional position, because section 35(3) of the Constitution requires that this section now be construed by all courts (including the magistrates’ courts) having “due regard to the spirit, purport and objects of” Chapter 3.
- [19] The second of the two complaints referred to above runs into the same difficulties. Assuming that the applicant is entitled to be informed with sufficient particularity of the “charge against him” the question as to whether any such right is infringed can only arise after the section 205 proceedings commence and after the applicant has refused to answer any question. While section 205 contains no express provision that the “charge” be put to the examinee, the section also does not prevent the presiding officer from doing so.
- [20] Even taking the broadest and least technical view of the applicant’s complaints that section 189 as applied in section 205 proceedings denies him a fair hearing on the imprisonment issue, there is no substance in them. The summary procedure for imprisoning a recalcitrant witness must be adjudged in the context of the section 205 proceedings as a whole. The persons who are authorised to take evidence at the section 205 proceedings (a judge of the supreme court, a regional court magistrate or a magistrate) are all independent judicial

officers and the very persons who preside over criminal trials. The subpoena to attend the proceedings is obtained at the request of an attorney-general or public prosecutor authorized thereto in writing by an attorney-general and can only be issued at the instance of the abovementioned judicial officer. A person can only be summoned to attend “who is likely to give material or relevant information as to any alleged offence”. In addition there is the important and far-reaching provision in section 205(4), introduced for the first time in 1993, [25] which prohibits the presiding judicial officer from sentencing the examinee to imprisonment as contemplated in section 189 unless such judicial officer “is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.” This affords an examinee the widest possible residual protection. This all shows that the section 205 provisions are as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime.

- [21] What more, one may legitimately ask, can the examinee possibly want to know about the “charge” than that the law demands, in the absence of a just excuse for the examinee not doing so, that he/she answers all questions, failing which imprisonment will follow? If the examinee is legally represented such representative will know all this. If unrepresented one would expect the presiding officer to explain this to the examinee. There is absolutely nothing to suggest that, on a proper post-constitutional construction of section 205, there is not a duty on the presiding officer to do so. Natural justice and fair procedure would, in my view, require this. That being the case the presiding officer is obliged to do so.
- [22] Summary proceedings for imprisoning recalcitrant witnesses, where the normal strict criminal procedure rules are not applied, are not unknown in other open and democratic societies based on freedom and equality. In the United States of America the grand jury investigation, amongst its other objects, fulfills the same function as section 205 of the CPA of obtaining information under oath from persons unwilling to assist voluntarily in a criminal investigation; both civil and criminal contempt procedures are used to coerce the recalcitrant grand jury witness into testifying. [26] “Civil contempt is used to coerce the recalcitrant witness into complying with the subpoena. The witness is sentenced to imprisonment or to a fine (which may increase daily), but he may purge himself by complying with the subpoena.” [27] In the case of such civil contempt proceedings in relation to grand jury proceedings departures from criminal procedure applicable to ordinary criminal prosecutions are permissible and even in criminal contempt proceedings “procedures may vary somewhat from procedures applicable to ordinary criminal prosecutions.” [28] Rule 42(a) of the Federal Rules for Criminal Procedure authorises summary criminal contempt proceedings in matters other than grand jury investigations. [29] In Germany section 70 of the Criminal Procedure Code [30] provides for summary proceedings against a witness who refuses to testify without legal justification. The witness is fined and on failure to pay is imprisoned. The witness may also be imprisoned without being given the option of a fine. Such and similar summary proceedings leading to imprisonment have been upheld as constitutional by the German Federal Constitutional Court. [31]

[23] The applicant's complaints on these grounds can accordingly not, in my view, succeed.

The attack based on sections 11(2) (cruel, inhuman or degrading treatment or punishment); 23 (access to information) and 24 (administrative justice)

[24] No argument was addressed to us why, if the section 205 procedures were otherwise not in conflict with the Constitution, the nature or extent of the penal sanction infringed the applicant's section 11(2) rights. We are unaware of any authority which suggests that this complaint is worthy of serious consideration. The same is true of the section 23 complaint, which was not pursued in argument. I have grave doubts whether section 24 is applicable at all to section 205 proceedings, since their aim is limited to the gathering of factual information; in fact they constitute no more than a mechanism for compelling a witness statement. No report is issued pursuant to the section 205 examination and the examinee's rights are adequately protected by the transactional immunity and use indemnity provisions and the "just excuse" exception contained in section 189 of the CPA. The summary sentencing procedure, which forms the essence of the complaint, is clearly judicial and not administrative action; it is in terms of subsection

(4) of section 189 subject to appeal in the same manner as a sentence imposed in any criminal case. Even assuming that the provisions of section 24 are applicable, there would be no infringement of section 24 for the very same reason that the applicant's section 11(1) fair trial rights have not been infringed.

[25] Notwithstanding the form of the referral, the real thrust of the constitutional attack has in substance been directed to the constitutionality of section 189(1) of the CPA. The fact that section 189 has been incorporated by reference into section 205 would not alter the fact that if we had found section 205 to be inconsistent with the constitution and declared it invalid in terms of section 98(5) of the Constitution we would in substance have done so because of the inconsistency of section 189(1). The question would then arise as to whether we had jurisdiction to strike down section 189(1) in view of the fact that its inconsistency with the Constitution had not been referred to us. There is also the conundrum as to whether it is logically or constitutionally possible to declare section 189(1) invalid for purposes of section 205 only and not for all purposes. Fortunately these problems do not have to be addressed in the present case because of the conclusion we have reached that the provisions of section 205 of the CPA are not inconsistent with the Constitution. They may well have constituted a bar to granting an order in terms of section 98(5) of the Constitution had we come to the conclusion that the provisions of section 189(1) rather than those of section 205 of the CPA were inconsistent with the Constitution.

[26] These problems do, however, once again highlight the great care which must be exercised in referring matters to this Court under section 102 of the Constitution and the duty resting on litigants in this regard. This has been emphasised in recent judgments of this Court. [32] In *Bernstein v Bester* [33] I pointed out that:

[w]hile 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 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 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 narrower and more closely focussed 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 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.

In *Ferreira v Levin (No 2)* [34] I also commented on the fact that the failure of parties to adopt a critical attitude at the referral stage could have implications for costs:

Parties, and respondents in particular, should not be encouraged to consent supinely to matters being referred to this Court in the mistaken belief that an applicant's failure to achieve substantial success on referral will automatically entitle the respondents to their costs ... If parties are of a mind to oppose relief being sought in a referral they should in the first place be astute to prevent matters being incorrectly referred and should oppose inappropriate referrals when they are sought; they should not sit back and raise their opposition for the first time in this Court after the referral has been made.

Had the litigants so applied their minds to the present referral, there is good reason to believe that the issue of the constitutionality of section 189 of the CPA would also have been referred and that the referral would have been a more narrowly focussed one.

[27] In the result it is declared that the provisions of section 205 of the Criminal Procedure Act 51 of 1977(as amended) are not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993.

Chaskalson P, Mahomed DP, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the above judgment of Ackermann J.

Case No: CCT 30/1996

Counsel for the Applicant: LJ van der Merwe

Instructed by: Edeling Vorster Pagel Counsel for the Second Respondent: PP Stander

Instructed by: Attorney-General of the Witwatersrand Local Division
Respondent: EM Patel
Instructed by: The State Attorney
Counsel for the Third Respondent: PF Louw
Instructed by: The State Attorney

[1] The Constitution of the Republic of South Africa Act 200 of 1993.

[2] Act 51 of 1977.

[3] Act 9 of 1933 as amended.[4] Subsections 189(1) and

(3) provide:

(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).

[5] Section 203 provides:

No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.

[6] Section 204 provides:

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955), or in the case of the territory, for a contravention of section 300 (3) of the Criminal Procedure Ordinance, 1963 (Ordinance 34 of 1963), arising likewise.

[7] 1978 (3) SA 896 (O) 898E-F.

- [8] See generally *Ferreira v Levin, Vryenhoek v Powell* 1996 (1) BCLR 1.
- [9] CCT 23/95 delivered on 27 March 1996 paras 58 to 63.
- [10] No 61 of 1973 (as amended).
- [11] *Supra* note 9 para 60.
- [12] *Id* para 61.
- [13] *Branzburg v Hayes et al* [1972] USSC 169; 408 US 665 (1972) 688.
- [14] *Supra* note 9 paras 62 and 63.
- [15] See, for example, the discussion in *Du Toit, De Jager et al, Commentary on the Criminal Procedure Act 23-50B to 23-53*. In *Attorney-General, Transvaal v Kader* [1991] ZASCA 135; 1991 (4) SA 727 (A) 735B-C the Appellate Division held that the term goes beyond matters of privilege, compellability and admissibility.
- [16] *Bernstein v Bester* *supra* note 9 paras 62 and 63.[17] In *S v Heyman* 1966 (4) SA 598 (A) the Appellate Division was called upon to construe the provisions of section 212 of the Criminal Procedure Act 56 of 1955(as amended) whose provisions, save for the length of the sentence that could be imposed, were in all material respects identical to subparagraphs (1) to (5) of section 189 of the CPA. At 601G Steyn CJ said the following:
- Sec. 212 (1) does not in specific terms create an offence or require the presentation of a formal charge to which the witness has to plead, and the provision in sub-sec. (4) for an appeal against the sentence as if it were a sentence imposed in a criminal case clearly implies that an enquiry under this section does not constitute criminal proceedings.
- [18] See *Natal Law Society v N* 1985 (4) SA 115 (N) 116F.
- [19] See section 189(3) of the CPA and *S v Heyman* *supra* note 17 at 601H.
- [20] *In re Nevitt* 117 F 448, 461 (CA 8th Cir 1902); *Shillitani v United States* [1966] USSC 110; 384 US 364 (1966)
368. See also *La Fave and Israel Criminal Procedure* 2 ed (1992) 382.
- [21] For example those contained in section 153 of the CPA; as to which see generally *Du Toit, De Jager et al* *supra* note 15 at 22-6A to 22-8.
- [22] *La Fave and Israel* *supra* note 20 at 376, 390 and *United States v Procter & Gamble Co et al* [1958] USSC 102; 356 US 677(1958) 681-682, quoting *United States v Rose* [1954] USCA3 227; 215 F 2d 617, 628-629.
- [23] *Richmond Newspapers Inc et al v Virginia et al* [1980] USSC 154; 448 US 555 (1980) 580-581 (and in particular footnote 18), 598 (and in particular footnote 24).

[24] See generally, Du Toit, De Jager et al supra note 15 at 23-15ff and Hiemstra Strafproses 5 ed (Johan Kriegler) 465ff.

[25] By section 11 of Act 204 of 1993.

[26] La Fave and Israel supra note 20 at 382.

[27] Id 382.

[28] Id 383 and footnote 2. See also Harris v United States [1965] USSC 171; 382 US 162 (1965) 164 - 167; Shillitani v United States [1966] USSC 110; 384 US 364 (1966) 368 - 371; Cheff v Schnackenberg [1966] USSC 106; 384 US 373 (1966) 377, 380.

[29] See Cheff v Schnackenberg supra note 28.

[30] Strafprozessordnung (StPO).

[31] In BVerfGE 76, 363 II [383,386]; BVerfGE 25, 296[304]; BVerfGE 64, 108[116].

[32] For example S v Mhlungu

[1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC); Ferreira v Levin (No 1) 1996 (1) BCLR 1 (CC) paras 6-8 and Bernstein v Bester supra note 9 para 2.

[33] Supra note 9 para 2.

[34] CCT 5/95 delivered on 19 March 1996 para 9.

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