REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: SS81/2000
9542/2000

In the matter between:

THE STATE (duly represented by the Director of Public Prosecutions, Western Cape, hereinafter referred to as "the Respondent") **Respondent**

and

ANDRé MANUAL FERREIRA **First Accused**

CHRISTOPHER WILLIE WESSO **Second Accused**

STEPHEN GEORGE CARSE VERMEULEN **Third Accused**

JUDGMENT GIVEN ON 19 MARCH 2001

H J ERASMUS AJ:

The first accused is charged with the murder of Duminsani Edmund Zwane ("Zwane"). He has in the meantime died and the charges against him have been formally withdrawn.

The second and third accused are charged with being accessories to the murder and, alternatively, defeating the ends of justice.

The trial was due to begin on 5 March 2001.

On 29 December 2000 the second accused gave notice that at the trial an application would be brought interdicting the Director of Public Prosecutions from proceeding with the prosecution. Affidavits were filed by and on behalf of the second accused as applicant, and the State (represented by the Director of Public Prosecutions, Western Cape) as respondent.

On 5 March 2001 the application was argued as a point *in limine* before the accused were asked to plead. Mr D Uijs SC appeared for the second accused; the respondent was represented by Mr MA Albertus SC and Mr S Schippers.

The relief sought

In his Notice of Motion, the second accused seeks the following relief:

1. Interdicting and restraining the abovenamed Respondent from proceeding with the prosecution against the abovenamed Second Accused, as at the date aforesaid or on any date thereafter, or with any other prosecution which is based on the same facts and circumstances;

2. Alternatively to that which is contained in prayer 1 herinabove, and only in the event of the above Honourable Court declining to grant the order contained therein:

2.1 Interdicting and restraining the abovenamed Respondent from instructing, permitting or allowing Advocate Kevin Rossouw and/or Advocate De Kock and/or any other member of his staff who

(a) took part in the interview held on 30 July 1999 with the abovenamed Second Accused, as a State witness, or any interview held with him thereafter as such a witness; and/or

(b) has knowledge of what was asked of the abovenamed Second Accused and/or was said by him and/or was pointed out by him during any such interview from conducting, taking part in or assisting in any way in the said prosecution of the abovenamed Second Accused, or any other prosecution which is based on the same facts and circumstances;

(c) directing the abovenamed Respondent to instruct the persons referred to in prayers 2.1(a) and 2.1(b) hereinabove to retain as secret and confidential the knowledge which they possess in consequence of their taking part in the interviews referred to in those prayers

or which they possess concerning those interviews, which knowledge has been received from any other source whatsoever;

(d) directing the abovenamed Respondent to cause all forms of information and/or evidence obtained from the abovenamed Second Accused during the interviews referred to in prayers 2.1(a) and 2.1(b) hereinabove, including tape recordings and transcripts of such tape recordings, to be destroyed, alternatively to be stored in a safe place and kept secret from all persons, until the trial of the abovenamed Second and Third Accused is brought to finality.

The background

The background to the application needs to be sketched in no more than the broadest outline. The second accused is a sergeant in the South African Police Service. During 1999 he was stationed at Hout Bay. On 11 May 1999 he was on duty with other police officers. He was a passenger in a police vehicle driven by inspector Ferreira ("Ferreira") who later became the first accused. At about 9h30 they received a radio message that there had been an armed robbery in Cape Town and that the suspects were on their way towards Hout Bay in a beige BMW motor vehicle. Ferreira and the second accused, accompanied by sergeants Lesch and Gouws, were parked at the turn-off to Llandudno and kept the road from Camps Bay to Hout Bay under observation.

A beige BMW approached from the direction of Camps Bay. Shortly before the vehicle reached the turn-off to Llandudno, it swung around and sped back towards Camps Bay. The police set off in pursuit and succeeded in forcing the BMW to a standstill. The occupants jumped out and one of them ran away. Warnings to stand still were shouted and warning shots were fired. Ferreira fired several shots and one of the occupants was fatally wounded.

Ferreira was subsequently arrested and charged with murder, the State case being that Ferreira fired the fatal shots after the fleeing suspect had been wounded and was lying on the ground. The second and third accused were arrested on a charge of being accessories to the murder and, alternatively, defeating the ends of justice.

The consultation with second accused on 30 July 2000

The second accused's application arises from an interview or consultation in the offices of the Director of Public Prosecutions in Cape Town on 30 July 1999. There are factual disputes between the parties as to what precisely had transpired at the interview.

The version of the facts given by the second accused can be summarised as follows:

He made a statement to the police on 11 May 1999. On 30 July 1999 he was invited to attend a consultation with Advocate Kevin Rossouw ("Rossouw"), a senior member of the staff of the Director of Public Prosecutions. The

interview was also attended by Advocate De Kock ("De Kock"), a colleague of Rossouw on the staff of the Director of Public Prosecutions.

He was under the impression that he was a state witness in the case against Ferreira and that the purpose of the interview was to discuss the evidence he was to give in that capacity. No word was said about the possibility that he might be charged along with Ferreira and he was not warned that he was a suspect.

After the interview had been going on for a while, Rossouw asked him whether he would mind if the interview was taped. The second accused says that --

> "Nie wetende dat hy alreeds beplan het om my te voeg as 'n beskuldigde in Ferreira se saak nie, het ek toestemming verleen tot die opneem van ons onderhoud op band".

A long, aggressive and difficult "interrogation" ("'n lang, aggressiewe and moeilike 'ondervraging'") followed.

On the same day, the second accused and Rossouw visited the scene of the alleged crime and the second accused pointed certain things out to Rossouw. There is no written record of what he said or pointed out during the visit to the scene.

The second accused says that because he was not warned that Rossouw regarded him as a "suspect" and because Rossouw proceeded to interrogate

him under the guise of consulting with him as a state witness, his right to a fair trial has irrevocably and irretrievably been subverted.

The version of the facts given by Rossouw differs materially from that of the second accused:

Rossouw, in the first place, denies that as at 30 July 1999 a decision had already been taken by the Director of Public Prosecutions to prosecute Ferreira and that he, Rossouw, had been appointed to conduct the prosecution against him. He accordingly denies that the second respondent could have conceived of himself as being a state witness in the prosecution of Ferreira and that he was treated as such during the consultation.

Rossouw says that at the commencement of the interview with the second accused on 30 July 1999 it was explained to him:

1. The Director of Public Prosecutions has not as yet made any decision as to whether or not to prosecute Ferreira or any other person in connection with the death of Zwane

2. The fact that the Independent Complaints Directorate had arrested Ferreira did not mean that a prosecution would necessarily be instituted against him.

3. The version of events given by sergeant Rhyno Gouws incriminated Ferreira.

4. It was apparent that the statement made by the second accused on 11 May 1999 was identical to that of Ferreira.

5. They (ie Rossouw and De Kock) would like to afford the second accused and others the opportunity of giving a more detailed account of the events than what was contained in their statements.

6. The second accused could choose to make a statement before the Director of Public Prosecutions would take a decision as to what the true facts are and whether or not those facts constituted and offence.

7. The second respondent was under no obligation to give a further explanation than what he had already given, but if he chose not to do so, a decision would have to be taken without the advantage of his version of the events.

8. If he wished to make a statement, the second accused could first obtain legal advice or approach the legal services of the police, and his legal adviser could be present when he gave the statement.

9. If a decision were later taken to prosecute him, any statement he made would not be used as part of the case against him.

Rossouw further says that it was only at a much later stage, after a decision had been taken to prosecute Ferreira, and after consultations had been conducted with various other witnesses, that the joining of the second and third accused as co-accused with Ferreira was first considered.

In his answering affidavit, Rossouw states that he has no intention of putting the statement made at the consultation into evidence during the presentation of the case for the prosecution --

> "save under circumstances where parts of the statement were to be elicited by the defence or Wesso [ie second accused] were to give evidence in his own defence and adduce a version contrary to the said statement. The State will then seek leave to put the said statement into evidence in order to impeach the credit of Wesso".

Are the proceedings interlocutory in nature?

Mr Albertus submitted that inasmuch as the criminal trial has as yet not commenced against the accused, the prosecution against them is presently in the nature of unterminated proceedings and as such the present application is interlocutory in nature. He accordingly relied strongly upon the well-known, and frequently followed, statement in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 120A that while a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of criminal proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice

might otherwise result. Recent cases in which this principle was applied, include *S v Friedman (2)* 1996 (1) SACR 196 (W); *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C), and *Sapat and Others v The Director: Directorate of Organised Crime and Public Safety and Others* 1999 (2) SACR 435 (C). It was contended that this is not one of those rare cases where grave injustice might otherwise result if the Court does not interfere before criminal proceedings have been finalised.

Mr Uijs submitted, rightly in my view, that the present application is not interlocutory in nature and that the principles set out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, supra,* do not apply to the proceedings. The application in this matter is for an interdict barring the continuation of the prosecution -- the second accused seeks the final termination of the proceedings by way of a permanent stay of the prosecution.

Stay of the prosecution

In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) where a stay of prosecution was sought on the ground that there had been an unreasonable delay in the prosecution, it is stated (at par [38]) that the relief sought --

> "is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins -- and consequently without any opportunity to ascertain the real effect of the delay on the outcome of

> the case -- is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."

The principle enunciated by Kriegler J is one of long standing in our law. In *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 at 261 Schreiner JA said:

> "Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of cases such an order would be entirely out of place".

Though the application in this matter does not arise from an alleged delay in the prosecution, I am satisfied that the considerations of policy and the test enunciated by Kriegler J in *Sanderson v Attorney-General, Eastern Cape, supra,* apply to the second accused's application for a stay of the prosecution in this matter.

"Significant prejudice" which would warrant the stay of a prosecution is clearly something more than prejudice to an accused which can be remedied by another, appropriate remedy. In *Sanderson v Attorney-General, Eastern Cape, supra,* where it was sought to bar a prosecution on the ground of delay, the following is said in this regard (at par [39]):

> "Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of 'appropriate' remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay".

In *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 (C) the Director of Public Prosecutions reneged on a negotiated plea agreement and reinstituted the charges against the applicants. A stay of the prosecution was granted on the ground, *inter alia*, that the applicants had no other remedy:

> "Indeed, I can think of no other way in which the rights of such persons can be adequately protected."

(*North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape), supra,* at 683j).

The second respondent says, in essence, that his right to a fair trial has been undermined, and that he can in fact never have a fair trial, because his right to remain silent has been violated, that there has been an invasion of his legal professional privilege and that, as a result, the prosecution knows what his defence is. The second accused further says that the prosecution continues to violate those rights and that they want to use privileged information against him (and, no doubt ultimately) the third accused.

In *Klein v Attorney-General, Witwatersrand Local Division and Another* 1995 (3) SA 848 (W) an application was brought for the stay of the prosecution on the ground that the prosecution had penetrated information of a confidential nature which was privileged and that it accordingly had knowledge of the defence the accused intended to raise. It was contended that it would be impossible for the prosecution to "unlearn" the information and that it was therefore impossible for a fair trial to be held. In this regard Van Schalkwyk J stressed (at 862D) that there has "never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial', and that before a stay of prosecution could be granted, "the nature and extent of the violation must be properly considered".

Van Schalkwyk J proceeds to say (at 862E--G) that in evaluating the nature and extent of an irregularity, regard should be had to the circumstances under which it took place:

> "A very serious violation of an accused's legal professional privilege, for instance, might give rise to the conclusion that the accused was *per se* thereby deprived of the right to a fair trial, and the circumstances under which the violation took place might then be of little or no consequence. Conversely, a relatively trivial violation might have taken place under circumstances so fundamentally inimical to the accused's constitutionally guaranteed rights that the court will, as a matter of principle, refuse to uphold a conviction where the proceedings were so tainted."

A "very serious violation of an accused's legal professional privilege" would be that which took place in *S v Mushimba en Andere* 1977 (2) SA 829 (A). In that case a "spy" in the offices of the attorneys of the accused, throughout the trial furnished the security police, without the knowledge of prosecuting counsel, with privileged information relating to the defence. In setting aside the conviction and sentence of each of the appellants, Rumpff CJ said (at 841H):

> "Die volledige uitskakeling van die privilegie is na my mening nie net 'n onreëlmatigheid nie, maar 'n uiters growwe onreëlmatigheid wat sover dit privilegie betref beswaarlik oortref kan word. Dit ly ook geen twyfel dat die skending van die privilegie in die onderhawige saak die verrigtinge geraak het nie".

The learned Chief Justice concludes (at 845F):

> "Ek meen dat in die onderhawige saak weens die aard en omvang van die skending van die privilegie van die appellante dit bevind moet word dat die appellante se beskerming deur privilegie vóór en gedurende die verhoor totaal verdwyn het deur die optrede van die Veiligheidspolisie, dat daardeur die verhoor nie voldoen het aan wat geregtigheid in hierdie opsig vereis nie en dat geregtigheid dus nie geskied het nie."

In *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape), supra,* a different kind of violation of an accused person's rights was considered sufficiently serious to warrant a stay of prosecution. A negotiated plea agreement had been reached in terms of which the prosecution agreed to withdraw the charges against the applicants in exchange for one M pleading guilty to the charges. When a third party applied for a certificate *nolle prosequi*, the Director of Public Prosecutions instead reinstituted the charges against the applicants. In granting an application for an order interdicting the Director of Public Prosecutions from proceeding with the prosecution, Uijs AJ said (at 683h—j):

> "In my view, instances where solemn agreements were concluded between accused persons and the prosecuting authorities, in terms whereof those accused persons gave up certain rights in exchange for an abandonment of prosecution, are instances where a stay of prosecution would be the appropriate remedy, where the State subsequently appears to renege on what it had offered as a *quid pro*

quo. My view is supported by the American authorities to which I have referred."

In the present matter, the alleged violation of the second accused's rights consisted of the failure to warn him of his right to remain silent and his right to counsel. In regard to the circumstances under which the violation took place, the second accused says, in essence, that he was tricked into making the statement. Rossouw, on the other hand, says that the second accused was fully and adequately warned before he made his statement. There is, therefore, as to the precise circumstances under which the statement was made, a dispute of fact which cannot be resolved on the papers. On the second accused's own version, he was misled into making the statement, but there is no suggestion that he was induced into making a statement, the contents of which did not emanate from himself. In fact, he says that he believed he was being consulted as a state witness and gave an honest version of the events to Rossouw. There was no unlawful penetration of privileged information such as that which occurred in *S v Mushimba en Andere, supra,* or in *Klein v Attorney-General, Witwatersrand Local Division and Another, supra*. At best for the second accused, on his own version, it may be said that the representatives of the respondent may not have acted with the professional detachment which they should as the prosecuting authority have observed in the circumstances (see *S v Nakedie and Another* 1942 OPD 162).

The fact that the prosecution has knowledge of matters pertaining to an accused's case does not necessarily constitute "irreparable trial prejudice" which would warrant barring the prosecution. In fact, the prosecution often

has knowledge of matter which forms part of an accused's case and which may not be admissible in evidence against the accused at the trial. The accused may have made an extra-curial confession which is inadmissible in evidence under the provisions of the Criminal Procedure Act 51 of 1977; or, the prosecution may have come into possession of documents by way of unlawful search and seizure. The mere fact that the prosecution has such knowledge does not amount to a violation of an accused person's right to a fair trial.

Mr Uijs posed the question whether, if the activities of the "spy" in *S v Mushimba en Andere, supra,* had become known prior to the commencement of the trial, an application for an order barring the continuation of the prosecution would have been warranted? The circumstances postulated may well fall within the "narrow range of circumstances ... where it is established that the accused has probably suffered irreparable trial prejudice ..." (*Sanderson v Attorney-General, Eastern Cape, supra,* at par [39]). The difference between the circumstances postulated and the present matter, is that the accused in this matter has an effective remedy, "less radical than barring the prosecution", in that the trial judge may rule that the statement made by the second accused may not be used for any purpose at the trial (*Sanderson v Attorney-General, Eastern Cape, supra,* at par [39]). That is also the difference between this matter and *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape), supra,* in which it was explicitly held that no other remedy than a stay of prosecution was available.

Is the application is premature?

Mr Albertus submitted that the application is premature in that the respondent has indicated that the statement will not be used as part of the prosecution's case against the second accused. Should the second accused at the trial elect to give evidence in his own defence, the prosecution would not be able, without more, to use the statement in the cross-examination of the second accused. The trial judge may, in the event of any objection by the defence, rule that the statement is inadmissible, in which event the statement may not be used by the prosecution.

In this regard reference may be made to *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1059E where it is said:

> "Op sy eie weergawe staan dit dus glad nie vas dat die respondent ooit uitgevra sou word oor ander aspekte wat hy as vertroulik en gepriviligeerd beskou nie. Die kwessie van privilegie kon dus goed moontlik nooit ter sprake gekom het nie. Tot tyd en wyl hy oor 'n gepriviligeerde aspek ondervra sou word, en hy ondanks 'n beroep op privilegie verplig sou word om te antwoord, was daar geen rede om die aansoek te loods nie".

It was submitted, as a general proposition, that a trial judge in criminal proceedings is the person best placed to determine the admissibility of evidence. In *Klein v Attorney-General, Witwatersrand Local Division and Another, supra,* the applicant sought an order, in the alternative to a stay of

the prosecusion, that the information in certain documents should be declared inadmissible in the trial action. The response of the learned presiding Judge (at 865H) was that –

> "any such order would amount to an unwarranted intrusion upon the right of the trial court to regulate its procedural matters in accordance with its own discretion".

In *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) it was endeavoured to exclude evidence of material garnered in the course of a search and seizure at a future criminal trial. In paragraph [14] of the judgment it is said --

> "If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded. It follows that the applicant is not entitled to an order from this Court in these proceedings that the evidence secured as a result of the searches and seizures will be inadmissible in criminal proceedings against him."

In *Sapat and Others v The Director: Directorate of Organised Crime and Public Safety and Others, supra,* the applicants sought an order to prevent the production of evidence at a future criminal trial on the basis of a constitutional challenge to the validity of the Act of Parliament in terms of

which the evidence was obtained. In dismissing the application, Davis J said (at 443c):

> "I consider that these questions should be determined by the trial court when appraised of the full factual context within which this evidence is sought to be admitted. In this way a correct balance between the right to due process and the imperative of crime control can be struck."

That this is the correct approach to be adopted in this matter is also apparent from *S v Mushimba en Andere, supra*. It will be recalled that in this matter, criminal proceedings were on appeal set aside because a "spy" in the offices of the attorneys of the accused had furnished the security police with privileged information relating to the defence. At 840C--F Rumpff CJ said the following:

> "Klaarblyklik het 'n mens nie hier te doen met 'n enkele gepriviligeerde dokument of verklaring wat tot die kennis van die verteenwoordigers van die Staat gekom het nie. Indien dit wel so 'n geval was, skyn dit duidelik te wees dat die inhoud van so 'n dokument of verklaring toelaatbaar sou wees en dat daar nie noodwendig van benadeling van die beskuldigde sprake kan wees nie. Hoe so 'n dokument of verklaring verkry is, sou egter wel 'n faktor kon wees by die oorweging of dit toelaatbaar is of nie. In hierdie verband kan verwys word na wat deur die Privy Council gesê is in *Kuruma Son of Kaniu v Reginam,* [1955] 1 All ER 236 op bl 239:

'No doubt in a criminal trial the Judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this Board of *Noor Mohamed v Regem*, [1949] 1 All ER at p 370, and in the recent case in the House of Lords of *Harris v Public Prosecutions Director,* [1952] 1 All ER, at p 1048, *per* Viscount Simon. If, for instance, some admission of some piece of evidence, eg a document had been obtained from a defendant by a trick, no doubt the Judge might properly rule it out.'

Dit is egter onnodig om in hierdie saak in te gaan op die vraag wanneer so 'n dokument of verklaring toelaatbaar sou wees. Daar is verskillende uitsprake in ons eie reg en in die Engelse reg wat nie op 'n vasomskrewe beginsel wys nie, en die moontlikheid van 'n diskresionêre bevoegdheid van die Hof is waarskynlik nie uitgesluit nie."

Whether or not the prosecution would in our law be allowed to cross-examine the second accused on the statement he made to Rossouw and De Kock is not clear. In *S v Sibusiso Makhatini and Others* (unreported, Durban and Coast Local Division, Case number CC73/97, 21 November 1997) questions aimed at discrediting an accused by putting to him statements made to the investigating officer were not allowed on the ground that there had not been the customary warning in terms of the Judges' rules and the accused had not been informed of his rights in terms of section 35 of the Constitution. In his judgment, Hurt J referred to the judment of the

American Supreme Court in the matter of *Harris v State of New York* 401 US 222 in which the majority held that statements made by an accused to police officers, without the accused having been properly apprised of his rights, while not admissible for the purpose of proving the State case against him, can properly be put to the accused in cross-examination to challenge his credibility. The *ratio* of the majority of the Supreme Court is that an accused elects of his own volition to give evidence and that the Court should not implicitly encourage an accused to commit perjury by putting up a lying defence. It was held that the shield provided by *Miranda v Arizona* 384 US 436 cannot be perverted into a license to use perjury by way of a defence free from the risk of confrontation with prior inconsistent utterances.

The minority emphasised the rights enshrined under the Constitution, and by virtue of cases such as *Miranda v Arizona* 384 US 436, took the view that to allow previous contradictory statements, otherwise inadmissible, to be put to an accused in cross-examination, would be allowing inadmissible evidence "through the back door".

A conclusion similar to that of the minority in *Harris v State of New York, supra,* was reached in *R v Murray Calder* 46 CR (4^{th}) 133, a case decided under the Canadian Charter of Rights and Freedoms. The circumstances of the case are similar to the present matter in that the accused was a police officer who had made a statement when interviewed by two officers who did not inform him of his right to counsel. The Supreme Court of Canada, however, kept the door open by holding that in some future case a trial judge might decide that there were "special circumstances" warranting reception of such a statement for the limited purpose of impeaching credibility.

From the debate following upon the decisions in *Harris v State of New York, supra,* (see John C Filippini 1970-71 (22) *Syracuse Law Review* 685--714) and *R v Murray Calder, supra,* (the uncertainties arising form this decision are considered by David Rose 46 CR (4th) 151 and Ian D Scott 46 CR (4th) 161) this much is at least clear, the admissibility of such a statement, and the issues of principle and policy which arise, are to be determined by the trial judge when appraised of the full factual context within which the evidence is sought to be admitted. This is also in accordance with our law as is apparent from, for example, *Klein v Attorney-General, Witwatersrand Local Division and Another, supra; Key v Attorney-General, Cape Provincial Division and Another, supra,* and *Sapat and Others v The Director: Directorate of Organised Crime and Public Safety and Others, supra.*

In my view the second accused has not demonstrated an entitlement to an order barring the prosecution.

The alternative claim

The respondent has given an undertaking that Rossouw will not conduct the prosecution against the accused. Another member of the staff of the Director of Public Prosecutions has been appointed to undertake the prosecution. The relief sought in paragraphs 2.1(a) and (b) of the Notice of Motion accordingly does not arise for consideration.

The further claim for an order that knowledge of what had transpired at the interview on 30 July 1999 be retained as secret and confidential, and tape

recordings (and transcripts of tape recordings) be destroyed or kept secret until the trial is brought to finality, cannot be granted. The statement taken at the interview, and the tape recording thereof, constitute evidential material of which the admissibility, if the prosecution desires to make use of it at the trial of the accused, is to be determined by the trial judge.

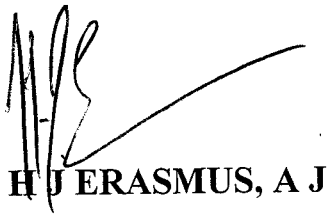
The third accused

The third accused has associated himself with the relief sought by the second accused on the ground that to allow the respondent to make use of the information and evidence obtained from the second accused under what he terms "circumstances of prosecutorial impropriety" may well impact on the fairness of his trial. The third accused has not demonstrated how the statement, if used in any way against the second accused, will impact adversely on his trial. The extra-curial statement made by the second accused would not be admissible in evidence against the third accused (*R v Matsitwane and Another* 1942 AD 213; *S v Banda and Others* 1990 (3) SA 466 (BGD) at 502E—504E).

Costs

The parties are agreed that there should be no order as to costs.

In the result, the application is dismissed.



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