

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: SS 40/2006

(1) (2) (3)	REPORTABLE: NO OF INTEREST TO OTHER JUDGES: YES REVISED.
<div style="display: flex; align-items: center; justify-content: center;"> <div style="text-align: right; margin-right: 20px;"> 16 February 2018 </div> <div style="text-align: center;"> SIGNATURE </div> </div>	

THE STATE

v

PORRITT, GARY PATRICK

Accused no. 1

BENNETT, SUSAN HILARY

Accused no. 2

RULING OF 12 FEBRUARY 2018

INTERPOSING WITNESSES IN RE MILNE'S PLEA AND SENTENCE AGREEMENT

ss 167 AND 186 OF CPA

SPILG, J:

INTRODUCTION

1. On 12 September 2016 Mr Porritt and Ms Bennett brought an application directing that subpoenas *duces tecum* be issued in terms of s186 and s167 of the Criminal Procedure Act 51 of 1977 (“*the CPA*”) for the examination of four witnesses “*or such other witnesses as the court may determine*”.

In terms of the application the witnesses are to be examined regarding the whereabouts of the original Plea and Sentence Agreement under s105A of the CPA which was signed by Mr John Milne in February 2004 and the charge sheet he faced. Milne is the first State witness and his evidence, if it is to be believed, implicates not only him but also both accused in the alleged fraudulent dealings involving PSC Guarantee Growth Ltd (“*PSCGG*”)

2. The witnesses the accused specifically wish to subpoena are the clerk of the Johannesburg regional court, the presiding magistrate who accepted the Plea and Sentence Agreement, Milne’s legal representative in his criminal case and Milne personally. It is now a year and a half after the application was launched. Milne is currently in the witness box and is effectively at the end of his evidence in chief. There is therefore no reason he cannot be cross examined in the ordinary course on these issues.
3. In terms of the draft subpoenas each witness is to produce the court file in the case where Milne was indicted together with its entire contents and the Plea and sentence Agreement signed by Milne together with all annexures.
4. While the issuing of a subpoena *duces tecum* is an essential feature of our criminal justice system the accused do not do so under s 179 of the CPA but invoke ss167 and 186. Moreover they seek an order that Milne’s evidence be adjourned pending the outcome of the examinations. As stated earlier, at this stage where Milne has all but completed his evidence in chief and his cross-examination is about to commence, the application is pointless insofar as he is concerned

GROUNDINGS FOR INVOKING ss 186 and 167

5. If regard is had to the founding affidavit the application is brought chiefly under s186. It reads:

Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

The other section relied on is s 167. It provides:

Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

6. The application seeks to fit itself within the decision of *S v Masooa* which was reported in SAFLII in February 2016 and in the South African Criminal Law Reports in August 2016 (*S v Masooa* 2016 (2) SACR 224 (GJ)).
7. There have been very few reported cases where these sections have been invoked. I believe that the leading cases were covered in *Masooa*. The two South African cases mentioned by the accused in their founding papers, which they say had no input from any legal representative, are identified in *Masooa*.

8. It is apparent that the accused seek to tease out of the production of two documents a court directed examination of witnesses to be interposed before Milne is cross-examined.

The facts which have emerged, including a subsequent affidavit filed by the accused, reveal that the issue before me is straight forward and I intend keeping this judgment equally simple. For this reason it is unnecessary to deal with case law on ss 186 and 167 or go into any detail in regard to its application.

9. I say this alive to the accused's attempt to emphasise in the founding affidavit that a decision to apply ss 167 and 186 flows from the duty of the judicial officer to ensure that justice is not only done but is seen to be done. I am also aware that their papers infer that if the court does not invoke either of the sections then it will demonstrate lack of impartiality in that it would be promoting the interests of the State above those of the accused.¹
10. I will first set out the accused's reason for wanting to issue the subpoenas.

PURPOSE OF ISSUEING THE SUBPOENAS

11. The accused could themselves have issued subpoenas on each of the mentioned persons to produce the original documents at court or explain their whereabouts.

Section 179 provides for a simple procedure where an accused can compel the attendance of any person to give evidence or to produce a document by taking out a subpoena in the manner prescribed by Uniform Rules 54(5) and (8)². Aside

¹ Paras 4 and 7 of the founding affidavit

² s179 Process for securing attendance of witness

(1) (a) The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose.

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give

from the accused's rights to be provided with the relevant sections of the docket, the defence itself has also the right to obtain the production of relevant documents, even if it is in the possession of a state witness during cross examination. See *Cave v Johannes* 1949 (1) SA 72 (T) and *R v Smale* 1948 (3) SA1210 (A)

12. On 7 September 2016, during the course of leading the evidence of Milne, the State indicated that Milne had pleaded guilty to fraud charges in respect of PSGG, that he had served a custodial sentence which was completed and that he had since been released. The general terms of any plea and sentence agreement that might have been agreed upon with the State under s105A therefore was relevant, at least from the court's point of view, in relation to how to treat his evidence.
13. On 8 September the State provided what it claimed was a copy of Milne's plea and sentence agreement and said that Milne had just located it. Bennet requested the court to stand down the hearing of further testimony until the outcome of an inquiry into the disappearance and whereabouts of the original plea and sentence agreement. Bennett indicated that the purpose was not just a question of Milne's creditability but also that the State was party to the production of a fraudulent plea and sentence agreement.

Porritt than sought to have the document introduced as evidence contending that it was a document which the accused had requested from the State and he wished to use it to show that "*it is a fraud on this court*"

evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.

(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.

(3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court-

- (i) that he is unable to pay the necessary costs and fees; and
 - (ii) that such witness is necessary and material for his defence,
- such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.

14. The court indicated that it would proceed with Milne's testimony, and that if the accused wished to raise the issue then they would have to bring it by way of a proper written application.

On 11 September 2016 the accused brought the present application. The founding affidavit recorded that after I had said that the court needed to know the terms of the plea and sentence agreement Milne produced a document which it was claimed he had found and which he said was the only plea and sentence agreement that he had.

15. The accused state in paragraph 34 of the application that ;

"If it is established ,during the examination, that the document in fact emanated from the State and that the State and the prosecutors have been untruthful in regards to the document being missing ,then ,.....,this Honourable court will have no option but to remove the prosecutors and to consider whether the trial can proceed in such circumstances."

16. The State averred that it was the penultimate draft and bore the signatures of at least Milne, Milne's counsel Adv M Hodes and Advocate C Jordaan SC who was the Special Director and head of the specialised commercial crime unit. Adv Coetzee pointed out that page 8 of the agreement was missing.
17. Milne than testified that the document was the copy of the one that had been placed before the presiding Magistrate, that it had not been amended by the Magistrate, that his initials were reflected on each page of the document and that annexures A to D, which had been attached to the document, were missing. Annexure A was the charge sheet.
18. Milne also claimed in evidence that this was the only document he had of the plea and sentence agreement. Furthermore it was stated from the bar that according to Adv Ferreira's recollection the original of this document had been placed before the Magistrate. The document was introduced into evidence as D3.

19. During argument Bennett again referred to a number of anomalies; for instance that only Adv Jordaan's signature was on the last page of the document, that page 8 was missing and that the initials, which were purportedly placed at the time the plea and sentence agreement was handed up, were in fact those of witnesses to the founding affidavit deposed to by the liquidators of PSCGG in their application to hold Milne personally liable for the debts of that company. It was also contended that page 8 of the agreement was deliberately withheld as it alleged that Milne did not personally gain financially from the PSCGG fraud to which he pleaded guilty.

20. Returning to the founding affidavit Bennet added in para 22:

'Furthermore the Accused had previously obtained from elsewhere a draft document with no annexures, but had been unable to obtain anything from the State. I pointed out that I had attached such incomplete draft document to the papers in the permanent stay application. I drew to the attention of the Court that, with regard to the still missing annexures, the Accused still have no knowledge of the charges to which Milne pleaded guilty. We do not know whether they were the same charges that we are facing or different charges. In fact, the Accused have no idea what Milne pleaded guilty to' (my emphasis)

21. The incomplete draft which Bennett mentioned had been attached to the permanent stay application features elsewhere in her founding affidavit in the present papers. It is identified as annexure "SB 4". At para 28.1 of the founding affidavit in the present matter Bennett explains the existence of this document and also refers to what she had said about it in the permanent stay application³. In the permanent stay application Bennett mentioned that Attorney Cohen had received a faxed document which "*sets out extracts from the terms of Milne's Plea and Sentence Agreement. It would appear that the agreement had been provided as a base for another document and portions of it had been blanked out or excluded.*"

³ The relevant portion of Bennett's statements in the permanent stay application was attached as annexure SB5.

The document had originally been attached as annexure SB116 to Porritt's affidavit of 11 November 2003 which had been filed in civil proceedings that had been brought for the winding up of EBN Trading and the Awethu Trust. Porritt's affidavit of November 2003 on which Bennett relies in the present proceedings states that SB 4 (then SB116) contained the following statement which Porritt expressly alleged under oath was made to the magistrate receiving Milne's plea and which, according to Porritt, *"to the knowledge of the State, were untrue and affected the decision of the Court in its sentencing"*. Two paragraphs from the plea and sentence agreement were then cited in Porritt's affidavit to substantiate this. The first, which Porritt identified as para 7 of the document read:

"The State is not in possession of any evidence to indicate that the funds of the investors were misappropriated for the personal financial gain of the accused"

He also said that para 4 under the heading *"mitigation of sentence"* read:

"The accused did not make any money out of the PSC Guaranteed Growth Limited Scheme"

As is evident from what has been said, these allegations were also repeated in an affidavit deposed to by Bennett in January 2016 when applying for a permanent stay.

It is evident that the draft plea and sentence agreement (SB4) appears to be a working copy of the plea and sentence agreement that was to be submitted on Milne's behalf. A number of proposed handwritten amendments appear on it.

In the present founding affidavit Bennett concludes in relation to the passages extracted from the draft agreement that:

"It is submitted that, on this basis, one can expect that the wording on page 8 of "SB4" will be the same as that which was contained in the missing page 8 of the Milne Agreement."

“This the very page that the Accused maintained to this Honourable Court ... evinced a fraud on the Regional Court in the Milne sentencing, is the page that is missing from the Milne agreement presented by the State. It is submitted that this is no coincidence

It is the view of the Accused ... that this is the only reasonable view that can be taken, that page 8 was not, in fact, missing from the document located by Milne on 7 September 2016, and that the State and Milne have colluded to perpetrate a fraud on this Court

Furthermore that the State and Milne have ensured that the annexures to the document and particular Annexure A being the charge against Mr Milne, have been deliberately withheld from Porritt and me and, particularly, this Honourable Court”⁴

22. The significance of the underlined extract from para 22 of Bennett’s present founding affidavit (see para 20 above) and the statements in the earlier affidavit of Porritt (see the preceding paragraph) is that:

- a. The underlined extract contains two significant concessions made by the accused. The first is that they had an incomplete draft of what they accepted reflects the proposed amendments to be inserted in Milne’s plea and sentence agreement. The second is that they had no idea of the contents of Milne’s charge sheet.
- b. By relying on Porritt’s earlier affidavit the accused contend that the plea and sentence agreement placed before the magistrate contained these numbered paragraphs under the specifically identified headings and that their contents were untrue in order to minimise the sentence that the magistrate would impose on Milne

⁴ Bennett’s Founding Affidavit pars 36 to 39

23. In her founding affidavit in the present proceedings Bennett said that she had studied the plea and sentence agreement on the evening of 9 September and alleged that it was a fraud on the court by both Milne and the prosecution. It was for this reason that she had requested the court to hold an enquiry and subpoena witnesses so that they can be examined by the court as to the whereabouts of the original documents and its contents. She also wanted the document to be admitted as evidence.

Aside from contending that the plea and sentence agreement was drawn in a way that minimised the benefit Milne gained from the fraud he admitted to, it was also urged that the missing charge sheet would, once found, highlight that Milne had only been charged with a single offence whereas the State was persecuting the accused by levelling a multiplicity of charges against them.⁵

24. In the affidavit Bennett referred to a letter addressed by attorney Frank Cohen of 4 May 2007 which had requested a copy of the plea and sentence agreement but despite being advising on 08 May that the State would respond to the letter it had not done so. Bennett pointed out that reference had been made to the document on several previous occasions.

I mention this because it shows that Bennett and Porritt, who supports her allegations, actually rely on a page of the plea and sentence agreement that was contained in the liquidators' application. They contend that page 8 was deliberately withheld since it revealed that Milne had claimed that he did not benefited from the frauds to which he pleaded guilty whereas he in fact had obtained financial gain⁶.

The accused also said that the charge sheet was deliberately withheld as it only charges Milne with one offence and this would support their contention that the State is using its resources to unfairly persecute them.

⁵ See Bennett's Founding Affidavit paras 28.1, 41 and 44

⁶ Bennet Founding Affidavit of

I will return to the confused and contradictory nature of the arguments presented by the accused in court on Monday this week and which required the court to regularly redirect the accused to the real issue; namely whether s 186 or s 176 should be invoked to obtain the original documents or establish their whereabouts.

25. Bennett said that she had inspected the original court file but Milne's agreement was missing, that the court digital recording of the hearing when the terms of the agreement were placed before it was also missing and that there was no transcript.

She also pointed out that the investigating officer at the time deposed to an affidavit in March 2007 stating that Adv Ferreira had kept Milne's court record in his personal possession prior to the present case being transferred to the high court. In argument it was also submitted that the Parole Board and the magistrate must have had the record of those proceedings when sometime later Milne's sentence was converted.

26. In argument on Monday this week the accused contend that Milne and the prosecution conspired to perpetrate a fraud on the court by untruthfully presenting the document as Milne's Section 105 statement. They point to the State's allegations regarding whose initials appear on the document Milne claimed to have found and which had been handed up. They emphasised that there had been no indication as to where the document emanated from and that there was no explanation as to why the agreement was not contained in the docket. They also drew adverse conclusions from the omission to provide page 8 of the document which Milne claimed to have found, contending that it had been deliberately withheld, as were the annexures to the agreement. They also point out that Milne's initials appear on all but the last page.

27. In her affidavit Bennet referred to the statement in the Milne agreement which reflects:

“Accused pleads guilty 1 count of fraud”

The accused complain that they face almost 3000 main charges as well as four charges under the Prevention under Organised Crime Act and a similar number of alternative counts but Milne who was their co accused in the alleged commission of the same crimes only pleaded guilty to one offence. The accused conclude that the trial magistrate might have passed a heavier sentence if he had been fully informed and been presented with a full charge sheet similar to that faced by the accused. The effect of the alleged deception is that Milne did not face the minimum custodial sentence of 15 years.

28. The accused make the following further submissions:

- a. The production of Milne’s charge sheet would highlight the discrepancy and inequity between its single charge against Milne as compared with the multiplicity of charges against the accused
- b. A disclosure of the full plea and sentence agreement would substantiate their allegations that the State has conducted a persecution against them and has acted *mala fides*.
- c. The failure to produce the document and charge sheet that was placed before the magistrate is deliberate and is intended to prejudice the accused in the conduct of their defence

29. They conclude that the issue cannot be deferred as it *“goes to the heart of the right of an accused to be prosecuted by honest prosecutors who have preserved the integrity of the docket and have not colluded with witnesses to deceive the courts”*.

Furthermore, they submit that if it is established that the document handed up by Milne emanated from the State then *“it has far-reaching implications on the validity of the prosecution and the credibility of the prosecutors”*

With these statements the accused submit that the issue should take priority over any further leading of Milne's evidence and that *"this Court is duty bound to now confront this issue in the light of the evident fraud that has just been revealed"*. It was also contended that such conduct by the prosecutors should not be condoned and it is incumbent upon this court to take such steps as are appropriate to safeguard the accused from what they contend is prosecutorial abuse.

30. In a supplementary affidavit deposed to on 20 October 2016 Bennett then disclosed that there was another copy of the plea and sentence agreement of which they had become aware. It was attached to the founding affidavit of the liquidators of PSSCGG deposed to in June 2006. Albeit that the document was unsigned it was alleged that the liquidator was assured that the originals had been signed. The document also contains a charge sheet against Milne as an annexure

The charge sheet relies on a fraud constituted by the alleged untruthful representations made in PSSCGG's prospectus to 4000 investors who had relied on the misrepresentations as being true and that the misrepresentations were made in April; 2000 and perpetuated up to May 2003. The misrepresentations included:

- a. Milne would be the managing director of PSSCGG and that he would be making investment decisions as head of the investment team;
- b. PSSCGG would invest in a wide range of securities as defined in the preamble;
- c. An investment in PSSCGG constituted a medium to low risk investment;
- d. The published net asset value was at all times both true and correct

31. It is again significant that the accused did not change tack when presenting their supplementary affidavit. On the contrary they persisted with their basic contention

that Milne and the State withheld page 8 of the plea and sentence agreement that was given to the presiding magistrate because of the untruthful statements contained in it regarding Milne receiving no financial benefits from out of PSCGG and that the charge sheet which was found shows that there was only one charge laid against Milne. I should add that the plea and sentence agreement together with the charge sheet was ANNEXURE DD to the accused's supplementary affidavit.

32. The State did not initially file an answering affidavit. Adv Coetzee sought to take certain procedural points. In view of the fact that the accused' alleged that the State had deliberately withheld information and had concealed the charge sheet and plea and sentence agreement I viewed the failure to file an affidavit in a serious light.

33. At the time I was therefore most concerned about ensuring that officials provide an explanation. On 17 October 2016 after hearing the State I;

- a. ruled that the investigating officer be subpoenaed to appear before me on Thursday of that week to indicate the whereabouts of the court file in respect of Milne's trial.
- b. nominated Adv Ferreira of the DPP to undertake an investigation into what happened to the court file and to also provide an explanation as to what happened to the DPP's file

34. The State subsequently filed an answering affidavit disputing the accused's allegations and attached affidavits which claimed to explain the last known whereabouts of the original plea and sentence agreement as well as the charge sheet. Included were affidavits explaining the loss of the originals and also confirming that the document contained in the supplementary affidavit which Bennett had copied from the liquidators' files was a true copy of the charge sheet and of the plea and sentence agreement that had been placed before the

magistrate save that Milne's signature was not on it nor those of anyone other than Jordaan.

35. The State also obtained an affidavit from Milne's Counsel who represented him at when he pleaded, Adv Max Hodes, who confirmed these facts.

36. The accused did not file a replying affidavit.

37. Since the papers were filed Milne has spent the better part of a year and a half testifying in chief with many hundreds of documents produced and identified through testimony.

THE ISSUES

38. At face value the accused want to secure the original plea and sentence agreement and the charge sheet (which was also attached as annexure A to the agreement).

39. They elected to do so not by way of s179 but by way of an application under ss 167 and 186

40. The allegations of trying to show the prosecution as acting underhand by withholding the true documents as a ground to again seek their removal is evident.

41. However the accused are not entitled to use a provision in the Act which is entirely procedural for another objective. However the papers are dressed up, the issue is whether the accused have received the documents that constituted the actual plea and sentence agreement and charge sheet relating to Milne and whether copies of these documents can be used in evidence instead of the original.

**COPY OF THE PLEA AND SENTENCE AGREEMENT MARKED DD TO
BENNETT'S SUPPLEMENTARY AFFIDAVIT OF 20 OCTOBER 2016**

42. It is evident from the signature of Joubert SC and the affidavit presented by the liquidators that annexure DD is a true copy of the original plea and sentence agreement that was handed up to the magistrate, save that it does not bear the signature of Milne and has initials that were not placed on it at the time but were inserted by the deponent or commissioner to another affidavit to which the document was an annexure.

43. Milne has testified that this was the final version of the text of the agreement to which he appended his signature and which was accepted by the magistrate under s 105A when he pleaded to the charges.

44. There is no other document which the accused have produced which puts into doubt that an agreement with different text was given to the magistrate. Quite the contrary; as I have demonstrated earlier, affidavits deposed to by both Porritt and Bennett, confirm that page 8 of annexure DD was one of the pages to the plea and sentence agreement that was actually handed up. Page 8 expressly includes allegations that Milne's testimony would be vital in the prosecution of other accused and Porritt and Bennett are expressly named.

45. The events have now overtaken the initial allegations made by Porritt and Bennett.

I issued my directive on 17 October 2016. On 20 October 2016 Bennett filed a supplementary affidavit that effectively confirmed that she now had, as did Porritt, a copy of the plea and sentence agreement as well as a copy of the charge sheet.

46. Realising that the tack they had adopted would not assist them, the accused changed their position when presenting oral argument on 12 February.

They now contend that even annexure DD is not the plea and sentence agreement that was submitted to the magistrate; they say it was a very different agreement admitting to much lesser offences, none of which implicated them.

They however could not explain why the magistrate then treated the offences as sufficiently serious so as to impose a sentence of eight years, albeit that three were suspended.⁷

It also does not explain the extracts from the previous affidavits, filed by one or other of the accused and to which I have already referred.

47. Accordingly the accused cannot pass first base. If regard is had to annexure DD, the admitted history regarding its existence, the earlier document which bears proposed handwritten amendments some of which found their way into annexure DD, the magistrate's notes as well as the charge sheet that was attached to annexure DD then it is evident that annexure DD contains the final text of the plea and sentence agreement in terms of s105A which was signed by Milne and handed up to the presiding magistrate

THE CHARGE SHEET

48. It is unfortunate that the charge sheet was not produced sooner. Had it been placed before me when the application was initially brought then the matter would have been resolved when it was first raised on 7 September. Instead this court has been presented with an application that, excluding the transcripts of hearings before me, is over 500 pages long.

49. The charge sheet sets out the fraud offence clearly. In substance it is no different to those the accused face in regard to the PSCGG prospectus. That it may only have constituted one offence does not militate against the fact that the Milne

⁷ The magistrate's original note recording Milne's conviction and sentence confirms this.

charge sheet relied on a number of individually specified fraudulent misrepresentations allegedly made to over 4000 investors which induced to them to invest in PSCGG to their detriment.

50. The accused are clutching at straws in contending that Milne was charged with only one offence. The number of investors who were defrauded is stated and was no doubt taken into account as an aggravating factor⁸ when weighed against the mitigating factors raised in the plea and sentence agreement. Accordingly, standing alone the charge sheet cannot be challenged as not being the one to which Milne was required to plead. Nor did it attempt to mask the number of investors defrauded. What it did not do was raise the 15 year minimum sentence; but the purpose of the accused's s 167 or s186 application was not directed at that. It was to obtain documents.

USE OF COPIES

51. The court called for the plea and sentence agreement in order to assess how Milne's evidence is to be treated. The documents before me suffice for these purposes.

52. The State made it plain that it did not intend using the documents. The accused however contend that they want the originals.

Since the State does not intend using them the only issue with regard to not producing the originals is if the accused were to use them either when cross examining Milne or in argument or otherwise.

53. I did not understand the State to say that it requires the originals should the accused wish to utilise the documents in question. Accordingly the accused are at liberty to do so.

54. I certainly do not need the originals if it is evident that the copies are a true reflection of the text of the original plea and sentence agreement that was

⁸ In the plea and sentence agreement Milne admitted to the facts set out in the charge sheet

handed up and the copy of the charge sheet before me which was annexure A to the agreement.

I am satisfied that they are and may be used by the accused in the trial whether for the purposes of cross examining Milne, in argument or for any other purpose. The plea and sentence agreement and the charge sheet are Annexure DD and will, on request, if not already an exhibit, will be made so.

GENERAL

55. The documents came into existence in 2004 and by September 2016 the accused had enough time to decide on the position they wished to adopt and the case they wished to make out in regard to their content.

56. They did so in their founding papers to the present application and it was responded to. They did not file a replying affidavit but in argument sought to make out a different case as to the contents of the original documents.

57. It is necessary to add that I do not need to deal at this stage with Milne's recollection, as that may be a matter for further cross-examination.

58. For the reasons given I find on the cases referred to in Masooa that there is no basis on which either the discretionary or obligatory provisions of either ss 186 let alone 176 can be invoked.

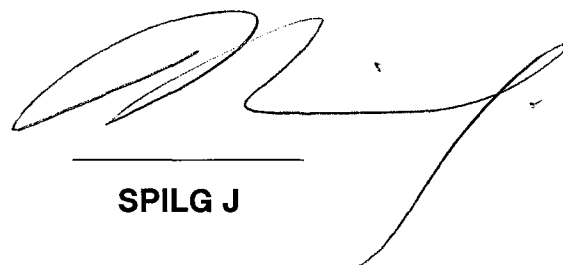
59. This is an application in criminal proceedings. I am aware of a case where the State had been required to bear the costs in criminal trials. While the accused must be given great latitude, if there is an abuse of proceedings and the court is obliged to expend unnecessary time in dealing with there may be grounds on which a court can show its displeasure by an appropriate costs award if the application was entirely frivolous.⁹

⁹ In the present case the State has engaged private counsel to head the prosecution. Accordingly there are legal costs actually expended by it.

60. I should add that unlike most criminal cases this case will essentially be determined by documents and the proximity of the accused to them whether in their creation, consideration or dissemination. The accused should not lose focus of that when considering the relevance of applications such as the present once it was known to them that they had a charge sheet and a plea and sentence agreement which satisfied the questions raised in their founding papers. This they clearly knew by 20 October 2016 when Bennett filed her supplementary affidavit.

61. The accused are on notice that I will seriously consider requiring argument on costs should they again continue with an application that has no merit. The State has not sought costs and accordingly the issue is moot in the present application.

62. It is for these reasons that I dismissed the application.



SPILG J

DATE OF HEARING AND RULING:	14 February 2018
DATE OF REASONS:	16 February 2018
FOR THE ACCUSED:	In person
FOR THE STATE:	Adv EM Coetzee SC
	Adv JM Ferreira
	Adv PJ Louw