IN THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 623/11

In the matter between:

RAJIV MUNSOOK SEWNARAIN **APPLICANT**

and

THE STATE **FIRST RESPONDENT**
Ms SHARON MARKS N.O. **SECOND RESPONDENT**

JUDGMENT Delivered on 17 September 2012

SWAIN J

[1] The applicant, by way of notice of motion, supported by affidavits, seeks an order setting aside his conviction for the murder of his wife, Shanaaz Sewnarain, for which he was sentenced to a term of life imprisonment by a Regional Magistrate, Ms Sharon Marks (who was subsequently joined as a second respondent) sitting in the Regional Court at Durban on 22 December 2010.

[2] The matter is opposed by the State. Copious affidavits, together with annexures have been filed by both parties, which have resulted in

the application papers growing to over seven hundred and fifty pages in length.

[3] The application is also distinguished by a plethora of interlocutory applications, a number of which were disposed of by consent, at the commencement of argument which in itself, exceeded two days in duration. Certain of these applications were, however, not so easily determined and will be dealt with in this Judgment. For the purposes of completeness it is necessary to record those which were resolved by consent.

[3.1] The first respondent's failure to file additional affidavits timeously was condoned.

[3.2] The first respondent was granted leave to supplement its answering affidavit, by the filing of an affidavit by the investigating officer, Warrant Officer Panday.

[3.3] The first respondent was granted leave to file a copy of the warning statement made by the applicant.

[3.4] The delay by the applicant in launching these proceedings was condoned.

[3.5] The first respondent's late filing of its opposition to the application was condoned.

[4] The remaining applications which were opposed and require determination in this Judgment are:

[4.1] An application by the applicant to strike out the evidence of Attorney Moodley, on the ground of legal professional privilege.

[4.2] An application by the applicant to lead similar fact evidence of the investigation methods employed by investigating officer Warrant Officer Panday and his investigation team in procuring pleas of guilty from other accused persons, in support of the applicant's allegations that similar methods were utilised to induce him to confess and plead guilty, to the crime with which he was charged.

[5] The wish to lead such similar fact evidence on behalf of the applicant, arose at the first hearing of this matter, when we directed that the first respondent obtain affidavits from Attorney Moodley, who represented the applicant when he pleaded guilty, as well as Magistrate Govender, who recorded the applicant's confession. Affidavits by Warrant Officer Panday and Attorney Moodley had been filed by the first respondent, in which they adopted the erroneous view that the applicant was obliged to join them as necessary parties in the application. Until this was done and the papers were served upon them, they adopted the view that they would not be dealing with the allegations made against them. This view was patently erroneous, because they quite clearly did not have a direct and substantial interest in the outcome of this application. The allegations made by the applicant however cast aspersions upon Warrant Officer Panday and Attorney Moodley. It was accordingly vital not only that they be

given an opportunity to deal with these aspersions by filing affidavits, but that they be filed to enable the merits of the matter to be properly ventilated and determined. As stated by Harms D P in the case of

National Director of Public Prosecutions v Zuma
2009 (2) SA 277 (SCA) at pg 308 para 85

"Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal. The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal. The applicants do not have such an interest".

[6] Before the first hearing, it appeared the first respondent appreciated the error of its ways and had accordingly launched an application for leave to supplement its answering affidavit, with a further affidavit by Warrant Officer Panday. In directing that affidavits be obtained by the first respondent from Attorney Moodley and Magistrate Govender, we acted in terms of Section 186 of Act No. 51 of 1977 as we were of the view, that their evidence was essential to a just decision of the case. That the present proceedings serve before us as an opposed application, does not in my view change their essential nature of being "criminal proceedings" aimed as they are at setting aside the applicant's conviction and sentence.

[7] At the time we ordered that an affidavit be obtained from Attorney Moodley, we were mindful of the fact that the applicant had already launched an application to strike out certain portions of Attorney Moodley's evidence, arising out of the brief affidavit he had already filed. It was quite obviously never our intention to simply ignore this application to strike out portions of Attorney Moodley's evidence, but that once his affidavit was filed, the applicant would obviously be at liberty to expand his application, to strike out any further averments made by Attorney Moodley, with which he was dissatisfied. It was on the same basis that we granted leave to the applicant to file affidavits dealing with the similar fact evidence referred to above. The first respondent would obviously still be entitled to argue its admissibility once the relevant affidavits had been filed. It was accordingly surprising when the following submission was made in the heads of argument, filed on behalf of the applicant, before the resumed hearing, by Mr. Y. Moodley S C, who together with Mr. V. Moodley, appeared on behalf of the applicant.

"At the hearing on 07 June 2012 and notwithstanding that the applicant's application to strike out was not decided upon by the above Honourable Court, it directed the applicant *(sic)* to obtain a further affidavit from Mr. Moodley. With respectful submission, the Court misdirected itself in doing so and it is submitted that the further evidence raised in Mr. Moodley's additional affidavit remains inadmissible on the ground of attorney and client privilege".

At the hearing I accordingly raised this issue with Mr. Moodley pointing out the basis upon which the further affidavit of Attorney Moodley was obtained. That this was the basis upon which all parties understood the further affidavit was obtained, was illustrated by the fact that detailed submissions were advanced by the applicant, in his heads of

argument, contesting its admissibility. If I understood Mr. Moodley correctly, he no longer persisted in this submission.

[8] Dealing firstly with the admissibility of Attorney Moodley's evidence and thereafter the similar fact evidence, concerning the investigation methods employed by the investigating officer, Warrant Officer Panday.

[9] As pointed out above, the challenge to the admissibility of the evidence contained in Attorney Moodley's affidavit, is that of attorney and client professional privilege. The first respondent, relying upon the decision in

S v Tandwa & Others
2008 (1) SACR 613 (SCA)

contends that the applicant as a consequence of the allegations he made in his founding affidavit, concerning the conduct of Attorney Moodley, has by imputation waived his right to legal professional privilege. The following passages in Tandwa are instructive:

"18. Since accused 1 has nowhere expressly consented, the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In *Peacock v SA Eagle Insurance Co. Ltd.* and *Harksen v Attorney-General, Cape, and Others,* the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the

holder's intention - fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.

19. In propounding a doctrine of imputed waiver (which may also be termed fictive or deemed waiver), the judges in *Peacock* and *Harksen* drew on a passage from Wigmore, much cited in our courts, that enjoins 'fairness and consistency' in inferring the extent of an implied waiver of attorney/client privilege. Wigmore in the same paragraph goes on to conclude that it is a 'fair canon of decision' that 'when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue'.

20. The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of the allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was admissible in assessing the accused's claims".

[10] It is therefore necessary to closely examine the allegations that were made by the applicant concerning Attorney Moodley in the founding affidavit. The applicant states the following:

"On the following morning I was given my medication, which I took. Thereafter, I was taken to the Durban Magistrate's Court by Mr. Panday. He advised me that he had arranged for an attorney, Mr. D. Moodley, to represent me and that the latter would take care of everything for me and that I should simply plead guilty. I mention that when I arrived at Court with Mr. Panday, Mr. D. Moodley was not there. I recall that Mr. Panday telephoned someone and told him that we were at Court and that he should come there. I presume that the telephone call was

made to Mr. D. Moodley. The medication which I had taken made me drowsy and I have a very patchy memory of what transpired at Court. I was tired and drowsy and have no memory of writing any statement but I do recall being approached by a male who introduced himself as an attorney representing me. I did not know Mr. D. Moodley and I met him for the first time on this occasion. I also have a vague memory of a brief discussion with this person and of signing some documents. I further recall the Prosecutor, the attorney and Mr. Panday having a discussion in an office whilst I was outside. I also have a very patchy memory of what transpired when I appeared in Court, but I do recall that I told the Magistrate I am pleading guilty to the charge. After my case had been finished, I was taken to Westville Prison where I was incarcerated".

Record pg 17 para 27

"my constitutional rights were not explained to me, nor had I been told of my right to apply for bail or to use the attorney of my choice, namely Mr. Carl van der Merwe"

Record pg 19 para 28.4

"Furthermore, in terms of Section 35 (2) everyone who is detained has the right to choose and consult with a legal practitioner and to be informed of this right promptly. In my case, although I procured the services of my attorney, Mr. Carl van der Merwe, he was not advised of the date of my trial nor had I been given an opportunity of informing him of the date of my trial. Consequently, he was not in Court. Instead, legal representation in the form of Mr. D. Moodley was foisted on me by the Investigating Officer, Mr. Panday".

Record pg 30 para 44

"I further respectfully submit that my rights in terms of Section 35 (3) were infringed in that:

I was not given adequate time and facilities to prepare a defence. In this regard I respectfully submit that my case was fast-tracked leaving me with little or no opportunity to prepare a defence;

I was denied legal representation of my choice;

I was compelled to give self-incriminating evidence in the form of a statement read into the record by the attorney, Mr. D. Moodley'.

Record pg 31 para 46

"I have always had the financial means to procure the services of legal representatives of my choice".

Record pg 33 para 52

[11] It is quite clear that the applicant challenged the authority of Attorney Moodley, to represent him at the court proceedings before the second respondent, where he pleaded guilty to the charge. The applicant alleged that he was "tired and drowsy" and did not have any memory "of writing any statement" at court but recalled "being approached by a male who introduced himself as an attorney representing me". The applicant states that he did not know Attorney Moodley who he met for the first time. The applicant alleges that he was prevented from utilising the services of his attorney of choice, namely Mr. Carl van der Merwe and instead legal representation in the form of Attorney Moodley, was foisted upon him by Warrant Officer Panday. The reference by the applicant to having no recollection of "writing any statements" whilst at court, has a direct bearing upon two statements which Attorney Moodley says were completed by the applicant in his own handwriting,

at court and before pleading guilty . One of these statements deals with the merits of the matter (Annexure "F" to first respondent's answering affidavit, Annexure "DM5" to Attorney Moodley's affidavit) while the other statement (Annexure "DM6" to Attorney Moodley's affidavit) is in the form of a written mandate containing *inter alia* the following statement:

"I instruct Deyan Moodley to prepare my plea and tender such plea in court as soon as possible".

[12] It seems to me quite clear that the applicant by challenging the authority of Attorney Moodley to represent him at court, by imputation waived the attorney and client privilege relating to any communications between them, concerning this issue, as well as the written statement instructing Attorney Moodley to act (Annexure "DM6"). Indeed, during argument Mr. Moodley conceded that the contents of Annexure "DM6", would be admissible on this basis. The passage I have quoted above instructing Attorney Moodley to prepare applicant's plea and tender it in court as soon as possible, cannot be read in isolation because standing alone it does not explain what plea Attorney Moodley was mandated to present in Court. The preceding paragraphs explain this in the following terms:

"1. I am a *(sic)* accused charged of murder for the shooting of my wife, Shanaaz Sewnarain.

2. I want to plea *(sic)* guilty to the charge of murder.

3. I want to plea *(sic)* guilty freely and vonterely *(sic)* and confirm that no one had forced me to plea *(sic)* guilty".

Consequently, the contents of Annexure “DM6” are admissible. In this regard Mr. Moodley submitted that only a partial waiver of the privilege could be imputed to the applicant, relating only to Attorney Moodley’s authority to represent the applicant.

[13] Turning to the admissibility of what the applicant told Attorney Moodley concerning the merits of the matter, as contained in Annexure “DM5”. Of crucial importance in this regard is the averment made by the applicant in his founding affidavit reading as follows:

“I was compelled to give self-incriminating evidence in the form of a statement read into the record by the attorney, Mr. D. Moodley”.

The reason why I say this allegation is crucial, is because I agree with the submission of Mr. Moodley, that in deciding this issue, one cannot have regard to the further averments made by the applicant, in reply to Attorney Moodley’s affidavit, concerning his conduct. These averments were clearly made by the applicant, in reply to the substantive averments made by Attorney Moodley in his affidavit, which the applicant was obliged to deal with before the admissibility of Attorney Moodley’s statement had been determined.

[14] The statement which was read by Attorney Moodley into the record, at the court proceedings was clearly the applicant’s statement in terms of Section 112 (2) of Act No. 51 of 1977 (Annexure “C” to first respondent’s answering affidavit). In this statement the facts upon which the applicant pleaded guilty to the charge were set out in some detail. It is, in my view, clear that the statement by the applicant that

he "was compelled to give self-incriminating evidence" in the form of the Section 112 statement, drafted by Attorney Moodley and read into the record by him, was not only directed at Warrant Officer Panday, but also at Attorney Moodley, for the following reasons. This statement must be read in the context of the preceding allegations made by the applicant concerning Attorney Moodley that "I was not given adequate time and facilities to prepare a defence" and that his "case was fast-tracked leaving me with little or no opportunity to prepare a defence". A failure to properly prepare the applicant's defence can have relevance only to the conduct of Attorney Moodley, who would have been obliged to investigate this and prepare the applicant's defence properly. The allegation against Attorney Moodley that he neglected his duty in this regard and participated in the "fast-tracking" of the applicant's case is clear. In addition, the applicant alleges that he has "a vague memory of a brief discussion with this person and of signing some documents" and that he has "no memory of writing any statement". Again the allegation is clear. Attorney Moodley failed to properly consult with the applicant and obtained the statements from the applicant (Annexures "DM5" and "DM6" to Attorney Moodley's statement) when the applicant was not in a proper state to appreciate what he was writing and signing. I accordingly disagree with the submission made by Mr. Moodley, that the applicant in his founding affidavit did not cast any aspersions on Attorney Moodley, apart from stating that Attorney Moodley was foisted upon him as his legal representative by Warrant Officer Panday.

[15] In my view, it is quite clear that the applicant charged Attorney Moodley as his "legal representative with incompetence or neglect giving rise to a fair trial violation"

Tandwa *supra* at 626 c – d

Such allegations

"require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them".

Consequently, the contents of Attorney Moodley's affidavit are admissible to assess the appellant's claims, that he did not consult with him properly and did not properly prepare his defence and to refute the applicant's allegation that he did not receive a fair trial. On this basis, the contents of Annexure "DM5" are admissible as its contents are directly relevant to the issue of whether Attorney Moodley, properly ascertained whether the applicant had any defence to the charge.

[16] This conclusion renders it strictly unnecessary to deal with the specific paragraphs which the applicant sought to have struck out in the first respondent's answering affidavit, but I will do for the sake of completeness. The first respondent conceded that the allegations contained in paragraphs 12.3 (e) and 34.4 of first respondent's answering affidavit, should be struck out. It was alleged in these paragraphs that the applicant's instructions to Attorney Carl van der Merwe "from the beginning was to plead guilty". This averment was confirmed by Attorney van der Merwe in a supporting affidavit. In my view, the concession made by the State was correctly made, as there is no basis upon which the applicant waived the privilege pertaining to what he discussed with Attorney van der Merwe.

[17] The remaining paragraphs which the applicant wishes to have struck out of the first respondent's answering affidavit are paragraphs 12.3 (c), (d) and (k), 34.2, 34.3 and 43.5 (f), (g) and (h). The applicant also seeks to have Annexures "F" and "G" to first respondent's answering affidavit, struck from the record. Annexures "F" and "G" are the statements "DM5" and "DM6", which I have found are admissible. Paragraphs 12.3 (c) and (d) and paragraphs 34.2 and 34.3 do not contain evidence of any communication that took place between the applicant and Attorney van der Merwe or Attorney Maharaj, when the applicant consulted with them. It is simply alleged that the applicant consulted with these attorneys on a specific date and time and that he consulted with Attorney van der Merwe for an hour. It is also alleged that Attorney Maharaj contacted Attorney van der Merwe on behalf of the applicant. In my view, there is no basis to exclude this evidence on the basis of legal professional privilege, because it does not relate to any communications that passed between the applicant and Attorney Maharaj or Attorney van der Merwe. The remaining paragraphs which the applicant seeks to have struck out are paragraphs 12.3 (k) and 43.5 (f), (g) and (h), which deal with what transpired between the applicant and Attorney Moodley, which I have found to be admissible.

[18] Turning to the admissibility of the similar fact evidence, which the applicant has placed before this Court, relating to the investigation methods employed by the Investigating Officer, Warrant Officer Panday and his investigation team, in procuring pleas of guilty from other accused persons.

[19] The evidence in question, is sought to be admitted on the basis that it reveals "a concerted *modus operandi"* or "an investigational system" on the part of Warrant Officer Panday and his investigation team

S v Letsoko and Others
1964 (4) SA 768 (A) at 775 C - D

which it is submitted includes assaults, threats of assault, denial of Constitutional rights relating to *inter alia* contact with family members, engaging the services of a legal advisor of the accused's choice, of bringing accused persons in haste to court, foisting a legal representative chosen by the investigating officer on accused persons, compulsion exerted on accused persons to plead guilty, the choice of a particular prosecutor who acts for the State when pleas of guilty are tendered, the unlawful removal and appropriation of accused persons possessions and undue promises made to accused persons for some reward or benefit.

[20] It is clear that to be admissible the similar facts must bear a "striking similarity" to the evidence in relation to the offence charged. The admission of such evidence requires "a strong degree of probative force", bearing in mind that its admission is out of the ordinary and unusual. A stricter test is applied when similar fact evidence is sought to be led against an accused, as against when it is to be used against the police, because of the concept of the prejudicial effect on the accused

S v M & others 1995 (1) SACR 667 (BA) at 692 f – h

The determination of whether the evidence possesses "a strong degree of probative force that outweighs any prejudicial factors" depends "a great deal on the common sense and practical experience of the judicial officer".

S v M at 689 c

The primary requirement for admissibility of such evidence is its "cogency". By this is meant "the ability of the evidence to assist the trier of fact in drawing reasonable inferences. This fact is sometimes referred to as 'relevance'".

S v Yengeni
1991 (1) SACR 322 (C) at 324 F

"The first question which ought to be asked is whether the similar fact evidence, if true, will in the particular circumstances, and having regard to the other available evidence, provide reasonable material from which to draw inferences which will materially assist in deciding the issues before a court. It is only if the answer to this primary question is in the affirmative that further questions such as questions of prejudice, the requirements of justice and the practicality of admitting the evidence need to be addressed. Once identified these factors are not examined in isolation, but have to be weighed against the cogency of the similar fact evidence".

Yengeni at 324 f – h

[21] In my view if the evidence of Khambula, Madlala and Saed is true, it will in the particular circumstances of this case, regard being had to the allegations made by the applicant, together with the allegations made by Yunus Khan (*aka* Boxer), provide reasonable material from which to draw inferences which will be of material

assistance in determining the allegations made by the applicant concerning his treatment by Warrant Officer Panday and his investigation team. In coming to this conclusion I do not overlook the fact that the events complained of by Khambula, Madlala and Saed took place during January 2009, whereas the events complained of by the applicant took place during December 2010. As regards the *"nexus"* between the two sets of events, there is consequently no proximity in time, but there is on the face of it "in method or in circumstances".

S v M pg 688 a – b

Although, as submitted by Mr. Truter, who appeared on behalf of the first respondent, there are differences in the facts pertaining to the arrest, interrogation and conviction of Khambula, Madlala and Saed compared to that of the applicant, I do not regard these differences as being of such substance to exclude the reception of the evidence.

If the evidence is admitted, it is clear that practical difficulties may be encountered, as all of the relevant evidence concerning the allegations of Khambula, Madlala and Saed will have to be led. In addition, the determination of their allegations will effectively require the determination of what is really a collateral issue. However the requirement of justice, in my view, outweighs this aspect.

[22] Before dealing with the merits of the matter, a further issue which requires determination is the contention of Mr. Moodley, that it is not permissible for Magistrate Govender, who recorded the

applicant's confession, or the first respondent "to rely on matters extraneous to what is recorded on the pro-forma form". It is submitted that "the Court should pay no attention to the Magistrate's *ex post facto* reconstruction of the events when she took down the confession". As I understand the argument it is that such evidence is inadmissible on the ground that the written record is the sole testimonial of what was said. Mr. Moodley quoted no authority in support of his submission. In

S v Jakatyana and Others
1990 (1) SACR 420 (CK) at 421 i – j

it was pointed out that a magistrate taking down a statement was not merely a recording machine , but is supposed to investigate the matter in order to establish whether the statement made is freely and voluntarily made. The authors of the work

Commentary on the Criminal Procedure Act at pg 24 – 63

state the following:

"In respect of the requirement that the accused be in his sound and sober senses, however, recourse may be had to the observations of the recording magistrate who may be in a position to judge this matter for himself".

I agree with this statement and can find no basis for restricting the evidence of Magistrate Govender, to what is contained within the confines of Annexure "B", to the applicant's founding affidavit.

[23] Turning to the merits of the application. What lies at the heart of

the applicant's case is the evidence of Dr. Laban, a psychiatrist, Professor Schlebusch, a clinical psychologist and Dr. Bosch, a clinical psychologist.

[24] Dr. Laban, for the reasons and on the grounds set out in a report (being Annexure "E" to the applicant's founding affidavit) expressed the view that the merits of the applicant's confession as well as his plea of guilty, could be challenged on psychiatric grounds. Professor Schlebusch expressed the view that the applicant at the time he confessed and at the time of his trial had "decompensated psychologically". According to Professor Schlebusch the applicant's insight and judgment was impaired, he suffered from this psychopathology and presented with this cognitive dysfunction. Dr. Bosch, by reference to the reports of Dr. Laban and Professor Schlebusch, concluded that the applicant could, without adequate forethought and appreciation of the consequences, indicate that he wanted to plead guilty and do so.

[25] On the basis of these reports, Mr. Moodley submits that the applicant was not fit to stand trial on account of mental incapacity and pleaded guilty under such circumstances.

[26] As against the views of these experts, the first respondent relies upon the evidence of Magistrate Govender, Magistrate Marks and Attorney Moodley that the applicant was in his sound and sober senses when he made his confession to Magistrate Govender and when he pleaded guilty before Magistrate Marks. Magistrate

Govender states she "explained and discussed with the applicant what sound and sober senses means in more detail" and "the applicant understood what I explained to him and indicated to me that he was in his sound and sober senses". Magistrate Govender added "I am morally convinced that the statement I recorded was made freely and voluntarily by the applicant in his sound and sober senses without being unduly influenced ……".

[27] Attorney Moodley states that he asked the applicant "whether he was assaulted, unduly influenced or compelled by the police to make the confession. He told me that he made the confession freely and voluntarily". In addition he states that the applicant was "rational and coherent" during their consultation and "was in his sound and sober senses at all relevant times and fit to stand his trial".

[28] Magistrate Marks states that "I have twenty seven years experience as a Magistrate of which twenty years have been served of the Regional Court bench. My observation of the applicant was that he was in his sound and sober senses at the time he pleaded to the charge on 22 December 2010. If he did not appear to be in his sound and sober senses I would most definitely have noted this and questioned him accordingly".

[29] However, in reply to these views of Magistrate Govender, Attorney Moodley and Magistrate Marks, the applicant put up affidavits by Professor Schlebusch, Dr. Laban and Dr. Bosch where they state the following. Professor Schlebusch states that:

"Given the complex psychodynamics that Mr. Sewnarain presented with at the time he pleaded guilty, it would not have been possible for someone without

specialised training/expertise in clinical psychology to identify his underlying symptoms".

Dr. Laban stated the following:

"The assessment of his mental capacity was beyond the scope of court officials as it would have required psychiatric/medical training to determine the impact that the combination of several factors at play".

As regards the views of Attorney Moodley, she stated the following:

"It would not have been possible for his attorney to determine that there was impairment in his ability to register events as they were happening or detect the presence of disassociation due to extreme levels of stress which would have also impaired the mental capacity of the accused".

Dr. Bosch states that

"Under these circumstances the above described psychopathology and associated psychodynamics which would have underpinned his cognitive processes, decision making and actions in pleading guilty, would not be identified by a lay person or any individual without specific training and qualifications in clinical psychology or psychiatry and without an adequate evaluation".

[30] Is there consequently a real, genuine and *bona fide* dispute of fact on the papers, concerning the mental state of the applicant at the time of his confession and when he pleaded guilty? Although Professor Schlebusch, Dr. Laban and Dr. Bosch state that Magistrate Govender, Magistrate Marks and Attorney Moodley would have been unable to assess the applicant's mental capacity, their views are supported in the case of Magistrate Govender by the written record of

her interaction with the applicant and his confession, in the case of Attorney Moodley by the contents of Annexures “DM5” and “DM6” written by the applicant himself and in the case of Magistrate Marks by the transcript of the court proceedings. A further fact to be considered is that Mr. Truter criticised the reports of these experts on a number of grounds. He submits that the experts claim of cognitive dysfunction and impairment on the part of the applicant, was established and diagnosed months after the applicant’s conviction. He submits the experts based their conclusions upon the *ipse dixit* of the applicant and did not consult with other important persons, who interacted with the applicant during his confession and plea, namely Attorney Moodley, Magistrate Govender, Magistrate Marks as well as Dr. Singh, who examined the applicant before and after he made his confession to Magistrate Govender. On the face of it there is some force in his submissions, but Mr. Moodley quite correctly, submits that the experts have not had an opportunity to deal with these criticisms, which were not part of any allegations made by the first respondent, because the first respondent inexplicably did not seek the views of any experts to comment on the views of the applicant’s experts.

[31] Various tests have been formulated by the courts to determine whether a real, genuine and *bona fide* dispute of fact arises on the papers, which are conveniently summarised in the case of

South Coast Furnishers v Secprop Investments
2012 (3) SA 431 (KZP) at 439 H – 440 A

in the following words

“In the light of what I have set out above, I do not believe that it can be said that

the version of the respondent raises 'bald or uncreditworthy denials…. fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers or is 'fanciful and wholly untenable,' or so 'inherently improbable that the respondent's version is incredible'. I am satisfied that the respondent 'has in [its] affidavit seriously and unambiguously addressed the fact said to be disputed'. In the absence of 'direct and obvious contradictions' judgment on the credibility of the deponent to the respondent's answering affidavit must be left open".

[32] The views of Magistrate Govender, Magistrate Marks and Attorney Moodley that the applicant was at the relevant times in his sound and sober senses, cannot in my view be rejected on the papers as "palpably implausible", "far-fetched" or "improbable" to the extent that they are incredible, due regard being had to the applicant's experts' views that they would have been unable to assess the applicant's mental capacity. Allied to this is my concern that these experts have not consulted with any of these witnesses in reaching the conclusions they did. Because there are no obvious contradictions in the evidence of Magistrate Govender, Magistrate Marks and Attorney Moodley it is not possible at this stage of the proceedings, to judge their credibility. I am therefore of the view that a real, genuine and *bona fide* dispute of fact arises on the papers, as to whether the applicant was in his sound and sober senses, when he confessed and pleaded guilty to the crime for which he was charged.

[33] It is trite that there are two ways in which such a dispute of fact may be resolved. By way of the approach enunciated in

Plascon-Evans Paints (Pty) Ltd. v Van Riebeeck Paints (Pty) Ltd.

1984 (3) SA 623 (A) at 634 H – 635 C

where relief may be granted where

"those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order"

or by the referral of the dispute to the hearing of oral evidence.

[34] In my view, an application of the so-called Plascon-Evans rule to the facts of the present case, would be entirely inappropriate in determining the dispute as to the applicant's mental capacity at the relevant times. Resolving the dispute based simply upon the views of Magistrate Govender, Magistrate Marks and Attorney Moodley, could result in a grave injustice to the applicant.

[35] It is therefore unfortunately necessary for the matter to be referred for the hearing of oral evidence, to determine this most important issue. I say "unfortunately" because such a procedure will obviously lead to a further delay, which is obviously of concern to the applicant who is incarcerated and to further expense to be incurred by the applicant. Because of these concerns, I at the outset of the hearing, asked Counsel for both parties whether they wished to apply for the matter to be referred for the hearing of oral evidence. After a short adjournment, both Counsel indicated that they did not wish the matter to be referred for the hearing of oral evidence. My query to Counsel was also dictated by the following *dictum* of Harms D P (as

he then was) in the case of

Law Society Northern Provinces v Mogami
2010 (1) SA 186 (SCA) at 195 C – D

where he said the following

"An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail".

[36] As regards the competence of a court hearing an opposed application *mero motu* to order a referral to oral evidence, the provisions of Rule 6(5) (g) extends a wide discretion to the court.

Santino Publishers v Waylite Marketing
2010 (2) SA 53 (GSJ) at 56 C – F

The rule provides that where an application cannot be properly decided on affidavit the court may dismiss the application "or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, without affecting the generality of the aforegoing it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact".

[37] The undesirability of a Judge *mero motu* ordering a referral to oral evidence was dealt with in the case of

Joh-Air (Pty) Ltd. v Rudman

1980 (2) SA 420 (T) at 428 in fin – 429 C

in the following words

"It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6 (5) (g) to be invoked. In the present case the amount involved is only half of R5,375.

In my view it should not be left to the presiding Judge to determine, in the light of what I have said, whether the application should be decided on the affidavits or not. In proper circumstances the presiding Judge may, in his discretion, decide to do otherwise".

[38] I consider that the present case is one where proper circumstances exist for its referral *mero motu* for the hearing of oral evidence. The applicant has been convicted of the most serious of crimes, murder, for which he has been sentenced to life imprisonment. To dismiss the application on the ground that the applicant should have foreseen the present dispute of fact arising and sought relief by way of action, in all the circumstances, could cause a grave injustice to the applicant. An application of the Plascon-Evans rule to resolve the dispute may have a similar consequence. The case is one where the interests of justice demand that the evidence be properly tested and evaluated.

[39] I have discussed the future conduct of this matter with Patel J P and he has directed that the matter be afforded preference and set down for hearing before Henriques J and I, in due course. The order I intend making provides for the holding of a Rule 37 Conference between the parties. At such Conference the parties should, in accordance with the order, reveal the witnesses they will be calling and estimate the number of days required for the hearing. In determining which witnesses will be called, both parties should act in accordance with the rulings I have made in this Judgment, concerning the similar fact evidence sought to be led by the applicant, as well as the evidence of Attorney Moodley and Magistrate Govender. Thereafter, application may be made to the Registrar for suitable dates for the hearing in consultation with the Judge President, to enable Henriques J and I, to be allocated to hear the matter.

I grant the following order:

a) The matter is referred for the hearing of oral evidence

on:

i) Whether the applicant was in his sound and sober senses when he confessed to the murder of Shanaaz Sewnarain before Magistrate Govender on

20 December 2010 and/or when he pleaded guilty to the charge of murdering Shanaaz Sewnarain, before Magistrate Marks on 22 December 2010 and

ii) Whether the conviction of murder and sentence of life imprisonment imposed by Magistrate Marks on 22 December 2010 should be set aside.

b) The deponents to affidavits shall be made available for cross-examination at the hearing of the matter.

c) The parties may call as witnesses persons who are not deponents to affidavits in these proceedings, provided that a summary of a proposed witness's evidence shall be delivered no later than five days before the Rule 37 Conference, which must be held, well in advance of the date of the hearing, by the parties.

d) The provisions of Rule 35, 36, 37, 38 and 39 shall apply *mutatis mutandis* to the hearing of oral evidence.

e) The Registrar is directed to afford preference to the parties in the set down of this matter before Swain J and Henriques J, subject to the allocation by the Judge President of these Judges to hear this matter.

f) The averments made in paragraphs 12.3 (e) and 34.4 of the first respondent's answering affidavit, are struck out on the grounds that they are inadmissible in evidence.

g) The costs of this application are reserved for determination by the Court hearing the oral evidence.

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SWAIN J

I agree

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HENRIQUES J

Appearances /…

Appearances

For the Applicant	:	Mr. Y. Moodley S C with Mr. V. Moodley
Instructed by	:	Prash Babooram Attorneys C/o Logan Chetty Attorneys Pietermaritzburg
For the Respondent	:	Mr. A. Truter with Ms C. Naidoo
Instructed by	:	Director of Public Prosecutions
Date of Hearing	:	30 & 31 July 2012 and 02 August 2012
Date of Filing of Judgment	:	17 September 2012