CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 21/94

Key

v

The Attorney General, Cape of Good Hope Provincial Division and Another

Heard on: 23 May 1995

Delivered on: 15 May 1996

JUDGMENT

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[1] **KRIEGLER J**: The applicant is the accused in a pending criminal trial in the Cape of Good Hope Provincial Division of the Supreme Court (the "CPD"). This case arises out of the collapse of a group of companies with which the applicant was allegedly associated. The flagship of the group, Tollgate Holdings Ltd ("Tollgate") was finally wound up early in 1993. Some two weeks later representatives of the second respondent, acting on the authority of an order issued by him under section 6(1) of the Investigation of Serious Economic Offences Act No 117 of 1991 (the "Act"), searched the residence and offices of the applicant and seized a number of documents. On 3 February 1994 the applicant was indicted on a number of charges related to the affairs of Tollgate. He contends that the case against him has been built up on the basis of the documents seized during the searches of his offices, consequent interviews with witnesses and a report prepared by investigative accountants to whom the documents were made available under section 7 of the Act. The trial was set down for hearing in October 1994 but in August of that year the

applicant launched urgent motion proceedings, resulting *inter alia* in an order in the following terms:

> 1. The issues whether:
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> > 1.1 sections 6 and 7 of the Investigation of Serious Economic Offences Act, 117 of 1991 ("the OSEO Act") are in conflict with the Constitution of the Republic of South Africa Act, 200 of 1993 ("the Constitution") and are, accordingly, invalid;
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> > 1.2 all evidence relating to the criminal proceedings in the matter of the State versus M R Key ("the criminal proceedings") in the above Honourable Court obtained in terms of sections 6 and 7 of the OSEO Act is inadmissible and may not be used against the Applicant in the criminal proceedings;
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> are referred to the Constitutional Court in terms of section 102(1) of the Constitution for determination.

The balance of the claims for relief was postponed *sine die* and the criminal trial did not ensue. On what basis a separate civil application was made to the CPD concerning the pending criminal trial is not clear to me. No argument was addressed on this question at the hearing of this matter. In the circumstances, I will not consider further whether the application was proper.

[2] It is not necessary to quote the two impugned sections of the Act. A paraphrase of the salient provisions will suffice. Section 6(1)(a) empowered the second respondent (or his authorized representative) to enter, inspect and search any premises in which he suspected there was anything relevant to an inquiry by him into a serious and complicated economic offence. Subsection (d) of section 6(1), in turn, authorized the seizure of anything found on the premises which he regarded as having a bearing on the inquiry. As far as section 7 is concerned, all that need be said is that investigative data could be disclosed with the second respondent's consent. The applicant argued that sections 6 and 7 were in breach of section 13 of the Constitution which reads as follows:

> Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

[3] The issues referred to this Court have been overtaken by supervening events. Since this case was argued, section 6 of the Act has been materially amended by section 1 of the Investigation of Serious Economic Offences Amendment Act No 46 of 1995, which came into force on 20 September 1995. The question of its constitutional validity prior to that amendment is moot. Moreover, the use in the criminal trial of the evidence obtained in or as a result of the search and seizure now fall to be determined in accordance with recent judgments of this Court.

[4] The first question to be asked however is whether the applicant can challenge the validity of sections 6 and 7 of the Act on constitutional grounds in respect of conduct which took place prior to 27 April 1994, the date upon which the Constitution came into force. For the answer to that question one need go no further than the judgment of this Court in *Du Plessis and Others v De Klerk and Another*.[1] One of the questions dealt with in that case is whether Chapter 3 of the Constitution operates retrospectively or retroactively. The defendants in a defamation action, in which the pleadings had been closed before the Constitution came into operation, applied post-constitutionally to introduce a defence based on section 15 of the Constitution.[2] The conclusion to which this Court has come is that

> the Constitution does not turn conduct which was unlawful before it came into force into lawful conduct. It does not enact that as at a date prior to its coming into force "the law shall be taken to have been that which it was not".[3]

And save possibly in exceptional circumstances involving gross injustice abhorrent to our present constitutional values, the courts apply the law as it was before the Constitution came into force.

[5] In reaching his decision Kentridge AJ relied upon the Canadian case of *R. v. James; R. v.*

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[1](CC) Case No CCT 8/95, delivered on the same day as this judgment.

[2]That section protects freedom of expression.

[3]*Supra* n1 at para 20.

Dzagic.[4] The two interrelated issues here, their factual matrix and the sequence of constitutional events are closely analogous with those pertaining in that case. There, as here, there was a search of a suspect's business premises and residence in the course of which documents, subsequently sought to be used in criminal proceedings against the suspect, were seized. In both instances the search and seizure were statutorily authorized when conducted,[5] but the very statutory authority was, before the commencement of the criminal trial, overtaken by a constitutional dispensation protecting personal rights and overriding infringing statutes.[6] Ultimately, after an extensive and incisive review of Canadian case law and academic opinion, Tarnopolsky JA, speaking for the Ontario Court of Appeal, came to the conclusion:

> [O]ne applies the law in force at the time when the act that is alleged to be in contravention of a *Charter* right or freedom occurs. Therefore, s. 8 of the *Charter* cannot be applied to a search or seizure which occurred *before* the coming into effect of the *Charter*.[7]

The judgment ends with a statutory reminder, no less applicable to Chapter 3 of the Constitution:

> The object of the *Charter* is not to make the obtaining of evidence or the getting of a conviction easier or more difficult, it is not intended to help people get acquittals or the Crown to succeed in its prosecutions, but rather to induce legislatures and government agents to respect the rights and freedoms set out therein, with notice as to the consequences of invalidity that follow any contrary action. From that point of view, it is important that actions be determined by the law, including the Constitution, in effect at the time of the action.[8]

It is significant[9] that the Supreme Court of Canada, without giving reasons, dismissed an appeal

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[4](1988), 33 C.R.R. 107.

[5]In *R. v. James; R. v. Dzagic* section 231(1) of the Canadian Income Tax Act permitted persons authorized by the relevant Minister to enter any business premises to inspect and audit any books or documents found there and to seize and remove such books or documents. Although there are differences of wording, the subsection is not unlike section 6(1) of the Act.

[6]The resemblance of the Canadian Charter of Rights and Freedoms to Chapter 3 of our Constitution does not require discussion. Suffice it to say that there are distinct echoes between section 24 of the Charter and section 7 of the Constitution, between sections 8 and 13, and between sections 1 and 33(1) respectively.

[7]*Supra* n4 at 128.

[8]*Supra* n4 at 131-2.

[9]As Kentridge AJ points out in para 23 of the judgment in *Du Plessis v De Klerk*.

against that judgment of Tarnopolsky JA.[10]

[6] The present case is the direct obverse. The search and seizure in terms of section 6 of the Act, the arrest of the applicant, the disclosure of documents seized to the accountants under section 7 of the Act, the preparation of their report in which such documents were used and the formulation and service of the indictment in the criminal proceedings all took place prior to the Constitution coming into force. And it is those acts which the applicant seeks to impugn by virtue of their alleged infringement of rights afforded to him by Chapter 3. Applying the *ratio* in *Du Plessis v De Klerk*, none of the events of which the applicant complains can be said to constitute a breach of any of his rights under the Constitution. Such rights had not yet come into existence when the events took place. Nor did - nor could - the subsequent advent of the Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken. It follows that even if we were to hold that section 6 (as it previously read) or section 7 of the Act infringes one or other fundamental right protected by Chapter 3 of the Constitution, that would not avail the applicant. Moreover, even if it were open to us in exceptional circumstances to make an order declaring that acts performed prior to 27 April 1994 are to be treated as being invalid, an issue we left open in *Du Plessis v De Klerk* and again leave open in the present case, this is clearly not a case in which there are exceptional circumstances which would justify the making of such an order.

[7] There is nothing inherently unfair in receiving in evidence material which was properly garnered in the course of a lawful search and seizure. And there is no warrant in justice for retroactively casting a blanket of illegality over what was properly unearthed according to the law

[10] *Supra* n4 at 108.

as it stood at the time. We are not dealing with any other possible grounds for excluding otherwise admissible evidence. The contention advanced on behalf of the applicant was that the advent of the Constitution, with the personal rights and freedoms it heralded, automatically, without more and by operation of law, served to render constitutionally objectionable - and therefore inadmissible at the criminal trial - evidence lawfully obtained in terms of sections 6 and 7 of the Act. That is the contention posed in the second issue referred and that is the contention which should, in my view, be firmly rejected.

[8] With regard to other possible grounds for excluding, at a subsequent criminal trial, evidence directly obtained during the searches, or evidence derived from or based on information discovered or documents seized during such searches, I would ordinarily not have commented, as it is not germane to the issues referred. Nevertheless I feel obliged to do so in the light of the judgment in the case of *Park-Ross and Another v Director: Office for Serious Economic Offences*.[11] That was a matter in which there had been a consent to the jurisdiction of the provincial division in terms of section 101(6) of the Constitution.[12] It related to a proposed inquiry under section 5 of the Act into suspected corruption and fraud. The applicants had sought to stay the inquiry, based on a challenge to the constitutionality of sections 5, 6 and 7 of the Act, and asked for a ruling on the admissibility of evidence directly or derivatively obtained by the respondent pursuant to the exercise of his powers under sections 6 and 7. A declaration was made

[11] 1995 (2) SA 148 (C).

[12] A provincial or local division of the Supreme Court has been vested with constitutional jurisdiction in respect of certain matters by section 101(3) of the Constitution. This does not include jurisdiction to enquire into the validity of an Act of Parliament, which is ordinarily within the exclusive jurisdiction of the Constitutional Court. Section 101(6) of the Constitution provides, however, that:

> If the parties to a matter falling outside the additional jurisdiction of a provincial or local division of the Supreme Court in terms of subsection (3), agree thereto, a provincial or local division shall, notwithstanding any provision to the contrary, have jurisdiction to determine such matter.

by the CPD that sections 5 and 7 were constitutional but that section 6 of the Act was inconsistent with the Constitution, and accordingly invalid.[13]

[9] The one point arising out of the *Park-Ross* decision which bears directly on the case now before us relates to the use immunity claimed by the applicant. The second issue referred, it will be recalled, aims at the exclusion at the impending criminal case against the applicant of any evidence obtained during the searches and of any evidence derived from such material. In the *Park-Ross* case an analogous claim succeeded.[14] It does seem, however, that the grant of that particular order was based on an agreement between the parties that such an order would be made should invalidation of section 6 of the Act be ordered.[15] The impression is fortified by the circumstance that the judgment does not address the question of admissibility as a separate issue, distinct from that of constitutionality.

[10] In his judgment in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* Ackermann J espoused a flexible, case-by-case approach to the admissibility of derivative evidence obtained under statutory compulsion and disagreed with the decision in *Park-Ross* to the extent that it differed from that view.[16] Although the majority of this Court did not subscribe to the views of Ackermann J on other aspects of the *Ferreira v Levin* case, the particular point now under discussion indeed carried the support of a substantial majority. In any event Ackermann J returned to his espousal of the flexible approach in two recent judgments in which

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[13] *Supra* n11.

[14] *Supra* n11 at 176D, para 2 of the order.

[15] *Supra* n11 at 174I-175G.

[16] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 147-52. The point at issue there was the constitutionality of section 417(2)(b) of the Companies Act No 61 of 1973 insofar as it rendered admissible self-incriminating statements made by an accused under compulsion of the section.

he enjoyed unanimous support. In the case of *Bernstein and Others v Bester NO and Others* a point at issue was whether a witness at an inquiry under sections 417 and 418 of the Companies Act No 61 of 1973 was constitutionally protected from answering questions which could expose him or her to civil liability.[17] In the other case, *Nel v Le Roux NO and Others*, this Court was concerned with the constitutionality of section 205 of the Criminal Procedure Act No 51 of 1977. There one of the issues was whether the section was unconstitutional in that it compelled a person to answer questions which could result in exposure to administrative penalties.[18] In both cases the conclusion was that there was no constitutional flaw in the statutory provision. And in both cases an essential component of the *ratio* was that the impugned provisions were not inherently inimical to any rights of the examinee which were protected in Chapter 3 of the Constitution, so long as the judicial officer presiding at the examination interpreted the provisions and their limitations in accordance with the spirit, purport and objects of the Constitution.[19]

[11] In the case of section 6 of the Act there is no reason to adopt a different stance. The section does not deal with the admissibility of evidence. Nor does any part of the Act deal with the topic; it is concerned with the procurement of information relating to suspected serious economic offences and does not purport to address questions of proof at any trial that may follow. Even if one were to accept that the section was constitutionally invalid, and even if one were further to assume that such invalidity in turn rendered the prior searches and seizures unlawful, it does not follow that the evidence obtained directly or derivatively as a result of such searches and seizures would necessarily be inadmissible in criminal proceedings against the person from whom the

[17](CC) Case No CCT 23/95 27 March 1996, unreported.

[18](CC) Case No CCT 30/95 4 April 1996, unreported.

[19]*Bernstein v Bester NO, supra* n16 at paras 60-3; *Nel v Le Roux NO, id* at paras 5-9.

documents containing, or pointing to, the evidence were seized.

[12] A criminal trial court will of course always have to be mindful of the fundamental rights entrenched in Chapter 3. It will in particular ensure that the accused enjoys the benefit of the right to a fair trial guaranteed by the general introductory words in section 25(3) of the Constitution.[20] In doing so, due regard will be had to the *dictum* of Kentridge AJ (speaking on behalf of this Court in its first reported judgment) in *S v Zuma and Others:*

> The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire:
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> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
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> A Court of appeal, it was said (at 377),
>
> > 'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'
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> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.[21]

[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to

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[20] "Every accused person shall have the right to a fair trial . . .".

[21] 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 16.

prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime.[22] But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision.[23] At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

[14] If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial judge to decide whether the circumstances are such that fairness requires the evidence to be excluded. It follows that the applicant is not entitled to an order from this Court in these proceedings that the evidence secured as a result of the searches and seizures will be inadmissible in criminal proceedings against him. In so far as the decision in *Park-Ross* is inconsistent with this conclusion, it must be taken to be incorrect.

[15] In the *Park-Ross* case section 7 of the Act was held to be consistent with the Constitution.[24]

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[22]It is that endeavour in the context of our history of executive) hegemony and the pervading abuse of its power, that inspired the drafters of the Constitution to opt for a constitutional democracy with a detailed and fully justiciable chapter of rights. That is manifest in Chapter 3 of the Constitution, especially when read in conjunction with the Preamble and Postscript. It was also the inspiration for many of the specific rights enunciated in the Chapter. Thus section 8(1), the very first of the array of rights speaks of "equal protection of law". A principle aim of the Chapter was to protect the individual against the state. This is apparent from section 11 (freedom and security of the person), section 13 (privacy), section 16 (assembly, demonstration and petition) and especially section 25, which affords detained, arrested and accused persons a formidable array of safeguards against invasion of their basic right to fair treatment.

[23]See *supra* n15 at para 153.

[24]*Supra* n11 at 174B.

We are inclined to agree with that decision. It is, however, not necessary to express a firm opinion in that regard. The disclosure objected to by the applicant took place prior to the date on which the Constitution came into force. The applicant does not, nor could he, allege that this constituted a breach of his rights under the Constitution. A disclosure of the information lawfully obtained before the Constitution came into force to the court or other persons for the purposes of the criminal proceedings cannot be said to infringe the applicant's right to privacy under the Constitution. No allegation has been made that the applicant reasonably fears that information will be disclosed to any person for any other purposes. In the circumstances the applicant has not established that his right to privacy is infringed or threatened by section 7 of the Act.

[16] In summary, the court makes no order in regard to the question whether sections 6 and 7 of the Investigation of Serious Economic Offences Act No 117 of 1991 are inconsistent with the Constitution. The evidence procured pursuant to sections 6 and 7 of the Investigation of Serious Economic Offences Act No 117 of 1991, which was obtained prior to 27 April 1994 was not rendered inadmissible in criminal proceedings against the applicant solely by virtue of the coming into force of the Constitution. The question whether the admission of such evidence would in any way infringe the applicant's right to a fair trial is a matter to be decided by the trial judge on the facts and circumstances established at the trial.

[17] Both the applicant and the respondents sought an order for costs. However, this was a matter referred to this Court by consent. For the reasons given in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* (No 2) (CC) Case No CCT 5/95, 19 March 1996, unreported at para 9, it is my view that no order regarding costs should be made in this case.

[18] In the result no order is made in respect of either of the two issues referred, nor in respect of costs.

J C KRIEGLER

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

For the applicant

SF Burger SC
DM Davis

Instructed by Webber Wentzel Bowens

For the respondents

JJ Gauntlett SC
JC Heunis

Instructed by the State Attorney, Cape Town