

SOUTH AFRICA / JUDGMENT

S v Zuma and Others (CC358/05) [2006] ZAKZHC 22 (20 September 2006)

[2006] ZAKZHC 22

COURT

High Courts - Kwazulu Natal

BEFORE

Msimang

CASE / FILE NUMBER

CC358/05

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IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO : CC358/05

In the matter between :

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA ACCUSED 1

THINT HOLDINGS (SOUTHERN

AFRICA) (PTY) LTD ACCUSED 2

THINT (PTY) LIMITED ACCUSED 3

J U D G M E N T

MSIMANG J

Three accused in this matter stand indicted on four (4) counts of contravening the sections of the Corruption Act 94 of 1992 and on a number of alternative counts also relating to the contravention of the said Act, the contravention of the Prevention and Combating of the Corrupt Activities Act, 12 of 2004 and the contravention of the Prevention of Organised Crime Act 121 of 1998.

During October of 2005 counsel for all the parties met with the Judge President of this division and, during that meeting, a date of trial of the matter was agreed upon, to wit, 31 July 2006 and it was further agreed that a provision would be made for the trial to run for at least four (4) months thereafter. However, on 7

April 2006, the authority charged with the prosecution in the matter, namely, the Directorate of Special Operations

(DSO), addressed a letter to the attorneys for accused numbers 2 and 3, copying the same to the attorneys for

accused number 1 and to the Registrar of this court, in which letter the said authority, inter alia, for the first time informed all concerned that it would appear that the agreed trial date was becoming increasingly unrealistic, ascribing that state of affairs to the delays in finalising the indictment and investigations occasioned by certain litigation. A suggestion was made that a meeting again be arranged with the Judge President to discuss the way forward.

Thereafter an exchange of correspondence ensued between the defence and the DSO resulting in the letter dated 11 July 2006 addressed to the DSO by the attorneys for accused number 1 in which letter a suggestion was made

that, should the DSO still desire to apply for a postponement of the trial on 31 July 2006, they should do

so by means of a substantive application supported by affidavit. This suggestion was later agreed upon by all the parties, save that in its letter dated 11 June 2006 (sic) the DSO expressed a view that, while they were in agreement, in principle, that the exchange of affidavits in advance of the trial date may be of assistance to the court and may avoid any delay in disposing of the application for a postponement, such a procedure is not provided for in the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) and therefore that the arrangement should not be construed as subjecting the parties to the rules of court governing the conduct of civil applications on motion.

It was against the background of these facts that on 19 July 2006 the DSO filed a Notice of Motion accompanied by a supporting affidavit in which Notice it gave notice that on the trial date an application would be made for an order in terms of section 168 of the Criminal Procedure Act that the trial be adjourned to a date during the year 2007 to be arranged in consultation with the trial Judge and/or the Judge President.

When the matter was called on 31 July 2006 the defence, in turn, gave notice that they intended to oppose the said application for a postponement and, in addition, that they would launch their own counter-application claiming

a permanent stay of the prosecution or, in the alternative and in the event of such a stay not being granted, that, in terms of section 342 A of the Criminal Procedure Act, the court strike the matter off the roll and impose conditions relating to the reinstitution of the prosecution. Together with the said notice defence counsel from the bar handed their own papers in the form of affidavits opposing the State's application for a postponement and in support of their counter-application. After listening to argument I made the following order, namely, that :-

The State files its replies and answers in the application by no later than 14 August 2006;

The defence files their replies by no later than 21 August 2006;

The defence files Heads of Argument by no later than 28 August 2006;

The State files Heads of Argument by no later than 31 August 2006;

The applications are adjourned for argument to 5 September 2006.

Indeed, voluminous papers have since been filed by the parties in terms of the said Order with the result that, to date and excluding the Heads of Argument, the papers amount to a total of four thousand and forty three

(4043) pages.

Before dealing with the issues raised in the applications, and for purposes of doing so, I first set out the surrounding facts of this case.

Accused number 1 is an adult male and is well-known within the Republic of South Africa. His struggle credentials, as briefly set out in the Judgment of VAN DER MERWE J in the decision in *S v ZUMA*, 1 are legendary and impeccable. As set out in the indictment, upon his return from exile he occupied a number of important government positions including the one of being the Deputy President of this country from which he was removed on 14 June 2005. He presently holds the position of Deputy President of the ruling African

National Congress Party which position he has held since December 1997.

Accused Number 2 is a company duly registered with limited liability in terms of the company laws of this country and is represented in the present proceedings by its director MR PIERRE JEAN-MARIE ROBERT MOYNOT.

Accused number 3 is also a company registered in terms of the company laws of this country and represented in the present proceedings by its director MR PIERRE JEAN-MARIE ROBERT MOYNOT.

The genesis of the troubles in which the accused now find themselves can be traced back to the South African Defence Review which was approved for implementation by Parliament during April of 1998. Later during that year

the office of the Auditor-General identified the procurement of the Strategic Defence Packages (SDP's) as a high risk area from an audit point of view and decided to perform a special review of that procurement process. The special review, in turn, identified a number of shortcomings in the procurement process and made recommendations leading to certain hearings and deliberations in the Parliamentary Standard Committee on Public Accounts resulting in the conducting of the Joint Forensic investigation by the office of the Public Protector, the office of the Auditor-General and the National Prosecuting Authority (NPA). During November 2001 this joint-investigation produced a report, inter alia, declaring that no evidence had been found of any improper or unlawful conduct by the Government and therefore that there were no grounds to suggest that the Government's contracting position was flawed.

It would appear that by then the Director of the then Investigating Directorate : Serious Economic Offences (DSEO) had already commenced its own investigations and, for that purpose, had instituted a preparatory investigation in terms of section 28 (13) of the National Prosecuting Authority Act 32 of 1998 (The National Prosecuting Authority Act) which related to allegations of corruption and/or fraud in connection with the acquisition of armaments at the Department of Defence in respect of negotiations and/or contracts concluded with regard to the purchase of corvettes, sub-marines, light utility helicopters, maritime helicopters, lead in fighter trainers and advanced fighter aircraft.

This preparatory investigation had been triggered by the discovery of what has now become to be notoriously known as "the encrypted fax" from a secretary of MR ALAIN THÉTARD (THÈTARD). The latter was, at all material times, the Executive

Chairman of the board of directors and Chief Executive Officer of THOMSON HOLDINGS. He was also a director of THOMSON (PTY) LTD. In middle of 2001 the DSO's investigations led them to, among others, this secretary who testified that in March 2000 THÈTARD had given her a letter handwritten by him in French to type and to thereafter fax it in an encrypted form to THOMSON-CSF COMPANY THALES INTERNATIONAL AFRICA LTD in Mauritius and to THOMSON-CSF (INTERNATIONAL) in Paris. She could recall the contents of the correspondence as being to the effect that THÈTARD, SHAIK and accused number 1 had met in Durban and that during that meeting accused number 1 had given a coded indication that it had been agreed that, in exchange for a payment to accused number 1 of a sum of R500 000.00 per annum, the latter would protect THOMSON-CSF against the investigation into the arms deal and would support and lobby for THOMSON-CSF in future projects. When the secretary later made available to the investigators the original handwritten document what she had earlier on related to the investigators was confirmed.

On 24 August 2001 this preparatory investigation had been transformed into an investigation as contemplated in terms of section 28(1)(a) of the National Prosecuting Authority Act and the investigation would then include the suspected commission of offences of fraud and/or corruption in contravention of the Corruption Act 94 of 1992 arising out of armaments acquisition for the Department of Defence involving certain prime bidders and contractors.

Notwithstanding aforementioned terms of the report of the Joint-investigation, it would appear that the criminal

investigations conducted by the DSO did not come to a halt as it had been found by that body that certain individuals

within the Government Departments, parastatal bodies and in their private capacities had used their positions improperly

to obtain undue benefits in relation to the SDPS.

On 22 October 2002 the investigation was, in terms of section 28(1)(c) of the National Prosecuting Authority Act, extended to include investigation of the suspected commission of fraud and/or corruption in contravention of the Corruption Act 94 of 1992 arising out of payments to or on behalf of or for the benefit of accused number 1 by SHABIR SHAIK (SHAIK) and/or his NKOBİ GROUP OF COMPANY or by the THOMSON/THALES GROUP OF COMPANIES (which group presumably included accused numbers 2 and 3) and the protection of and/or wielding of influence for and/or using public office to unduly benefit the private business interests of SHABIR SHAIK and/or his NKOBİ GROUP OF COMPANIES and/or the THOMSON/THALES GROUP OF COMPANIES by accused number 1.

The next important event in the chronology of events in this matter was a press statement issued by the erstwhile National Director of Public Prosecutions MR BULELANI THANDANANI NGCUKA (MR NGCUKA) on 23 August 2003 and pursuant to which he announced, inter alia, that the investigations against accused number 1 and SHAIK had been finalised, that the DSO would prosecute SHAIK on various counts of corruption, fraud, theft of company assets, tax evasion and reckless trading. Regarding the position of accused number 1 MR NGCUKA informed all present that, though the investigating team had recommended that he should also be prosecuted, after careful and dispassionate consideration of the evidence and the facts of the case, it was concluded that, whilst there was a prima facie case of corruption against this accused, the prospects of success in a prosecution were not strong enough and that it was not certain that the case against him was a winnable one. This conclusion had been tested with senior counsel who was very skilled in these types of matters who had concurred with the same. Accordingly, the National Director concluded, a decision had been made not to prosecute accused number 1.

Indeed, in November 2003 SHAIK, together with eleven (11) related corporate entities, was duly indicted in the Local Division of this division. Among these corporate entities was accused number 3 who was indicted on charges

of corruption as accused number 11 in that trial (SHAIK trial).

On 19 April 2004 MR NGCUKA held a meeting with the representatives of THOMSON-CSF. It is common cause that in that meeting an agreement was concluded to the effect that, should THÈTARD depose to an affidavit stating that he was the author of aforesaid encrypted fax, the National Prosecuting Authority would, among other

things, withdraw the prosecution against accused number 11 in that trial. Pursuant to that agreement and on 20 April 2004 THÉTARD deposed to an affidavit confirming his authorship of the fax which affidavit was handed over to the DSO on 26 April 2004. Indeed, when the matter in the SHAIK trial was called on 11 October 2004, the State withdrew all charges against accused number 3, accused number 11 in that trial.

The trial against SHAIK and the rest of the corporate entities duly proceeded resulting in the conviction on a number of counts and the pronouncement of sentences on 8 June 2005. SHAIK has since appealed against the convictions and sentences and his appeal is pending before the Supreme Court of Appeal.

On 20 June 2005, following SHAIK'S conviction and no doubt as a result of the success the prosecution achieved in the SHAIK trial, the new National Director of Public Prosecutions decided to prosecute accused number 1 on afore-mentioned counts of corruption.

On 8 August 2005, presumably in terms of the relevant section of the National Prosecuting Authority Act, the DSO further extended the investigation against accused number 1 to include the suspected commission of the offences of fraud and the contravention of the Income Tax Act 58 of 1962, relating to declarations which accused number 1 allegedly made to Parliament, Cabinet and to the South African Revenue Service.

Since 29 June 2005 accused number 1 appeared in the Magistrate's Court on a number of occasions and, on 12 November 2005, an indictment was served upon him and the matter was formally transferred to the High Court on the date which had been arranged with the Judge President.

In the meantime the National Director of Public Prosecutions took a decision also to prosecute accused numbers 2 and 3 and, on 4 November 2005, an indictment was also served upon these accused in which indictment they

were being summonsed to appear in the High Court on 31 July 2006 together with accused number 1 for the trial of the matter.

A stage has now been set for dealing with certain incidents which, though they do not form part of the main plot, are relevant to the determination of the applications before us.

During August 2005 and at the instance of the DSO the Judge President of the Transvaal Provincial Division granted orders for the issue of search warrants authorising that body to conduct search and seizure operations at various premises, including the residences of accused number 1, the offices of two attorneys associated with him, the

business premises of accused numbers 2 and 3 and the residential premises of their director MR MOYNOT. The searches, which were subsequently conducted in terms of the warrants, unleashed strong court challenges by some of the subjects of those searches. In one of those challenges mounted during September 2005 the Witwatersrand Local Division set the relevant warrant aside and declared the search conducted on the strength thereof to have been unlawful. The DSO was,

however, subsequently granted leave to appeal against that order, which appeal is pending before the Supreme Court of Appeal. Another application was decided in favour of accused number 1 and his attorney by the Local Division of this division and we have been told that, though the DSO has filed a Notice of Application for Leave to Appeal, that application has as yet to be set down for argument. Another similar application which is worth mentioning here is the one launched by accused number 2 and MR and MS MOYNOT in the Transvaal Provincial Division. In that application the court upheld the warrant concerned, thus dismissing the application. All we have been told is that the applicants in that matter are contemplating an appeal against that order.

This then completes the synopsis of the factual background against the backdrop of which relief is being sought in the present applications.

At the commencement of argument and after having listened to counsel I ruled that the matter would proceed first on the State's application for a postponement and that application would be argued and judgment thereon be

given before attention is given to the defence counter-applications. Pursuant to that ruling what follows in this judgment will relate solely to that application.

Before analysing and discussing the legal issues raised by the facts and at the risk of stating the obvious, it is important, in view of the circumstances of the present matter, to briefly allude to the import of the

equality clause of our Constitution.

There can be no doubt that accused number 1 is a prominent member of the South African community which prominence is born of years of his dedication to the struggle for the liberation of the oppressed masses of this country. Also, that he is respected and idolised by a large sector of the community cannot be gainsaid. His standing within the community can, however, not alter his position in the eyes of the law. Our Constitution proclaims

that everyone is equal before the law and has the right to equal protection and benefit of the law. 2 We are therefore enjoined by the Constitution to treat accused number 1 in exactly the same manner as we would treat any other person. As a corollary to that decree and as equally important is the decree that, by virtue and because of his standing within the community, accused number 1 should be treated no worse. I am reminded of a pronouncement once made by a Judge of the Canadian Supreme Court when a prominent politician was on appeal before that court. During the course of his judgment the said Judge warned himself as follows :-

"(135) Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse." 3

It is this important principle which will, at all times, guide us in the determination of the issues before us in this matter, the principle which is enshrined in our Constitution for which accused number 1, together with many others, fought so hard.

Applications for postponements in criminal proceedings are governed by the provisions of section 168 of the Criminal Procedure Act which provide that :-

“A Court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the Court may seem proper and which are not inconsistent with any provision of this Act.”

The provisions have been the subject of judicial scrutiny and interpretation on a number of occasions and it has become trite during these interpretations that the section confers to the court a discretion which should be exercised judiciously. In the exercise of the same the court should be guided by two general principles, namely,

that :-

“...it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition” 4

The courts have also emphasized that ‘an adjournment of a criminal trial is not to be had for the asking’. 5 It must be motivated in terms of the Criminal Procedure Act and the court must be satisfied that the persons in respect of which the postponement is being sought are material witnesses, that the party seeking an adjournment has not been guilty of any remissness or neglect in an endeavour to procure their attendance and, thirdly, that there is a reasonable expectation of his being able to procure their attendance on the adjourned date. 6

Finally, in the exercise of judicial discretion the court must take into consideration the tenor and spirit of the Constitution. It was in this context that the HONOURABLE KRIEGLER J remarked as follows in *WILD AND ANOTHER v HOFFERT NO AND OTHERS* 7 :-

“(34) It goes without saying that, should an application for a remand be made by the prosecutor, the Magistrate will remain mindful of the provisions of the Bill of Rights. In particular the Magistrate should keep in mind the demands of s 25(3)(a) and the need to consider countering prejudice by using appropriate remedy.....”

An indictment which was served upon accused number 1 on 12 November 2005 is, with minor alterations, a mirror image of the indictment upon which SHAIK was tried and convicted during 2005 and the one that was served upon

accused numbers 2 and 3 on 4 November 2005 is, with minor alterations, also a mirror image of the indictment which had been served upon accused number 11 (accused number 3 in the present trial) in the SHAIK trial. It accordingly follows that by the date of trial of the present matter, namely, 31 July 2006, the DSO could have furnished the accused with all documents, statements and further particulars to those indictments and that, if that had happened, in all probability, the matter would have been ready to proceed to trial on those indictments on that date. No such documents, statements or further particulars had, however, been furnished by that

date.

Instead the DSO applied for a postponement of the matter, stating that the search and seizure operations had yielded over 93000 documents that needed to be scanned, copied and scrutinized for purposes of compiling a forensic report from which they intended to formulate a fresh indictment to replace the one that had already been served upon accused number 1 and to reply to a request for further particulars. The legal challenges by MS MOHAMED and

accused number 1 and his attorney to these operations had a delaying effect on the investigation since the documents

in question could not be inspected until the cases involving these challenges are disposed of. In view of these delays the DSO had, on 23 May 2006, instructed their forensic accountants to commence with the finalisation of the report, using all the available documentation. The same instruction had been given regarding the documents that had been seized during the search upon accused number 2.

The process of compilation of the report had reached an advanced stage and it was anticipated that the report would be ready as soon as possible after 31 July

2006. It was only after the compilation of the report that

the State would be able to provide outstanding further particulars and finalise an indictment which will, with the leave of the court, replace the existing one. All these processes would be completed in time for the trial to commence during the first half of 2007.

Indeed, when the matter was called before us on 5 September 2006 we were informed that the level of preparedness of the State had undergone a dramatic metamorphosis. The task, which had been considered to be impossible when the legal challenges were launched, had now been completed. The forensic report had then been compiled and copies were ready to be given to the defence. All that was left was the formulation of an indictment which would be completed by 15 October 2006. It was on the basis of these facts that the prosecution urged this court to find that it is "necessary or expedient" that the proceedings in this matter be adjourned and therefore that the application should be granted.

The defence persisted with their resistance to the application, contending that a case had not been made for such an adjournment and that, to postpone the matter, would infringe upon the constitutional right of the accused to a trial within a reasonable time.

Notwithstanding arguments of the defence to the contrary, it would appear that the evidence which was not available on the date of trial and in respect of which the adjournment is sought by the prosecution (contested evidence)

is material to its case. The allegation is made that such evidence is contained in the forensic report and that it will be used to formulate an indictment. This allegation is not denied by the defence. The only finding that can be legitimately made on the facts is therefore that such evidence is necessary to bolster the case for the prosecution and that it is material.

However, not only must such evidence be material but there must also be a “reasonable expectation” that it will be procured on the adjourned date. The word “expectation” is defined as follows :-

“awaiting : anticipationprobability of a thing’s happening.....” 8

Clearly therefore the enquiry involves a belief in the future occurrence of an event. The preceding adjective qualifies the type of the belief required, namely, that it must be “a reasonable one,” connoting that such a belief must be sensible and one based on sound judgment. 9

The contested evidence comprises, inter alia, of evidence of the documents which were seized during the search and seizure operations upon the office and residence of MS MOHAMED and upon the residences of accused number 1, his former office as well as upon the offices of his attorney of record in the present proceedings. The warrants in terms of which these searches were conducted and documents seized were declared to have been unlawfully obtained and unlawfully executed in the

decisions of two High Courts, the MS MOHAMED ones by the Witwatersrand Local Division on 9 September 2005 10 and those involving accused number 1 and his attorney, by the Durban and Coast Local Division on 15 February 2006.11 On 24 October 2005 the Witwatersrand Local Division granted leave of appeal to the Supreme Court of Appeal against its order. That appeal is pending as no date has as yet been fixed for the hearing of the same. Though notice of application for leave to appeal was noted on 15 February 2006 in respect of the other order, no steps have yet been taken to set the same for argument.

The position regarding the availability of the contested documents on the trial date is therefore presently uncertain. Even assuming (without deciding) that the prosecutor’s submission to be a correct one, namely, that the noting of appeals by them in the MS MOHAMED and ZUMA – HULLEY matters suspended the operation of the

orders

in those cases and that, pending the variation of those orders by the Appeal Court, they are entitled to utilize the contested evidence, in my judgment, to make use of those documents when their legal status have not been

clarified would not be a sensible move. I shudder to think of the consequences should the Appeal Court thereafter

dismiss the appeals thus upholding the decisions of the High Courts.

Besides, it is clear from the proven facts that the availability of the contested evidence is dependant upon the successful prosecution of the appeals by the State which should therefore have provided some evidence as to their

prospects in those appeals.

The court in the Acheson case (*supra*) was faced with a similar situation. There the procurement of witnesses on the adjourned date was dependant on the success of certain diplomatic initiatives. MAHOMED AJ (as he then was) pronounced himself as follows on the issue :-

“I say this because central to all the three possible mechanisms suggested by Mr Heyman for procuring the attendance of the absentees concerned is some successful diplomatic initiative, and I would therefore need some evidence as to the prospects of such diplomatic initiatives if I were to hold that there is a reasonable possibility of procuring the attendance of these absentees.” 12

No such evidence was placed before us in the present proceedings.

Something must also be said about social prejudice in this matter, namely, that prejudice associated with embarrassment and pain accused persons suffer as a result of negative publicity engendered by the nature of the charges. During argument the prosecution conceded that, as a result of the charges, the accused in this matter did and still suffer from this type of prejudice. Not that the prosecution had any choice. We cannot imagine any case

in recent times which has triggered as much negative publicity in the media as the present one. Having made

that concession the prosecution hastened to add that such prejudice is inavoidable and constitutes an unintended

consequence of our criminal justice system. It comes with the territory.

That may well be so. However, as it was pointed out in the Sanderson case, 13 the problem with this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the tension between the presumption of innocence and the publicity of trial be mitigated.

As we have already found, the prosecution has not satisfied us that the required evidence will be procured on the adjourned date. Should the matter then be further postponed, the accused will continue to suffer this type

of prejudice, unnecessarily so, in our judgment. It would therefore be appropriate at this stage to curtail this non-trial related prejudice and to counter the same by using an appropriate remedy.

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Having perused the papers filed of record and having listened to counsel's argument, it has dawned to us that it was inevitable that the State's efforts to prosecute in this matter would flounder. From the very

outset when a decision was taken to prosecute those efforts were anchored on an unsound foundation. In the Sanderson case 15 KRIEGLER J counsels as follows:-

"But the prosecution should also be aware of those inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in the complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay."

It is now history that these words of wisdom emanating from one of our eminent judges were jettisoned by the State in favour of some non-procedural policy and a precipitate decision was taken to prosecute accused number 1, a mere twelve (12) days after what the prosecution perceived to be their success in the SHAIK trial. The implementation of that decision constituted the beginning of the end of the edifice. Thenceforth the State case limped from one disaster to another.

Perhaps matters could have been rectified during October of 2005 when accused number 1 was due to appear in the Magistrate's Court for the second time. The defence applied pressure, threatening to resist further efforts to keep the matter in the Magistrate's Court and demanding to be given an indictment and the matter to

be transferred to the High Court. Because of its earlier precipitate and ill-advised decision, the State could do neither. Instead of forcing the issue and arguing for a postponement for further investigations in that forum, it gave in to defence pressure and opted for an easy way out. It struck a deal. It would now provide an indictment based on the SHAIK trial charges to the defence and agree to a consultation of all the parties with the Judge President to arrange a date of trial. That was the only business of the meeting with the Judge President on 12 October 2005 and 31 July 2006 was produced as the agreed trial date. And yet the prosecution knew very well that they would not use that indictment at the trial. Hence the characterisation of the document by MR SINGH as "a sham". Another false foundation for which the State was bound to pay.

Again, as they had failed to factor the inherent delays into their headstrong decision to prosecute, they could not have entertained a reasonable expectation that they would manage what was admittedly a mammoth task, that is, the marshalling of their evidence in time for the arranged date of trial. There were legal challenges to the warrants which were far from having been resolved, a lengthy forensic report to be compiled, an indictment to be formulated, an application for an amendment to the indictment to be attended to and the requests for further particulars to the indictment to be responded to. To use the description of the situation by their counsel later during argument, they took their chances.

During May 2006 the chickens came home to roost. At the time they stared the trial date in the face without adequate preparations. Another knee-jerk reaction to the crisis. They will now instruct their accountants to compile a report utilising all the documents, including the contested ones, again taking their chances that the trial court would come to their rescue and admit such evidence in terms of section 35(5) of the Constitution, overlooking the fact that, even for that purpose, for them to be granted a postponement in the matter, they needed to show that such evidence would be available on the adjourned date, the task, we have found, they were not equal to.

I digress to also allude to what we regarded as a material inaccuracy in the papers filed by the State in this matter. The State's founding affidavit was deposed to by MR JOHAN DU PLOOY who is described as a Senior

Special Investigator employed at the Director of Special Operations. In paragraph 36 thereof he declares that the decision to refer all the documentation to the forensic accountants on 23 May 2006 was taken with the agreements

reached in principle with the legal representatives of MS MOHAMED and accused number 1. The statement was repeated by their counsel MR TRENGOVE during argument. However, after counsel for the accused had indicated that no such

agreements had been concluded I broached this subject again with MR DOWNER during his replying argument. It now seemed that the version was that the decision was taken in anticipation of an agreement but that no agreement (either in principle or otherwise) had ever been concluded. No explanation was given for this inaccuracy which, in our judgment, was an important one and one that could have influenced our decision directing it in the favour of the State.

Explaining the reason for the decision to use the contested documents in the Forensic Report notwithstanding the fact that litigation in respect thereof was outstanding, MR TRENGOVE informed us that 'implicit in that decision, is a decision (for the State) to take its chances.' This submission was confirmed by MR DOWNER in his replying argument who went further to inform us that '.....obviously the State every day in every court case takes chances.....'

It is not necessary, for purposes of the enquiry before us, to pronounce upon the propriety of such a conduct on the part of the prosecution neither can I confirm whether taking chances is what prosecutors do every day in our courts. What is, however, evident in the present case is that there were clear judicial guidelines available

to the State which should have informed their decision to prosecute. There was accordingly no need for them to take any chances. They ignored those guidelines to their peril.

In view of the circumstances set out herein, in particular the conduct of the prosecuting team as well as the lack of a reasonable expectation, I have been driven to the conclusion that it would be inappropriate for me to exercise my discretion in favour of the prosecution in this matter and the application for the postponement of the case is accordingly dismissed.

1

[2006] 3 All SA 8 (W) at 49 - 50;

2 Section 9(1) of the Constitution of the Republic of South Africa Act 198 of 1996;

3 Per Binnie J in *S v Regan* 91 C.R.R. (2d) 51 at 99;

4 *S v Geritis* 1966(1) SA 753 (W) at 754 E - F;

5 *S v Acheson* 1991(2) SA 05 (Nm Hc) at 811 C;

6 *Geritis* case (supra) at 754 H - 755 B;

7 1998(2) SACR 1 (CC) AT 14 h - I;

8 *The Concise Oxford Dictionary* 7 ED at 339;

9 *Ibid* at 863;

10 *Mohamed v National Director of Public Prosecutions and Others* (2006) 1 All SA 127 (W);

10 *Mohamed v National Director of Public Prosecutions and Others* (2006) 1

All SA 127 (W);

11 *Zuma and Anther v National Director of Public Prosecutions and Others* (2006) 2 All SA 91 (D);

11 *Zuma and Anther v National Director of Public Prosecutions and Others* (2006) 2

All SA 91 (D);

12 *Acheson* case (supra) at 814 G –t H;

13 *Sanderson v Attorney-General, Eastern Cape* 1998(1) SACR 227 (CC) at pp 238 – 239 para 23;

14 *Wild Case* (Supra) at p 15 para 35;

15 *Sanderson Case* (Supra) at 243 para 36;

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