

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CC CASE NO. :  
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 Uniform Rules  
of the Constitutional Court

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**AFFIDAVIT**

I, the undersigned,

**SCHABIR SHAIK,**

do hereby make oath and say :

1.

I am the Applicant herein. I am an adult male, businessman, director, and I reside at 20<sup>th</sup> Floor, Yarningdale, 199 Marine Parade, Durban. I am a director of Nkobi Holdings (Pty) Ltd (“Nkobi”). The company’s principal place of business is at Suite 582, Victoria Maine Building, 71 Victoria Embankment, Durban, and a director of a number of associated companies.

2.

The First Respondent is The Minister of Justice whose address for the purposes of service is at the offices of the State Attorney (KwaZulu-Natal), 3<sup>rd</sup> Floor, Sangro House, 417 Smith Street, Durban.

3.

The Second Respondent is the National Director of Public Prosecutions whose

offices are at Maize Board Building, corner Beatrix and Belvedere Streets, Pretoria, and who is represented by the State Attorney (KwaZulu-Natal).

4.

The Third Respondent is Leonard McCarthy, the Investigating Director : Director of Special Operations, appointed in terms of the National Prosecuting Authority Act 32 of 1998 (“the Act”), and whose offices are at Promat Building, corner Creswell and Moreleta Streets, Silverton, Pretoria.

5.

The Fourth Respondent is William John Downer, who is the Deputy Director of Public Prosecutions, Cape of Good Hope, and has been cited as a party to the application in the Court *a quo* in his capacity as the person who has been designated by the Third Respondent to conduct an investigation in terms of Section 28(2)(a) read with Section 28(14) of the Act. He is also represented by the State Attorney (KwaZulu-Natal).

6.

The Fifth Respondent is Gerda Ferreira, an adult female, Advocate, who is

employed by the Directorate of Special Operations (“DSO”) and has been cited in the application in the Court *a quo* in her capacity as a member of the Directorate of Special Operations appointed to conduct the investigation referred to in the preceding paragraph with the Fourth Respondent for the purposes of questioning me in terms of Section 28(6) of the Act. She is also represented by the State Attorney (KwaZulu-Natal).

7.

The application which I brought in the Court *a quo* arose as a result of a summons issued by the Director/Deputy Director : Director of Special Operations, on 12 June 2002, in terms of Section 28(6) and (7) of the Act, that I appear on 26 June 2002 at 14h00, at the offices of the Director of Special Operations in Durban, to be questioned and to produce documentation. A copy of the said summons is annexed marked "A". On 31 July 2002 a letter was addressed by the Fourth Respondent enclosing an amended annexure that was to be substituted for the annexure attached to the summons. A copy thereof is annexed hereto marked "B".

8.

On 26 June 2002 I appeared at the venue allocated for the purposes of

questioning. I was represented by my attorney and Counsel. The Fourth and Fifth Respondents were present on this occasion and intended to conduct the questioning, with the Fifth Respondent acting as Chairperson. It was agreed, as a result of objections raised by my legal representatives, that in view of the nature of the objections that were raised that I bring appropriate legal proceedings to deal with the validity of the proceedings and that the questions stand over until finalisation of those legal proceedings. On 6 September 2002 the application brought before the Court *a quo* was instituted. That application was opposed by the Second to Fifth Respondents. The First Respondent has indicated that he abides the decision of the Court.

9.

The application was heard in the Court *a quo* by the Honourable Mr Justice McLaren on 27 June 2003. Judgment was delivered in regard to the application on 18 July 2003.

10.

I thereafter lodged an application in terms of Rule 18(2) of the Rules of the Constitutional Court and in terms of Rule 49 of the Uniform Rules of the High Court, the latter being an application for leave to appeal to the Supreme Court of

Appeal which would only be prosecuted in the event of the Constitutional Court ruling that leave to appeal directly to the Constitutional Court be refused.

11.

The application referred to in the preceding paragraph was heard by Mr Justice McLaren on 12 August 2003 and he issued a certificate and order on 13 August 2003.

12.

A copy of the judgment granted in the main application is annexed hereto marked "C". A copy of the judgment recording the certificate and order is annexed marked "D".

13.

In the present application for leave to appeal I challenge the following findings made by the Court *a quo* :

- (a) that Section 28(6) of the Act is constitutional and valid;
  
- (b) that the procedure for questioning in terms of the abovementioned Section does not constitute administrative action and is accordingly not subject to the requirements set out in Section 33(1) of the final Constitution.

14.

The abovementioned findings are the broad findings made by the Court *a quo* and the grounds upon which and reasoning for reaching those conclusions are set out in the judgment referred to above.

15.

I annex hereto as annexure “E” a copy of the application that was lodged in terms of Rule 18(2) of the Rules of the Constitutional Court and in terms of Rule 49 of the Rules of the High Court, which set out the substantive grounds on which a certificate was sought in terms

of Rule 18, and leave to appeal was sought to the Supreme Court of Appeal.

16.

In the judgment of the Honourable Mr Justice McLaren he dealt with each of the

grounds relied upon and was satisfied that as regards the grounds that were relied upon to challenge the first finding, for seeking the certificate in terms of Rule 18 and the order in terms of Rule 49, that :

- (a) the constitutional matter was one of substance on which a ruling by the Constitutional Court is desirable;
- (b) the evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and dispose of the matter without having to refer the case back to the High Court for further evidence; and
- (c) there are reasonable prospects that the Constitutional Court will reverse or materially alter the judgment if permission to bring the appeal is given.

17.

In regard to the challenge to the second finding and that part of the judgment dealing with the findings that the process for questioning is not administrative action, the Court *a quo* held

that there was no reasonable prospect that another Court will come to a different conclusion although it held that another Court may hold that the procedure which was proposed for questioning was unfair.

18.

The Court *a quo* correctly held that the provisions of Section 28(6) of the Act infringe the right in Section 35(1)(a) of the Final Constitution namely the right that “*everyone who is arrested for allegedly committing an offence has the right to remain silent*”.

19.

The Respondents challenged the interpretation placed by my legal representatives upon the interpretation of this right as one enjoyed by a suspect. The Court *a quo* held that a suspect also enjoys such right. It is respectfully submitted that this conclusion by the Court *a quo* was indeed correct.

20.

It was common cause on the papers in the Court *a quo* that I was a suspect in the investigation being carried out by the Directorate of Special Operations and accordingly the Court *a quo* held that I accordingly enjoyed such right. The Court also held that I also accordingly had standing to bring the said application to challenge the validity of Section 28(6).

21.

It was also argued by my legal representatives that on a proper interpretation of Section 28(6) it also permitted the questioning of an accused person and that was relevant for the purposes of determining the constitutional validity thereof. The Court *a quo* held that this section did not include a power to question an accused person. It is respectfully submitted that this Honourable Court may take a different view on the matter considering that the said section permits the questioning of “*any person who is believed to be able to furnish any information on the subject of the investigation*”. The ambit and reach of the said section is accordingly not curtailed to exclude an accused person. It is respectfully submitted that the interpretation placed by the Court *a quo* is not permissible on the principles applicable to reading down an over-broad provision inasmuch as the language that has been used is not reasonably capable of being read down.

22.

The Constitutional Court has not considered whether a statutory power to compel a person to answer questions in a situation such as the present, would be constitutional and valid. The purpose for which the power to question is provided in the Act, is to enable the State to conscript the suspect to assist in a criminal investigation against himself. A provision of this nature has far reaching

effects in regard to the right to remain silent, and the right to a fair trial, should the suspect subsequently be charged.

23.

The Court *a quo* relied upon Section 28(8)(b) as being sufficient to afford protection, as well as a trial court's discretion to exclude evidence to ensure trial fairness, and that these constitute an adequate balancing justifying the infringement of the right to silence.

24.

It is respectfully submitted that whilst this balancing of the competing interests was accepted as being appropriate in the case of interrogations under the Companies Act where broader public interests are at stake, it is inappropriate to transpose and equate that in the context of criminal investigations. In the former situation the disclosure serves a purpose other than conscripting the examinee in a criminal investigation against himself, and any derivative evidence obtained is ancillary to the main purpose and objective sought to be achieved and can be excluded to ensure trial fairness.

25.

The power which is in issue in Section 28(6) touches upon the very issue of trial fairness. In the case of regulatory investigations this is not the case. Pre-trial interrogation allows the State to have a full insight into the examinee's case, what witnesses favourable or adverse to his case are available to the examinee and to all aspects of the defence strategy that could avail him in a criminal trial. The result is that by trial stage the State enters the criminal trial with a substantial advantage over the accused, as the latter has no opportunity to question State witnesses, enquire into their evidence or probe the State's strategy and uncover pivotal areas of the State's case.

26.

The Court *a quo* had erred in failing to attach sufficient importance to the adversarial relationship that exists between the State and a suspect, when the latter is called upon to answer questions in terms of Section 28(6). See in this regard :

**R v S (RJ) [1995] 1 S.C.R. 451**

27.

The following extracts from the judgment in R v S are significant in illustrating the concerns that arise :

- (a) *“The Crown will be predominantly advancing its case against the accused when, by calling the witness, it is engaged in the colourable attempt to obtain a discovery from the accused and, at the same time, is not materially advancing its own valid purposes”.*

**See : paragraph 278 of the judgment**

- (b) *“The principles of fundamental justice under s. 7 do not allow the State to have a general power of interrogation, that is, to permit the State to pass a law requiring all suspected persons to answer pre-trial questions, even if such a law prevented later use of those statements at trial”.*

**See : paragraph 279 of the judgment**

- (c) *“In some situations, however, forcing a witness to testify will violate the case - to - meet principle in a manner that cannot be*

*remedied by an exclusionary rule. For example, the compelled testimony might reveal an accused’s defence strategy, or bring to light crimes of which the State was previously unaware. In these latter cases, attempting to protect the principle against self-incrimination through use immunity and derivative-use immunity would indeed be, as my colleague Sopinka J notes (at p. 625), “like closing the barn door after the horses have escaped” “.*

**See : paragraph 3 of the judgment**

- (d) *“...if it be accepted that a person can always be compelled as a witness and that protection by way of evidentiary immunity will always be sufficient, then it must also be accepted that we have gone considerable distance towards diluting the principle of the case - to - meet without ever having said so”.*

**See : paragraph 141 of the judgment**

- (e) *“If, however, the **Charter** places no limits on when this structure may be invoked, then the **Charter** could, in fact, condone an inquisition of the most notorious kind. Such condonation would*

*bespeak an impossible dualism. To ask a question by paraphrasing a concern voiced in **Thompson Newspapers**, supra, at page 606(per Sopinka J.) : are we prepared to arm the police with subpoena powers?”.*

**See : paragraph 143 of the judgment**

28.

The concerns aforementioned were all raised in the context of one accused being called as a witness to testify about the facts relevant to the charges he faces, in a trial relating to another

accused. The concerns which are expressed in this judgment, however, are equally applicable to pre-trial questioning as is the case here in that the tensions which arise as expressed above relate to the harm and prejudice in consequence of conscripting the person against himself. Under the *Charter* such a person would have been entitled to object to direct use of anything said in the trial, however, the Court was divided on the nature and extent of the immunity that ought to be afforded a person in such a position. An analysis of the divergent views is instructive, and this was argued before Mr. Justice McLaren, however, he did not deal with these arguments in his judgment.

29.

Lamer C.J. accepted that a witness can be compelled to testify and that the exclusionary rule proposed by Iacobucci J. should be applicable. He, however, argued that in addition the Court should have a discretion in appropriate cases to exempt a witness from being compelled to testify. A witness must be able to show that in all the circumstances the prejudice to his interest exceeds the necessity of obtaining the evidence.

30.

Iacobucci J., La Forest, Cory and Major JJ concurring, made the following significant findings. No absolute right to silence was afforded to a witness. The infringement falls to be balanced by an evidentiary immunity. To address the concern that the State could subpoena a witness even where they did not have a sufficient case to meet, one must examine the

character of the proceedings in which the testimony is compelled, to determine the validity of such a process. This would involve an examination of the purpose for which the testimony is sought. The starting point would be a distinction between an adversarial and an inquisitorial process. Where the purpose is to obtain information constituting self-incriminatory facts, it would not be permissible. In addition to an immunity relating to actual testimony, there ought also to be a derivative use immunity

which must apply to all evidence that could not have been obtained or the significance of which could not have been appreciated but for the testimony of the witness. The Court concluded that the witness was compellable subject to sufficient use immunity protection as defined.

31.

L'Heureux-Dube J. with Gonthier J. concurring reasoned as follows. The test is whether the testimony that is sought to be compelled falls within the principles of fundamental justice. Where the State is engaging in fundamentally unfair conduct, the witness can be excused from testifying. Where the State is engaged as its predominant purpose in building or advancing its case against the witness instead of some other substantial purpose, that would be fundamentally unfair. The issue of fundamental unfairness can be raised at the subpoena stage and at trial stage.

32.

Sopinka J. with McLachlin J. concurring reasoned as follows. The issue is not whether the use immunity complies with the principles of fundamental justice. The issue is whether the witness is a compellable witness. This required a balancing between the State's entitlement to every person's evidence and the

right to silence. The recognition of an exception to the principles of compellability was permissible in certain instances. The Court can exempt a person from the rule regarding compellability by applying a balancing exercise namely where the right of the accused to remain silent outweighs the necessity of obtaining the evidence. The Court identified a number of factors which can be taken into account for this purpose. The application of the exercise in balancing these factors accounts for the accused being entitled to remain silent if interrogated before trial. If the State cannot establish the necessity to obtain the evidence, it would fail to establish that its interests outweighs the accused's right to silence.

33.

It is particularly significant that Section 28(6) does not require the State to establish that the State cannot obtain evidence from any other source, that the State will be hampered in its investigation without being able to question the suspect or the sufficiency or otherwise of other available evidence to the State in order to make a decision as to whether to prosecute or not. None of these constitute criteria which have to be satisfied before the subpoena power can be exercised. The finding by the Court *a quo*, that in the case of organised crime and corruption, the insidious nature thereof requires "*extra-ordinary procedures and powers*" does not address this concern. In terms of Section 36(1) of the final Constitution, one of the

important factors to be considered in the limitation

of any fundamental right, is “*less restrictive means to achieve the purpose*”. Where the legislation is broad enough to encompass a questioning of a suspect even where the State cannot establish that it cannot obtain evidence from another source, that it would be hampered in its investigation without being able to question the suspect or that it has insufficient evidence to make a decision, this constitutes an over-breadth in its reach and therefore cannot constitute justification for the infringement of the fundamental right.

34.

It is respectfully submitted that the question as to whether Section 28(6) is constitutional and valid, raises serious issues deserving of the consideration of this Honourable Court and that there are reasonable prospects that this Honourable Court may come to a different conclusion. I have been advised by my legal representatives that it is not necessary to set out comprehensively all the arguments that were made to the Court *a quo* on this aspect of the case, but simply to demonstrate that there are serious issues to be tried which are deserving of the consideration of this Honourable Court. I respectfully submit that for the reasons aforementioned this is satisfied in this matter.

35.

The second issue upon which leave to appeal has been requested is also a

constitutional issue namely whether action taken for the purposes of implementing the legislative purpose of the National Prosecuting Authority Act, constitutes administrative action. It is relevant to note that even in the case of interrogations under the Companies Act, which is necessary for a broad public interest (to reconstitute the knowledge and affairs of the company for its proper winding up) and the tensions are different to those in the case of a criminal investigation, the interrogation takes place before an independent arbiter i.e. the Master or a Magistrate in the Magistrate's Court. It is respectfully submitted that the requirement of an independent arbiter is based on sound principles to avoid abuse during the questioning process and it can hardly be expected of a member of the investigating team to exercise impartiality in dealing with issues of that nature. It is accordingly respectfully submitted that even on the second issue a serious constitutional issue is raised which is deserving of the consideration of this Honourable Court and upon which there are reasonable prospects of success that this Honourable Court may come to a different conclusion.

36.

It is accordingly respectfully submitted that on the second issue as well, leave to appeal ought to be granted.

37.

As regards direct access to this Honourable Court for the purposes of an appeal, it is relevant to note that the State supports an appeal directly to this Honourable Court. The issues raised

are significant, any findings on its validity will have an impact upon a police power which it is continuously using and accordingly there is a public interest in the determination as to whether this is a valid power or not. The investigation which the Respondents are engaged in relates to various transactions described broadly as having arisen under the “arms deal” and there are a number of significant other interests that are also affected by an expeditious decision of this appeal. Clearly the State is intent upon finalising its investigations in regard to these matters as quickly as possible, it being an investigation which has received wide media coverage and public comments. A decision in the appeal would result in finality being achieved in the investigation far more quickly, if the appeal were brought to this Honourable Court directly.

38.

It is also relevant to mention that it is likely that one of the parties would have appealed to this Honourable Court even if an appeal is first prosecuted to the Supreme Court of Appeal. There is accordingly a saving of costs arising from an appeal directly to this Honourable Court.

39.

It is respectfully submitted that the positive certificate issued by the Court *a quo* is also indicative that it is in the interests of justice for leave to appeal to be granted to this Honourable Court.

40.



**AREA :**