

SOUTH AFRICA / JUDGMENT

S v Porritt and Another (SS 40/2006) [2021] ZAGPJHC 382; 2022 (1) SACR 88 (GJ) (26 March 2021) [2021] ZAGPJHC 382

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

SS 40/2006

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED. YES

26 March 2021

THE STATE

v

PORRITT, GARY PATRICK

Accused no. 1

BENNETT, SUSAN HILARY

Accused no. 2

RULING OF 26 MARCH 2021

ADMISSIBILITY OF DOCUMENTS UNDER SECTION 5 (2)(b) OF THE INTERNATIONAL CO-
OPERATION IN CRIMINAL MATTERS ACT NO. 75 OF 1996

SPILG, J:

INTRODUCTION

1. Previously I ordered that the State had lawfully obtain letters of request (“LoRs”) under s 2(2) of the International Co-operation in Criminal Matters Act, 75 of 1996 (“the ICCMA”). The issue now before the court concerns the admissibility of the evidence so obtained. I believe the issue should be split into three separate enquiries.
2. Solely for present purposes trade and business records, which I will refer to loosely as “documents”, are distinguished from the affidavits of the deponents through whom the documents are identified and came to be provided under the LoRs.
3. The first enquiry concerns whether the documents obtained by the LoRs are admissible by reference to s 5(2)(b) of the ICCMA. In this regard the State may refer to the affidavits which introduce them for purposes of identification and by reference to the category of documents they purport to be.

It is common cause that they purport to be the trade and business records that were in the deponent’s possession. In their affidavits the deponents describe the basis under which the documents came to be in their custody or control or from which it appears that they had a duty to record the information from someone who had personal knowledge.

The documents in issue in the first enquiry are limited to those introduced by Messrs Gordon, Lintern-Smith and Mercer.

4. The second enquiry which has yet to be undertaken concerns the admissibility of the contents of the affidavits to the extent that they add a gloss to the documents themselves which goes beyond simply identifying them and classifying their nature.
5. The third stage will be to deal with both the documents identified in and the contents of the two affidavits deposed to be Mr and Mrs Adamczyk.

DISCUSSION

6. There appears to be a view that a consequence of remaining entirely supine when exercising his or her fair trial right to remain silent allows an accused to require the State to laboriously introduce each and every document into evidence through vive voce evidence. Without writing a treatise on when and how documentary evidence may be introduced into evidence suffice it that such reasoning is fallacious. Where an accused fails to exercise the other fair trial rights of adducing evidence to counter a prima facie case then the election to remain silent may have serious adverse consequences,
7. With respect Madala J had stated the position in *Osman and Another v The Attorney - General, Transvaal* 1998 (4) SA 1224 (CC) at para 22 with sufficient clarity for there to be no misunderstanding. I quote:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

8. In reaching this decision the learned justice had gathered and endorsed at paras 19 to 21 the following pronouncements from our courts and those of comparable jurisdictions:

“[19] McCreath J was of the view that the entrenchment of the right to silence in s 25(3)(c) should not detract from the meaning of the right as it has been understood hitherto. His reasoning stood on two legs. Firstly, that “s 36 does not . . . per se cast a duty on a person suspected of contravening the section to make any statement at all”. Secondly, that

'(t)he circumstances of a particular case may of course be such that an explanation will be required of the person's possession of the goods in order to avoid a conviction under the section and that that explanation can only be given by that person himself or herself. Such person still has an election whether to give an explanation or to risk the consequences. The necessity to give a satisfactory account to avoid conviction is in that event not created by s 36 itself but by the circumstances of the particular case. Section 36 compels nothing. It is a misfortune inherent in the case. So also if the account required to be given involves an admission or confession to a crime on the part of that person. The situation is analogous to that which may arise in any criminal case at the end of the State case. Sufficient evidence may have been advanced by the prosecution at that stage to require a satisfactory explanation from the accused, which is reasonably possibly true, if he is to avoid conviction. His right to remain silent has not been impinged upon by any statutory provision in conflict with the Constitution. The circumstances of the case against him are such that he exercises his right to silence at his peril....

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- [20] Similarly, in *S v Sidziya and Others*, the Court effectively held that the constitutional right to silence does not preclude the presiding officer from considering as part of the overall assessment of the case the accused's silence in the face of a prima facie case established by the prosecution. As was so aptly put by Naidu AJ in *Sidziya*:

'The right entrenched in s 25(3)(c) means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inferences can be drawn against him.'

- [21] This issue was also dealt with by the Botswana Court of Appeal in *Attorney-General v Moagi*. The Court there had to interpret the meaning of s 10(7) of the Botswana Constitution, which provides that '(n)o person who is tried for a criminal offence shall be compelled to give evidence at the trial'. Maisels JP, delivering the majority judgment, held that where the prosecution had established a *prima facie* case, '(u)nless the accused's silence is reasonably explicable on other grounds, it may point to his guilt.'"
9. Shortly after *Osman*, in the case of *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) at paras 93 and 94 the court was called on to resolve the apparent tension between the right to remain silent and not to incriminate oneself as well as the other "battery of rights under s 35(1) and (3) of the Constitution" on the one hand and the right to make out an effective case on the other (in relation to obtaining bail where an accused is charged with a serious criminal offence). The court held that under consideration was not that the accused had an election, but rather whether the choice to speak was made with a proper appreciation of what it entailed and whether the choice was forced on the person concerned. Kriegler J said the following:
- [93] It is true that evidence given at a bail hearing may ultimately redound to the prejudice of the accused. It can therefore not be denied that there is a certain tension between the right of an arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under s 35(1) and (3) of the Constitution. But that kind of tension is by no means unique to applicants for bail. Nor does its mere existence sound constitutional alarm bells. Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one's own choices is an indispensable quality of freedom. And often such choices are hard.
- [94] Litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversarial system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under s 115 of the CPA? Does one adduce evidence, one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions. As was pointed out in *Osman's* case ['t]he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her.' It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed choice is indeed no choice. The responsibility resting upon judicial officers to ensure the requisite knowledge on the part or the unrepresented accused need hardly be repeated.[1]

10. In the same case at para 78 the court drew a distinction between instances where an onus was imposed on an accused which was geared at arriving at a factual conclusion and those designed to make informal prognosis in situations where the facts were peculiarly within the knowledge of an accused who chose to remain silent. In the latter situation the court concluded that the question of an erroneous conviction did not arise.
11. It should be recalled that once the trial has commenced the right to be presumed innocent, to remain silent and not to testify under ss 35(3) (h) and (j) are illustrations of the broader right to a fair trial. The preamble to s 35(3) says as much:

“Every accused person has a right to a fair trial, which includes the right...”

(emphasis added)

These are not the only fair trial rights expressly identified as being enjoyed by an accused. Under ss 35(3)(i) and (j) an accused has the right “to adduce and challenge evidence” provided he or she is not “compelled to give self-incriminated evidence”. In other words, the accused has an election, and hard choices as to whether to testify or remain silent do not according to either Osman or Dlamini amount, without more, to an infringement of fair trial rights.

12. At this stage the enquiry is confined only to the admissibility of documentary evidence which is sought to be introduced because ex facie their contents they self-evidently appear to be the trade and business records of the specific entity in whose possession they were obtained or that the person who provided them would ordinarily have possession or custody of them on behalf of that entity and was either responsible for the record or had a duty to record the information from someone who had personal knowledge of the matter. The nature of admitting such documents appears to fall more closely within the category of evidence described in Dlamini as not in itself amounting to a factual conclusion determinative of the trial nor one which could raise concerns about an erroneous conviction. Briefly the reasons are;
 - a. The protection afforded under s 5(2)(b) of the ICCMA which comprise well recognised qualifiers for the admissibility of evidence.
 - b. The documents are sought to be introduced into the pool of evidence which must be considered by the court. At this stage the prime considerations are their genuineness and probative value which themselves must be taken into consideration against the broader issue of prejudice to the accused by allowing their introduction as an exception to the hearsay rules.

While prejudice is one thing, whether or not the evidence sought to be admitted carries any weight once the totality of all the evidence is evaluated is quite a different matter. At this stage the question is whether the documents should be admitted into the pool of evidence which a court is obliged to take into consideration under s 5 of the ICCMA. The fact that they may eventually carry little weight or be quite damning depends on the other evidence produced and such evidence as the accused may challenge or themselves elect to adduce. The enquiry at present is directed at

whether there are sufficient safeguards to ensure that the accused can meaningfully exercise their fair trial right to challenge the evidence sought to be admitted or whether they are prejudiced in doing so and to what extent such prejudice is likely to be real rather than apparent.

13. I turn to a consideration of s 5(2) and the challenges raised by the accused.

SECTION 5(2) of ICCMA

14. The provisions of s 5(2)(a) and (b) of the ICCMA read:

(2) Evidence obtained by a letter of request prior to proceedings being instituted shall be admitted as evidence at any subsequent proceedings and shall form part of the record of such proceedings if-

(a) each party against whom the evidence is to be adduced agrees the admission thereof as evidence at such proceedings; or

(b) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) any prejudice to any party which the admission of such evidence might entail; and

(v) any other factor which in the opinion of the court should be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

15. Two other provisions impact on a consideration of s 5(2)(b). They are: Section 5(1) which reads:

Evidence obtained by a letter of request shall be deemed to be evidence under oath if it appears that the witness was in terms of the law of the requested State properly warned to tell the truth.

Section 5(3) which provides:

The provisions of subsection (2) shall not render admissible any evidence which would be inadmissible, had such evidence been given at the subsequent proceedings by the witness from whom it was obtained.

Nature of Proceedings

16. Section 5(2)(b)(i) requires a court to have regard to the nature of the proceedings. This is a reference to the nature of the current proceedings. They are criminal proceedings where the accused are confronted with “untested evidence”. At this stage the evidence sought to be introduced are the trade and business records located in Hong Kong of certain entities ostensibly managed from there. The method of securing that evidence is sanctioned by the ICCMA and it is not contended that the safeguards provided for in obtaining and

despatching the documents pursuant to the provisions of s 2(2) were not adhered to. I have already ruled that the LoRs were lawfully obtained under that section.

It is also not in dispute that the requirements of s 5(1) were satisfied.

17. In *S v Shaik*

[2006] ZASCA 105; 2007 (1) SA 240 (SCA) the court, when dealing with the similar provision which is contained in s 3(1)(c)(i) of the Law of Evidence Amendment Act 45 of 1988 said at para 171 that “sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception”.

Nature of the Evidence

18. The evidence sought to be introduced at this stage is not evidence of what a witness claims to have seen. The evidence comprises documents which are alleged to constitute a continuous, and generally contemporaneous, trade and business record of each of the entities. It is relatively easy to discern if that is the case or not. In such a case the more complete the record the more difficult it is to contend otherwise as the risk of selective extraction is reduced, if not all but eliminated, and the more readily incongruities and chronological gaps or anomalies can be picked up. None have been suggested by the accused.
19. The State alleges that the hand of the accused effectively directed the actions of the entities whose trade and business records are sought to be admitted; at least to the extent that such actions form an integral part of the scheme and its consequences in relation to the offences with which the accused have been charged. The State has described the Hong Kong entities as the alter egos of the accused, utilised by them either individually or in the execution of a common purpose or conspiracy for the purposes of committing the offences with which they have been charged, at least in respect of counts 1 to 14.
20. A court must obviously be conscious of avoiding a chicken and egg situation. The difficulty is that the court is not dealing with a handful of documents. Whatever the number of individual documents, their sum total is approximately 9 000 pages. A few of the documents may have one or other of the accused’s signatures or initials, or were despatched or received by them or a person already identified as their personal assistant or secretary. A few appear to

be copies of documents already admitted into evidence.

21. At this stage, while Bennett is prepared to make clear admissions regarding certain documents where duplicates have already been tendered in evidence, Porritt is not prepared to make any unequivocal admission, tempering any admission with a caveat, the extent of which is unclear and therefore cannot be taken into account at this stage as enough to amount to an agreement to admit these few documents in under s 5(2)(a).

22. The documents themselves may indicate the involvement of either or both the accused or they may not. However, I am not prepared to go further than accept that if they are admitted into evidence they have the potential of significantly advancing the State's case against the accused. However, at this stage they should only be admitted on the basis that they are what they purport to be but not as to truth of content- leaving that determination to be made either when the State seeks to have the individual document admitted as such or leaving it for argument as to the inferences to be drawn from their content either individually or when considered against the totality of the evidence.
23. The accused had an opportunity to contend that they were not the trade and business records obtained from the specific entities in question (which are identified in my earlier judgment). The furthest they went was to challenge the State's allegations that the documents are also to be admitted into evidence as the trade and business records of the Tigon Group of companies. I will consider later whether they had been given adequate opportunity to inspect and consider all the documents sought to be admitted into evidence under s 5(2)(b).

The purpose for which the evidence is tendered

24. In the earlier judgment delivered regarding the lawfulness of proceeding under s 2(2) of the ICCMA I dealt with the relevance of the documents sought to be admitted by reference to the charges under counts 1 to 14 of the indictment.
25. Bennett however argued that the State claimed that the evidence sought to be introduced was not necessary as it had other evidence on which it could rely.

Even if that were so, there is no guarantee that such other evidence will necessarily prove the State case beyond a reasonable doubt. If regard is had to the evidence already tendered by Milne and by Prof Wainer it is apparent that the State is required to demonstrate a course of dealings by the accused undertaken by them with a common purpose in furtherance of an elaborate scheme at a number of levels. It is not for the accused or the court to anticipate at this stage the sufficiency of evidence particularly where the accused have exercised their right to remain silent and in doing so have only admitted a handful of documents- even original documents which bear Porritt's signature or initials were required to be proven through Mr Milne who claimed to be familiar with Porritt's signature and initials. In the end, Porritt did not put such evidence in issue during his cross- examination of the witness. No quarter is being given and the State as a responsible litigant is entitled to present such evidence as it considers appropriate provided it is relevant: These documents appear to be relevant if regard is had to the indictment and the further particulars provided in response to the request made by Bennett.

Prejudice to any party which the admission of such evidence might entail

26. Porritt relied on this court indicating the potentially prejudicial nature of the documents if they support the allegations contained in the indictment.

27. That is not the prejudice to which the provision relates. The prejudice relates to the ability of the accused to challenge the content of documents which are handed up without the ability to cross-examine the person who has tendered them as such. See Shaik at para177.
28. At this stage the court is only concerned with whether it can be satisfied that the documents are what they purport to be. The accused claim that they are unable to comment because they had nothing to do with any of the entities. That does not constitute prejudice because the State must still demonstrate beyond a reasonable doubt through the documents themselves or evidence aliunde and either directly or by inferential reasoning that the accused had used the instrumentality of these entities to commit the offences with which they have been charged. And if the State proves a prima facie case then the accused have an election whether to exercise their right under s 35(3)(i) to adduce their own evidence with the risk that if they do not then it may result, on the totality of evidence led, in the State proving its case beyond a reasonable doubt.

As Osman and Dlamini demonstrated, the election whether to remain silent cannot of itself constitute prejudice. In short there is nothing to suggest that the accused are unable to contradict the documents if they wish to do so. Compare Shaik at 178

29. The only attack on the genuineness of the documents is a technical one relating to the so called chain of evidence. Bennett contends that it is necessary for the Investigating Officer to have made an affidavit regarding the chain of evidence. That is a convenience afforded to the State. The State however does not have to produce such evidence if the chain of evidence is satisfactorily demonstrated by other means.
30. In the present case the chain of evidence followed to the letter the requirements of the ICCMA, at least from the time the documents were presented to the judicial officer in Hong Kong by the deponent to the affidavit under the provisions of s 2(2) until the seals were broken in South Africa. While seals of the outer packaging may have been broken on arrival, the actual seals placed on the documents by the Hong Kong officials were only broken after the accused's legal representative at the time, on the advice of their senior counsel, persistently refused to participate in their being broken; which of necessity would have resulted in them inspecting the documents at the time.
31. The deponents to the affidavits have identified that these are indeed the business records of the entities concerned. I did not understand the accused to dispute that, only that the State cannot contend that they also constitute the business records of the Tigon Group. At this stage the court is not prepared to have these documents admitted into evidence as being anything more than the trade and business records of the entities who purported to have produced them (in the discovery sense) through the deponent in question.
32. A further contention by the accused is that they did not examine or consider the documents and that they could not be expected to go through 9000 individual pages of documents.

33. Prejudice is not concerned with whether the accused did or did not examine and consider the documents and affidavits.

It is only concerned with whether they were given an opportunity to do so but declined. Once again the accused made the election: Certain correspondence to and from the NPA and the accused's attorney, the late Frank Cohen, reveals that as far back as 2006 they were given an opportunity to examine and consider the documents and affidavits obtained under s 2(2) of the ICCMA.

It does not lie in the accused's mouth to now say that they accepted the advice of their lawyers not to cooperate. For whatever ostensible reason, ultimately it was their decision whether to accept that advice or not. They cannot be treated as ordinary lay litigants. The manner in which they have handled the case and presented argument without legal assistance attests to that. They are highly intelligent and astute individuals who would have weighed up the advice they were given and considered the consequences.

34. Correspondence going back to December 2006 and through to April 2007 reveals that the accused were given over the years more than enough opportunity to go through the documents. Even more recently the court gave them the opportunity during the lengthy break at the end of last year to indicate whether they were prepared to make any admissions regarding the documents which the State intended to introduce by way of the ICCMA. On a previous occasion earlier this year the accused confirmed that they were fully aware of the potentially serious ramifications of these documents if they were admitted.

The indictment, the formulation by Bennett of the request for further particulars to the indictment and the response, as well as the State's advisory at a very early stage of the trial regarding the basis on which it would seek the admission of documents and the present heads of argument filed by the prosecution, all demonstrated to each of the accused the clear intention of the State to introduce the evidence obtained by the LoRs in this way.

If they did not go through the documents then it is not because they were denied a reasonable opportunity to do so. It is because they elected not to do so. That does not amount to prejudice.

35. Bennett also contended that she expected the documents to be handed up one by one and each would be considered individually. The accused were required to prepare for trial and for this particular aspect of the trial. It does not matter, therefore, whether the documents are handed up one by one or as a single body of trade and business records. The accused also would have appreciated, by reference to the State's heads of argument, that it wished to admit the documents through the affidavits obtained under the ICCMA, not through the physical calling of a witness.

36. It was argued that other documents were handed up individually, each one was individually considered and in some cases only provisionally admitted into evidence. The reason why they were only provisionally admitted was that another witness may have to prove their authenticity or its contents may be challenged through cross-examination. Here the documents themselves fall into categories which allow their admission into evidence in this manner.
37. The final issue is whether the documents are originals or copies. The short answer is that they are the business and trade records of the entities in question. It does not matter if the entity received or retained an original or a copy; they nonetheless constitute its trade and business records.
38. There is another reason why it does not matter at this stage. A court does not always require an original document, in the sense of the originating document produced by the person concerned.
39. There are a number of reasons for this. The most obvious is that we have progressed way beyond a document written by hand which is conveyed physically by a person whether on foot or via some form of transport over land, or by ship or aeroplane. Moreover the sender is no longer limited to creating a physical duplicate by means of copy paper or roneo

machine.

There is enough legislation which allows for most copies to be received into evidence, particularly if it is a facsimile transmission or one sent over the internet. While legislation may have been introduced during the infancy of such technology, our common lived experience since then is that there are sufficient inherent safeguards in electronic transmissions as to make little difference between the authenticity of the document which is transmitted and the one which is received; and hence the need to classify one as the original and the other as a copy has effectively diminished.

Any prejudice can be dealt with on an individual ad hoc basis with reference to any specific document whose genuineness is challenged or in respect of which a witness may be specifically called on to deal with as to truth of content (and not just as a trade or business record purporting to be what it claims).

But in the present case no such challenge has been raised, as the accused were required to, if it turns out that the evidence demonstrates that they were effectively operating these entities in furtherance of the commission of the alleged offences with which they have been charged.

Any other factor which in the opinion of the court should be taken into account,

40. One of the factors which appears to be relevant is the probative value of the evidence. Business and trade records by their nature have a high probative value where it is alleged that a white collar crime has been committed involving the business or financial entity in question. If regard is had to the allegations made in the indictment as read with the further

particulars supplied it is evident that their probative value either for or against the State's case is likely to be significant either independently or having regard to the totality of other evidence presented

41. It is also self-evident that the persons who deposed to the affidavits in relation to the nature of the documents cannot attend court here. They are residents of Hong Kong and due to Covid-19 would not be able to attend this court now or for the foreseeable future, even if they were amenable to doing so bearing in mind that they are not susceptible to this court's jurisdiction.[2]

42. The accused submit that I cannot objectively determine the issue because I am biased against them and should have recused myself. The argument is still born if an appeal court refuses an appeal against my decision not to recuse; and until an appeal process is finalised my decision not to recuse stands.

Insofar as the overall interests of justice are concerned the SCA, when dealing with this topic in relation to delay, stressed in *Zanner v Director of Public Prosecutions*, Johannesburg [2006] ZASCA 56; 2006 (2) SACR 45 (SCA) at para 21 that the: "right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the ... the crime'.

SECTION 221 OF THE CPA AND SECTION 3 OF THE EVIDENCE ACT

43. The prosecution argued that the documents were also admissible under the provisions of ss 221 and 222 of the Criminal Procedure Act 51 of 1977, s 3 of the Law of Evidence Amendment Act 45 of 1988 as well as a number of other statutory provisions relating to the admissibility of documentary evidence. The documents in issue

comprise the various sets of documents obtained under s 5 of the ICCMA and at this stage are sought to be admitted only as evidence of what they purport to be and not as to truth of content. For this limited purpose I believe that it is only necessary to determine their admissibility by reference to the ICCMA.

44. Although requested to deal with all the other grounds of admissibility relied on (in addition to the ICCMA), the question of whether other legislation applies may require an individual consideration of the documents or may depend on a consideration of the totality of vive voce evidence already tendered or still to be led by the prosecution and whether it wishes to go further and tender the contents of any documentary evidence obtained under the ICCMA as constituting truth of content.

45. , I therefore believe that it would be premature at this stage to consider any of the other grounds of admissibility raised. This will not preclude the State from doing so at any later stage.

46. It is my intention to engage the parties at the close of the State case to identify which documents remain only provisionally admitted, which are sought to be admitted as being truth of content and whether it is possible at that stage to finally determine the basis of their admissibility, but obviously not their weight. The responsibility lies with both parties to remind me to do so.

ORDER

47. In this first stage of the enquiry into the admissibility of the Honk Kong documents and affidavits obtained under s 5 of the ICCMA I find that the accused were given sufficient opportunity to inspect them but failed to do so and that none of the other objections to the admissibility of these documents under s 5 of the ICCMA can succeed.
48. The documents will however be admitted into evidence as being what they purport to be without further proof;
- a. subject to the accused's entitlement to challenge the admissibility of any such document, should the State refer any witness to its contents, on specific grounds relevant to the genuineness of that document or the correctness or otherwise of its contents; and
 - b. without prejudice to the State seeking to rely on the truth of content of any document by reference to any other law which has been identified in its various Heads of Argument filed of record; in which event the accused's right to challenge the admissibility of the content of such document for such purpose is preserved
49. I accordingly order that:
- 1. The documents obtained by the letter of request and identified in the affidavits of Messrs Gordon, Lintern-Smith and Mercer are admissible under s 5(2)(b) of the International Co-operation in Criminal Matters Act, 75 of 1996 (the ICCMA) as being the trade and business records of the entities from whom they were obtained in Hong Kong and only to the extent that that they;
 - a. are the trade and business records of the entity from whom they were obtained;
 - b. are what they purport to be without further proof;
 - c. were sent and received by the person purporting to have done so as appears from the contents of the document itself on or about the date reflected thereon as the date of either despatch or receipt or approximating such date by reference to the document and any other relevant document that can shed light thereon; or were brought into existence on about the date reflected thereon
 - 2. The order in para 1 is;

- a. subject to the accused's entitlement to challenge the admissibility of any such document, should the State refer any witness to its contents, on specific grounds relevant to the genuineness of that document or the correctness or otherwise of its contents; and
- b. without prejudice to the State;
- i. subsequently relying on any other law identified in its aforesaid Heads of Argument in regard to the admissibility of the documents on the grounds that they are what the purport to be;
- ii. seeking to rely on the truth of content of any document by reference to any other law which has been identified in its various Heads of Argument filed of record; in which event the accused's right to challenge the admissibility of the content of such document for such purpose is preserved.

SPILG, J

The reasons for the decision were read out during a virtual court hearing on 26 March 2021 save that para 46 was introduced when para 47 was revised. The revised ruling was emailed on 13 April 2021

DATES OF HEARING:

24 March 2021

DATE OF JUDGMENT:

26 March 2021

FOR THE STATE:

Adv. EM Coetzee SC

Adv. JM Ferreira FOR ACCUSED ONE AND TWO: In person

[1] The reference is to Osman at para 23

[2] Almost all airlines and governments will not permit persons to fly to or return from South Africa.

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