

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case No. 34/03
DCLD Case No. 5680/2002

In the matter between :-

SCHABIR SHAIK

Applicant

and

THE MINISTER OF JUSTICE

First Respondent

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

Second Respondent

LEONARD McCARTHY – THE
INVESTIGATING DIRECTOR :
DIRECTOR OF SPECIAL OPERATIONS

Third Respondent

WILLIAM JOHN DOWNER

Fourth Respondent

GERDA FERREIRA

Fifth Respondent

AND IN THE MATTER of an
Application for leave to appeal in terms
of Rule 18 of the Rules of the
Constitutional Court.

**SECOND TO FIFTH RESPONDENTS' RESPONSE
IN TERMS OF RULE 18 (9) (a)**

KINDLY TAKE NOTICE THAT the second, third, fourth and fifth respondents (referred to below as "the respondents") oppose the application for leave to appeal on the grounds set out below :-

LACK OF PRACTICAL EFFECT :-

1.

- (a) The Summons which the applicant sought to have set aside was issued on the basis that the applicant was a "suspect" in the investigation of the suspected commission, or attempted commission, of certain offences of fraud and/or corruption in contravention of the Corruption Act, No. 94 of 1992.
- (b) The applicant has, since the application for leave to appeal was lodged, been formally charged and is now an accused person in relation to the said offences.
- (c) In terms of Section 35 (1) of the Constitution of the Republic of South Africa, 1996, the applicant has a right to remain silent.
- (d) The respondents are accordingly no longer entitled to question the applicant pursuant to the provisions of Section 28 (6)(a) of the National Prosecuting Authority Act, No. 32 of 1998 ("the Act") and have no intention of doing so.
- (e) The basis upon which the applicant approached the Durban and coast Local Division of the High Court has accordingly disappeared and the granting of relief, even if an appeal should be successful, would serve no purpose.

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- (f) The determination of the appeal, if the application for leave to appeal were granted, would not have any practical effect on the parties, or on other persons, since each case would have to be determined on its own peculiar facts.
- (g) The appeal is accordingly of academic interest only.

CONSTITUTIONALITY OF SECTION 28 (6) :-

2.

- (a) Having regard to the protection afforded to accused persons by Sections 35 (1) and (3) of the Constitution, the words "any person" in Section 28 (6) (a) of the Act must be construed to exclude a reference to an accused person.
- (b) Section 28 (6) (a) of the Act accordingly does not infringe the applicant's rights to remain silent and to a fair trial.
- (c) There is, however, no justification for excluding "suspects" from the ambit of the definition of "any person".

3.

- (a) There was a dispute of fact on the papers as to whether the State had already formed an intention to charge the applicant.

The respondent's attitude was that, because the investigation was still ongoing, it was not possible to weigh up the evidence available and to determine which of it constituted evidence of complicity or "incriminating evidence" for the purposes of a possible prosecution.

- (b) The Court a quo correctly held that the respondents' version should be accepted, namely that no decision had been taken whether or not to charge the applicant.
- (c) The proceedings contemplated by Section 28 (6) of the Act are not criminal proceedings.
- (d) The applicant had accordingly not been put upon his defence and the State could not validly be accused of using Section 28 (6) in order to circumvent a defence.

4.

- (a) In any event, the "use immunity" afforded by Section 28 (8) (b) of the Act provides the applicant with adequate protection.
- (b) Is for the Court hearing the criminal trial to determine the admissibility in evidence of answers furnished during a Section 28 (6) (a) Inquiry.

5.

- (a) It was not disputed that investigations in terms of Section 28 of the Act are “crucial in the fight against crime, especially the sort of crime contemplated in Section 7 (1) (a), in respect of which the Directorate of Special Operations was established”.
- (b) It was common cause that the community has a pressing interest in security.
- (c) In the circumstances, such limitation as Section 28 (6) (a) of the Act might oppose on the applicants’ constitutional rights, is reasonable and justifiable.
- (d) The purpose of such a limitation is, through the procedure provided by Section 28 of the Act, to achieve the imperatives prescribed by Section 179 of the Constitution.

PROCEDURE TO BE ADOPTED :-

6.

- (a) In terms of Section 28 (4) of the Act, the procedure to be followed in conducting an investigation is to be determined by the Investigating Director at his or her discretion, having regard to the circumstances of each case.
- (b) The exercise of such a discretion does not constitute “administrative action”.

DATED AT DURBAN THIS 2ND DAY OF SEPTEMBER 2003.

SECOND TO FIFTH
RESPONDENTS' ATTORNEY

THE STATE ATTORNEY (KWAZULU-NATAL),
Second to Fifth Respondents' Attorneys,
3rd Floor,
Sangro House,
417 Smith Street
DURBAN

Ref: 116/506/02/S/P13 : Mr Kevan

C/o 10th Floor,
North State Building,
95 Market Street
JOHANNESBURG

TO : **THE REGISTRAR**
Constitutional Court,
Braampark Forum II
33 Hooft Street
JOHANNESBURG

AND TO : **REEVES PARSEE ATTORNEYS,**
Applicant's Attorneys
C/o **SADER'S ATTORNEYS**
4th Floor,
Cape House,
15 McLaren Street,
Cnr Fox/McClaren Streets
JOHANNESBURG