 REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3109/2006

DATE: 23 OCTOBER 2007

In the matter between:

MAHOMED FAROUK OMAR SULIMAN	Applicant
And	
THE NATIONAL DIRECTORATE OF SPECIAL OPERATIONS	1st Respondent
THE PROVINCIAL DIRECTORATE OF SPECIAL OPERATIONS	2nd Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS	3rd Respondent
SUAAD JACOBS	4th Respondent
THE MINISTER OF SAFETY & SECURITY	5th Respondent
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	6th Respondent

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J U D G M E N T

DAVIS, J:

[1] Applicant is one of three persons charged in the magistrate's Court, Bellville. The charge involves

dealing in 100 000 Mandrax tablets in contravention of the Drugs & Drug Trafficking Act 140 of 1992 ('The Drugs Act') Mr Theodore and Mrs Lydia Meyer ('the Meyers') were charged with the same offence. Subsequently, the prosecutor invoked the provisions of section 204 of the Criminal Procedure Act 51 f 1977 ("the Act") in respect of the Meyers. The disputes between the parties are confusing and applicant's papers are unfortunately hardly a model of forensic clarity. For this reason, it is necessary to examine the fairly lengthy history of this dispute.

Background

[2] Initially applicant sought the following relief:

1. An order directing the first and fourth respondents to furnish the applicant with reasons for the decision to indemnify the Meyers from prosecution in terms of section 204 of the Act.
2. An order that the first to fourth respondents furnish the applicant with copies of affidavits upon which they relied to secure a warrant for the arrest of the applicant and one Mukhtar Khan, the applicant's co-accused, who apparently is presently a fugitive from justice.

3. An order that the warrant which the first to third respondents rely upon to secure the applicant's arrest be declared unlawful and void.

4. An order that the evidence, being the Meyer's affidavit, implicates the applicant in drug dealing be declared void.

[3] In December 2006, applicant amended his notice of motion to include a challenge to the effect that section 204 of the Act is inconsistent with the Republic of South Africa Constitution Act 108 of 1996 ("the Constitution") and a further order directing that first to fourth respondents furnish the applicant's attorney with the record of the proceedings in the bail application brought by Khan in Nelspruit, failing which the applicant would seek an order that that evidence be held to be void. Furthermore, the applicant challenged the constitutionality of section 204 of the Act without joining the Minister of Safety and Security and the Minister of Justice and Constitutional Development. The respondents advised the applicant's attorneys that these Ministers had to be joined pursuant to the jurisprudence developed by the Constitutional Court (see Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour

intervening) 1999(2) SA 1 (CC) at para 7). Applicant then brought an application to join both Ministers and on 15 May 2007, Veldhuizen, J made an order joining them as the fifth and sixth respondents and therefore as parties to these proceedings.

[4] On 19 December 2006, applicant brought an application in which he sought an order that the rules relating to discovery be made applicable to these proceedings. The documents sought, including the transcript of Khan's bail proceedings in the Nelspruit Magistrate's Court, the application for the applicant's warrant of arrest and a transcript of the Meyer's bail proceedings. The application for discovery was settled. On 9 March 2007 Allie, J made an order by agreement between the parties in terms of which the applicant withdrew this application. Respondents undertook to notify the applicant in writing by 30 March 2007 whether the record of proceedings in the bail application of the Meyers, which apparently had gone missing, could be reconstructed from the notes of the magistrate. On 16 March 2007 applicant was informed that these notes were not available and that therefore the bail proceedings could not be reconstructed.

[5] On 25 July 2007, applicant again amended his notice of

motion to include an application for an order reviewing and setting aside the decision to call the Meyers as witnesses in the criminal case which had been brought against him. There therefore appear to be three issues which remain to be resolved between the parties:

1. Whether the prosecutor's decision to invoke section 204 of the Act in respect of the Meyers falls to be reviewed and set aside.
2. The applicant's attack in terms of section 204 of the Act.
3. Costs of the application for discovery as well as costs of the main application.

[6] I turn now to deal with the background surrounding the arrest and charge brought against the applicant, both of which events are also of some material interest in this dispute.

Facts

[7] On 18 October 2004, applicant was arrested and charged with dealing in 100 000 Mandrax tablets with a street value of approximately R3 million, in contravention of the Drugs Act. On 14 October 1999, Mr Graham Dawes ("Dawes") Senior Special Investigator of the erstwhile Investigative Directorate for Organised Crime and Public

Safety ("IDOC") received information that a consignment of drugs was to be delivered to one of the applicant's co-accused, Mr Faizel Manuel, at 24 Wrench Road, Parow ("the property"). On 20 October 1999, members of the IDOC and the police raided the property. They found two black sports bags containing numerous packets of Mandrax. They also seized a number of boxes containing a fine white residual powder which the police laboratory later established was Mandrax. Mrs Kulsum Manuel, who was present during the search of the property, was then arrested. Mr Faizel Manuel was arrested later that day when he arrived home. He could not give any explanation for the Mandrax tablets or the boxes.

[8] On 21 October 1999, Dawes continued the investigation and called at the Meyer's business L&T Coachworks in Parow. He informed Mr Meyer that he was investigating a case of dealing in drugs and that Mr Manuel had been arrested. Mr Meyer replied that he delivered five large boxes containing blankets to the house of Mr Manuel. He said that he had collected these boxes from Kargo National Couriers in Parow on 20 October 1999. Mr Meyer stated that he and his wife sold blankets and linen purchased from a company called Khaya Blankets in Johannesburg and that Mrs Manuel had sold blankets for

them.

[9] On the same day Mr Meyer accompanied Dawes to the Parow police station where he identified the bakkie in which he had transported the boxes containing the blankets. He also pointed out the Manuel's house where he delivered the blankets. He stated that his wife drove a silver Toyota Camry registration number XHT174T which they had borrowed from a person in Johannesburg for the past eight months with an option to buy it. It was apparently established subsequent to this that the vehicle had a false compartment built into the petrol tank and which was employed to conceal drugs. Khan was apprehended in a Toyota Camry with a similar false compartment.

[10] At IDOC's offices in Cape Town, Dawes informed Mr Meyer's attorney, Mr Snitcher, that there was reason to believe that Mr Meyer was involved in dealing in Mandrax. He was granted an opportunity to cooperate with the authorities. However, after consulting with Mr Meyer, Mr Snitcher informed Dawes that Mr Meyer refused to assist the prosecution since it had not been shown that he had transported anything illegal in the boxes. Dawes then informed Snitcher that he would

arrest the Meyers of the results of the forensic tests on the boxes were positive, namely that they contained Mandrax. It was established that the boxes contained traces of methaqualone. A packet which had been seized with the boxes was found to contain traces of cocaine. The Meyers were then arrested and the premises of L&T Coachworks and the silver Camry were then searched.

[11] During the course of this criminal investigation, applicant's name had featured prominently. Initially he could not be linked to the 100 000 Mandrax tablets, although he was directly and indirectly linked to itemised billing and cars used in the delivery and the collection of the drugs. As a result of these investigations Dawes approached the applicant on 18 October 2000. In the course of the investigation it became apparent to the Meyers that their defence of having sold blankets may well not withstand scrutiny. They then approached Dawes in October 2002 for an indemnity against prosecution. According to Dawes:

> "On 7 October 2002 I was approached by Lydia Theresa Meyer...one of the accused in this case. She demonstrated a willingness to testify against her co-accused in the matter and a process ensued whereby a decision was reached to utilise her as a

section 204 witness. An affidavit was eventually drawn up and signed by her which outlined the full extent of her involvement in this case, as well as her general involvement in the drug trade...This affidavit implicates Faruq as the supplier of the narcotics that were seized on 20 October 1999. Furthermore it states that the initial consignment consisted of 100 000 Mandrax tablets. It is clear from this affidavit that Faruq is a large-scale supplier of Mandrax and had a long-standing relationship with the Meyers. Attached to Lydia's affidavit is a picture of this Faruq and I am able to confirm that this is the same Faruq that I consulted with in October 2000.

Her husband Theo Meyer who was also involved with her in this illegal trade corroborates the events described by Lydia in her affidavit".

[12] It appears that the Meyers used four different methods to transport Mandrax which had been supplied to them by the applicant. The first was by concealing the drugs in their luggage on a bus from Johannesburg to Cape Town. The second method was similar, save that couriers transported the drugs. On one occasion the couriers drove the silver Toyota Camry to Cape Town and hid the

drugs in a separately built compartment of the petrol tank. Thirdly, they transported the drugs in fridges and freezers using Mzala Couriers from Swaziland. This was arranged by the applicant. On two occasions Mr Meyer collected a freezer containing the drugs from Mzala Couriers at an Engen One Stop garage on the N1 freeway. Fourthly, applicant packed the drugs into boxes which were then concealed in bigger boxes containing blankets. The blankets were then transported to Cape Town by two different courier companies, namely Cross Cape and Kargo.

[13] In order to avoid being identified in the event that a consignment was seized by the police, the Meyers and the applicant took turns in delivering the boxes to these courier companies. When the applicant delivered the boxes he would fax the waybill to the Meyers to enable them to collect the drugs in Cape Town. Once they had received the drugs from applicant, the Meyers would supply most of it to Mr Faizel Manuel. He is one of the biggest drug distributors in Hanover Park, he was a reliable buyer who sold the drugs quickly on each occasion and paid promptly. According to Mrs Meyer, the applicant sent the consignment of 100 000 Mandrax tablets seized at the property. On the day that he sent

the drugs applicant informed her of the fact and said that he would fax the waybill bearing number 5088684 to them. It was arranged that Mr Meyer would collect the drugs from Kargo on 20 October 1999.

[14] On the morning of 20 October 1999, Mr Meyer fetched Mr Manuel's bakkie from the property. He proceeded to Kargo to collect the drugs and returned to the property. The bakkie was pulled into the garage after which the doors were closed. They opened the big boxes which contained the smaller boxes with the Mandrax concealed in the blankets. Instead the smaller boxes were black canvas tog-bags each containing 20 000 Mandrax tablets. After checking and counting the tablets, Mrs Meyer put 10 000 tablets aside which she had promised to another dealer in Cape Town. Mr Meyer later put this Mandrax in the boot of the silver Toyota Camry. Mrs Meyer went home and removed the 10 000 Mandrax tablets from the boot. She later joined Mr Meyer at their business.

[15] Before Mr Manuel was arrested, he informed Mr Meyer that there was trouble at home. He went to L&T Coachworks where he handed Mrs Meyer a bag of money, a SIM card, his cellphone and some cocaine rocks. He then went home as Mrs Meyer described it, "to face the

music". Mrs Meyer also said that after she and her husband were arrested they still had contact with the applicant. The police seized only 40000 tablets and he wanted payment for the remaining 60000 tablets. They eventually met the applicant at the Peninsula Hotel in Sea Point. Mr Faizel Manuel was also supposed to attend the meeting but he did not. The Meyers explained to the applicant that they had not received payment from Mr Manuel. Subsequently the Meyers and Mr Manuel met the applicant at the Passage to India Restaurant in Cape Town. The applicant asked for his money. Mr Manuel asked him to supply another shipment of drugs to enable him to pay back the money that he owed the applicant. The applicant then refused.

[16] In his affidavit, Mr Meyer says that when he called the applicant informing him of Mr Faizel Manuel's arrest, the applicant was "paranoid" that his name should not be mentioned at all. Mr Meyer's cellphone records showed that he and the applicant had numerous conversations around the time of the arrest of Manuel. On 18 October 2004 applicant was arrested. He appeared in the Bellville Magistrate's Court on 27 October 2004 charged with dealing in 100 000 Mandrax tablets. He was subsequently released on bail.

[17] On 14 April 2005 applicant and the Manuels pleaded not guilty to the charges of dealing in drugs and made certain formal admissions. Thereafter the applicant and the Manuels challenged the lawfulness of the search warrants obtained to search the property. The magistrate ruled that the search warrants were valid. Subsequently the magistrate recused himself from the proceedings. The criminal trial was postponed subsequently to 17 November 2006. It appears that it is yet to commence *de novo*. With this particular background, I can now turn to deal with the three issues in dispute.

The prosecutor's decision to invoke section 204 of the Act

[17] Applicant initially sought an order directing the first to fourth respondents to furnish reasons for the decision to indemnify the Meyers from prosecution in terms of section 204 of the Act. In terms of the amended notice of motion, applicant seeks, in addition, an order reviewing and setting aside the decision by the first and/or second and/or third respondents "to call Theo Meyer and Lydia Meyer as the witnesses contemplated in terms of section 204 of Act 51 of 1977 in pending proceedings before the Bellville Regional Court".

[18] It appears from the founding affidavit deposed to by applicant that he bases his application on the following evidence:

1. Dawes is "*functus officio*" when the Meyers approached him to testify on behalf of the State.
2. The first respondent was "*functus officio* and therefore prevented by law in having resolved to for a second time granted Theo and Lydia Meyer indemnity in terms of section 204."
3. The evidence provided by the Meyers was utterly dishonest and unreliable. In this connection the applicant states in his founding affidavit:

On page 10 paragraph 10.18 of the affidavit deposed to by Lydia Meyer dated 7 February 2003 Mrs Lydia Meyer says:

> "Although I did not realise this at the time, the police discovered a handwritten note in the Camry with the name and ID number of Mukhtar Khan. I was quite shocked to see this in the docket and realised that it may connect us to Farouk."

The afore-quoted portion of the affidavit

deposed to by Mrs Lydia Meyer on 7 February 2003 clearly revealed that Lydia Meyer and Theo Meyer were first given the entire State docket before they orchestrated the second "bit of the cherry" i.e. turning "State evidence". It is apparent to a simple mind that Lydia and Theo Meyer, realising that their alibi was exposed to be false, conviction on the Schedule 6 charge was inevitable and the statutory minimum sentence of 15 years was certainly going to be imposed upon them(sic). An example of a blatant lie deposed to by Lydia Meyer in the very affidavit which Mr Dawes relied upon not only engineered the withdrawal of very serious charges against her but also recommended her to become a 204 witness is the following:

"I arranged that one of the employees Heinrich Solomons take our Camry away, remove the tank and replace it with a new one. This was the same Camry mentioned in paragraph 7.3.2 *supra*, i.e. registration number XHT174T

which we had subsequently purchased from Farouk (referring to me)."

[19] Mr Schippers, who appeared on behalf of the first, fifth and sixth respondents together with Mr Solomon, submitted that these challenges were misconceived, essentially because decision to institute or continue a prosecution does not constitute administrative action as contemplated in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). He conceded that it is settled that the control of public power by the Court through judicial review is a constitutional matter and that the common law principles that previously provided the grounds for judicial review of public power had been subsumed in the Constitution. A court's power to review administrative action therefore no longer flows directly from the common law but from the Constitution and the provisions of PAJA.

O'Regan, J stated in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004(4) SA 490 (CC) at 26-27 that the source for judicial review ordinarily is to be found in PAJA; hence it is desirable that litigants who seek to review administrative action should identify clearly both the facts and the provisions of PAJA upon which they rely for their cause of action. It

is to the question therefore of PAJA and administrative action that I now give consideration.

The possibility of review in this case

[20] Section 1 of PAJA defines administrative action, *inter alia*, as follows:

> "Administrative action means any decision taken or any failure to take a decision by (an organ of State) when:
>
> (i) exercising a power in terms of the Constitution or Provincial Constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation...which adversely affects the rights of any person and which has a direct external or legal effect but does not include;
>
> (ff) a decision to institute or continue a prosecution". (my emphasis)

Mr Schippers submitted that, on this basis alone, the application for reasons as well as the application to review and set aside the decision not to proceed with the prosecution against the Meyers fell to be dismissed. For the same reason, he submitted that the applicant was not entitled to reasons for the prosecutor's decision to invoke the provisions of section 204 of the Act in respect of the

Meyers. He further submitted that the decision to prosecute, to continue with or institute a prosecution or the decision to invoke section 204 of the Act in respect of a particular witness was ill-suited to judicial review. In his view, courts would then have to become involved in reviewing the sufficiency of the evidence and policy decisions. Furthermore, an already over-burdened criminal court system would be further clogged by a host of reviews, which in turn would undermine the effectiveness of a prosecuting authority by revealing the State's confidential strategies and enforcement policy.

[21] Furthermore, in this particular case, the applicant's application for this Court to intervene in unterminated criminal proceedings is a power rarely exercised. In this connection Mr Schippers referred to the well-known case which sets out this approach, namely Wahlhaus & Others v Additional Magistrate, Johannesburg & Another 1959(3) SA 113 (A) at 120A.

[22] The arguments regarding PAJA aside, there lies the possibility of a review outside of PAJA. Hoexter: Administrative Law (2007) at 115 observes that PAJA may be "the most immediate source of review jurisdiction" but section 33 of the Constitution remains the ultimate source of the review power. Therefore the

question arises whether the definition of administrative action in PAJA is not identical to that developed by the Constitutional Court (see for example President of the Republic of South Africa v SARFU 2000(1) SA 1 (CC) at 141-143; Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005(6) SA 313 (SCA) at 22-24). Hence Hoexter in her work at 211-212 submits that the excluded decisions, in this case decisions to institute or continue a prosecution are reviewable under the principle of legality in particular and the Constitution more generally. (See for an example of a common law review Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order 1994(1) SA 387 (C)

[23] De Ville: Judicial Review of Administrative Law in South Africa at 64-65 supports this approach, namely that the possibility of a review of a prosecution decision has not entirely been excluded from the realm of administrative law.

[24] In the present case, there has been no attack on the constitutionality of PAJA, nor any measure of precision as to the basis of the relief sought. In other words it has not been contended that the exclusion from administrative action of decisions to institute or continue

prosecution is in breach of section 33 of the Constitution, an argument which would then raise the constitutional sufficiency of PAJA to cover the field. Even if there is a residual review power open to the courts by way of a common law ground (or a direct constitutional review in terms of section 33 which leaves the PAJA exclusion constitutionally intact, an issue which raises a significant number of jurisprudential problems of a kind which are unnecessary to resolve in this case), the Court must examine the evidence to justify this exercise of a review power.

[25] This evidence would have to be examined in the light of the chosen approach to review. In support of the argument that the Court retains a review power of these decisions, De Ville at 64-65 refers to the decision of the House of Lords in R v Director of Public Prosecutions: *ex parte* Kebeline & Others: R v Director of Public Prosecutions: *ex parte* Rechachi 1999 [4] ALL ER 801 HL which, in his view, supports the notion that such decisions should be reviewable, although subject to a less stringent standard of scrutiny. In short, the submission by the learned author is that notwithstanding section 1 of PAJA, reviews of these decisions should be entertained by the Court, save that the Court should accord considerable deference to the decision of the

prosecuting agencies.

[26] Significantly, in Kebeline at 835 Lord Steyn said:

> "I would rule that absent dishonesty or *mala fides* of an exceptional circumstance, the decision of the DPP to consent to the prosecution of the respondents is not amenable to judicial review and I would further rule that the present case falls on the wrong side of that line. While the passing of the 1998 Act marked a great advance for our criminal justice system, it is, in my view, vitally important that insofar as the courts are concerned its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system".

It is clear from Kebeline's case, *supra*, that, whereas the House of Lords circumscribed the possibility of review to the narrowest of grounds insofar as the institution of a prosecution is concerned, when it comes to the question of a refusal to prosecute, broader review grounds are

recognised, albeit within the context of some deference and respect, owed to the prosecuting agency. That respect or deference, to the extent that such a review is available outside PAJA (a point I am prepared to assume without necessarily deciding it) has, however, to be assessed in terms of concrete facts.

[27] In this case, applicant is in the possession of an affidavit deposed to by both Meyers. Furthermore, as Mr de Kock states in his answering affidavit:

> "The applicant is entitled to be given the opportunity to challenge all the above allegations in his criminal trial but what he cannot do it will be argued is to pre-empt the evidence that will be adduced against him or stifle the prosecution's case by resorting to this Court for an order to exclude evidence that will be adduced against him in his criminal trial".

The affidavit relied upon to secure the applicant's arrest was furnished to his legal representatives. Again, to refer to Mr de Kock's affidavit:

> "The applicant's right to a fair trial are guaranteed by the Constitution(sic). He is entitled to all statements of witnesses that the State intends to call in his criminal trial, including all statements

made by Mrs Lydia Meyer and Mr Theodore Meyer. Moreover, the applicant has the right to challenge the evidence of all witnesses in cross-examination and call any witness to testify in his defence."

The applicant has detailed his reasons for the review sought, being the exclusion of the Meyers as witnesses.

The reason he offers deals with the unreliability and hence the credibility of the Meyer's evidence. These issues are ones which, as Mr de Kock points out, are most appropriately dealt with by the trial Court. Given this case made out by the applicant, it is clear that a review application is inappropriate. The questions raised can be dealt with, without any compromise to the applicant's rights to a fair trial, by the trial court. Furthermore, as I have already indicated, a measure of respect and deference should be shown by the courts to the decisions of the prosecution agencies to institute criminal trials as they, within their expertise, deem fit.

[28] As to the final argument relating to review, Mr Omar did not develop this argument; that the reason why Mr Dawes or first respondents were *functus officio*, hence rendering invalid the decision to invoke section 204 in this case.

To the extent that the argument is understandable to me,

it appears to run along the following lines:

The affidavit filed on behalf of the respondents indicate a decision to sue the Meyers as State witnesses and not to charge them were arrived at by Dawes who carries out police functions which should be kept distinct from the functions of a prosecutor. If a prosecutor were simply to rubber-stamp the decision of the police this would destroy the safeguard of having a prosecutor reaching an independent decision as to whether or not to prosecute. But all that Mr Dawes tells the Court is that a decision was reached after a process to utilise her (Lydia Meyer) as a section 204 witness.

There is no evidence that the respondents did not make the decision to employ the Meyers or witnesses in terms of section 204 of the Act, nor does the section itself preclude a process which envisages an inter-relationship between the investigative and prosecutory arms of the State in order to come to such a decision. It would be very surprising if indeed it did.

[29] In summary, there is no merit in any of the grounds which were brought by the applicant to review the decision of respondents to invoke section 204, nor is there any basis by which to conclude that more than ample information was provided to the applicant to assess any alleged

erosion of his rights. It is perhaps for this reason that Mr Omar's major attack was on the constitutionality of section 204 of the Act, meaning that because there was so little basis by which to sustain a review, the section had to be constitutionally shown to fail muster in order for the relief sought to be successful.

The constitutionality of section 204 of the Act

[30] The relevant portion of section 204 of the Act reads thus:

> "Incriminating evidence by a witness for prosecution
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> (1) Whenever the prosecutor at criminal proceedings informs the Court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such a witness with regard to an offence specified by the prosecutor:
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> (a) the Court, it satisfied that this witness is otherwise a competent witness for the prosecution, shall inform such witness;
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> (i) that he is obliged to give evidence at the proceedings in question;
>
> (ii) that questions may be put to him which may incriminate him

with regard to the offence specified by the prosecutor;

(iii) that he be obliged to answer any question put to him, whether by the prosecution, the accused or the Court, notwithstanding that the answer may incriminate him with regard to the offence as specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence as specified;

(iv) that if he answers frankly and honestly all questions put to him he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence as specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the Court, notwithstanding that the reply thereto may incriminate him with regard to the offence as specified by the prosecutor with regard to any offence in respect of which a verdict of guilty would be competent on a charge relating to the offence so specified.

(2) If a witness referred to in sub-section (1) in the opinion of the Court answers frankly and honestly all questions put to him:

(a) such witness shall, subject to the provisions of sub-section (3), be discharged from prosecution for the offence as specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence as specified; and

(b) the Court shall cause such discharge to be entered on the record of the proceedings in question".

[31] Applicant contends that section 204 of the Act is unconstitutional because there is no judicial oversight over the manner in which prosecutors are permitted in criminal proceedings to call witnesses on behalf of the prosecution to answer incriminating questions in terms of section 204 of the Act. He therefore seeks an order that the alleged defect in section 204 should be remedied by the insertion of the words "that another judicial officer certify" before the words "that any person called". On this construction, the introductory part of section 204 of the Act would read:

> "Whenever the prosecutor at criminal proceedings informs the Court that another judicial officer has certified that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor..."

[32] Respondents counter that the constitutional attack has been inadequately pleaded. In their view, the amended notice of motion, when it states that an order will be sought declaring the failure to provide judicial oversight over the manner in which the prosecutors are permitted

to call witnesses being unconstitutional and invalid. Applicant has attacked section 204 of the Act without any identification of its unconstitutional features, any identification of the constitutional provisions which it contravenes or indeed any explanation at all of the way in which section 204 is alleged to be unconstitutional.

I asked Mr Omar to specify the basis of this constitutional attack, that is on what rights he was relying to sustain the attack. He encountered considerable difficulty in pinpointing those rights allegedly breached by section 204.

[33] In his heads Mr Omar contended that the facts of this case revealed the need for judicial supervision over the exercise of a decision taken in terms of section 204 the proposed reading into the reasonable measure that will not frustrate the objectives to be attained by the provisions of section 204. At the hearing, after consideration, he submitted that the applicant's right to a fair trial had been unjustly compromised as a result of the invocation of the section. In his view, without adequate judicial supervision the section jeopardised applicant's rights to a fair trial.

[34] The provisions of section 204 of the Act afford the prosecution a measure of discretion of a kind which I

have already analysed in dealing with the review argument. In this regard it is perhaps pertinent to refer to a *dictum* in R v Power [1994] CLR (SCC) 126 of L'Heureux-Dube, J:

> "It is manifest as a matter of principle and policy courts should not interfere with prosecutorial discretion. This appears clearly to stem from the separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive."

This approach was developed further by the Canadian Supreme Court in Krieger v Law Society of Alberta [2002] 217 DLR (4th ed.) 513 (SCC) at 46 where the Court set out key elements of this discretion thus:

> "(a) The discretion whether to bring the prosecution of a charge laid by police;
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> (b) the discretion to enter a stay of proceedings in either a private or public prosecution;
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> (c) the discretion to accept a guilty plea to a lesser charge;
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> (d) the discretion to withdraw from the criminal proceedings altogether; and
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> (e) the discretion to take control of a private prosecution".

[35] In Krieger's case Iacobucci & Major, JJ said the following:

> "Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney-General's participation therein".

Mr Omar countered with reference to the approach adopted in Australia. The document handed to me as support for the adoption of a different approach by the Australian authorities entitled "Prosecution Guidelines of the Office of the Director of Public Prosecutions (NSW)" contains the following:

> "Section 19 of the Director of Public Prosecutions Act 1986 enables a director to request the Attorney-General to grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence. The director may not grant such an indemnity or give such an undertaking. The Attorney-General may do so pursuant to Chapter 2 of the Criminal Procedure

Act of 1986 and may also give an undertaking that binds him or her honour.

Generally, an accomplice should be prosecuted (subject to these guidelines), whether or not he or she is to be called as a witness. An accomplice who pleads guilty in and agrees to cooperate in the prosecution of another is entitled to receive a consequential reduction in the otherwise appropriate sentence. There may be rare cases, however, where that course cannot be taken (for example there may be insufficient admissible evidence to support charges against the accomplice). A request for an indemnity or an undertaking on behalf of a witness will only be made by the Director after consideration of a number of factors, the most significant being:

(i) Whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused person;

(ii) whether or not that evidence is available from other sources;

(iii) the relative degrees of culpability of the witness and the accused person. It must be able to be demonstrated in all cases

that the interests of justice requires that the immunity be given. Any request to the Attorney-General for immunity (indemnity or undertaking) pursuant to the Criminal Procedure Act 1986 or otherwise must be made in a timely manner and must address the following matters:

(a) The present circumstances of the proposed witness should be outlined and in doing so, his or her attitude to give evidence without the benefit of any immunity and his or her exposure to prosecution in having previously given evidence should be addressed;

(b) the evidence which the proposed witness is capable of giving should be summarised;

(c) the involvement or culpability of the proposed witness in the criminal activity compared with that of the accused person should be considered, as should the appropriateness of the kind of

protection (i.e. indemnity or undertaking) proposed;

(d) the availability of evidence that would substantiate charges against a proposed witness must be stated and the question whether it be in the public interest that he or she be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act, should be examined;

(e) the strength of the prosecution evidence against the accused person without the evidence it is expected the witness can give should be assessed, as should the question of whether if such charge or charges could be established against the accused person without the evidence of the proposed witness, the charge(s) would properly reflect the accused persons' criminality. The proposed witness' reliability and whether his or her evidence may be

corroborated should also be addressed;

(f) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the proposed witness can give...should be examined. The request should also deal with the likelihood of a conviction being secured using the proposed witness' evidence;

(g) the general character of the proposed witness should be examined, in particular the outcome of reliance on any previous grounds should be addressed, as should the question whether any inducement or other reward has been offered;

(h) the views of any other relevant Commonwealth or State investigatory prosecution authority should be addressed".

[36] I have cited this document at length because Mr Omar

held it up as an example of the constitutional position as advocated by him. Mr de Kock informed the Court that a not dissimilar process actually applies in South Africa. In his affidavit he states:

> "In every case, as in the present one, when deciding whether or not to grant immunity in terms of section 204 of the Act, the NPA weighs all the relevant circumstances, including the following".

He then details the circumstances which are taken into account, including the seriousness of the offence; the importance of the witness' evidence; the reliability of the evidence or information offered; the person's culpability for the offence; the person's previous convictions; the protection of the public. He concludes:

> "It follows that section 204 of the Act is essential in the detection, investigation and prosecution of crimes. Unfortunately in prosecuting crimes the State cannot pick and choose its witnesses it does not have the luxury of using only solid citizens to prove its case, often it has to rely on prostitutes, criminals, crooks, perjurers and informers to do so. It will accordingly be argued that s204 of the Act fulfils a vital role in an open and democratic society and to the extent that it constitutes a limitation on any fundamental right (which is denied) it is

reasonable and justifiable".

[37] In the light of Mr de Kock's analysis of the process which is undertaken by the prosecuting agencies in South Africa, even comparing to that which Mr Omar held up as a highwater mark, it is clear that applicant has not at all provided a sufficient case to explain why the safeguards entertained by Respondents and, more important, the safeguards contained expressly in section 204 are insufficient to ensure no adverse impact upon an applicant's right to a fair trial.

[38] As stated, there is no evidence that the system employed by third respondent invoking section 204 is materially different from the position in Australia or indeed in Canada, the two jurisdictions suggested by applicant as being an adequate comparative. In any event, as third respondent contended, a provision such as section 204 is essential in the fight against crime; courts have to be clear about the manner of their supervision of the prosecuting agency, whether there is such a review power (as analysed in the earlier part of this judgment). Courts must recognise that provisions such as section 204 are essential in the fight against crime in South Africa. To bind the hands of the prosecuting agency in

such circumstances would only redound to the benefit of those criminals who have launched an incessant and foundational attack on the very fabric of our constitutional society. As respondents contended, the National Prosecuting Authority and the prosecutors' authority are often compelled to invoke the provisions of section 204 of the Act by not prosecuting a person for a crime or to terminate a prosecution in return for the provision of evidence, information, cooperation and assistance.

[39] It may well be that there will be cases where the prosecution exceeds that which is envisaged in section 204. As I have stated, there is no such evidence in the present dispute. Third, fifth and sixth respondents have placed evidence before the Court to the effect that there is a policy based on rational considerations as to when section 204 is invoked and immunity to a witness is granted. In my view, there is no basis by which to sustain the constitutional attack launched by the applicant in terms of any of the arguments or evidence which applicant has placed before this Court.

I therefore turn finally to the third issue, the question of costs.

Costs

[40] Respondents submit that the present case justifies a punitive costs order. In the original notice of motion the applicant sought reasons for the decision to indemnify the Meyers. Copies of the affidavits relied upon to secure his arrest and the arrest of Mukhtar Khan, a declaration that his warrant of arrest was unlawful and void and a declaration that the evidence of the Meyers was also void. Respondents were compelled to oppose this relief. Third respondent's answering affidavit stated that the decision by the prosecution to call a witness in a criminal trial to answer questions that may incriminate him or her was not revealed under PAJA and that the applicant was provided with the affidavits relating to his and Mukhtar Khan's arrest, that he was not entitled to ask for an order declaring the Meyer's evidence to be void as he had not made out a case for such relief, particularly the exercise of the Court's power to interfere in undeterminated criminal proceedings.

[41] It was pointed out that applicant had the right to challenge the Meyer's evidence in cross-examination. Notwithstanding, applicant persisted with the application. According to respondents what made matters worse is that applicant then launched an interlocutory application

in which he asked that the rules of discovery be made applicable to the main application. Virtually all the documents sought in that application had already been provided to the applicant, more specifically, the prosecutor in the criminal trial provided him with all the documents necessary to enable the criminal trial to proceed. The trial had in fact commenced. Again the respondents were forced to oppose the application for discovery, file answering papers, incur costs in relation thereto on 9 March 2007, only for the applicant to withdraw the application on 9 March 2007.

[42] With regard to the interlocutory application, Mr Omar submitted that approximately 12 months before applicant pursued his application to compel discovery, he had sent a lengthy letter to the respondent dated 30 January 2006 in which he requested a range of information which then turned into the basis of the interlocutory application. According to Mr Omar, respondent appeared to ignore this letter. Only after applicant initiated the interlocutory application which was enrolled for argument on 9 March 2007, did the respondent serve and file an answering affidavit. All the documents requested by applicant by way of discovery were annexed by the respondent to this affidavit. Respondent then placed on record that after a

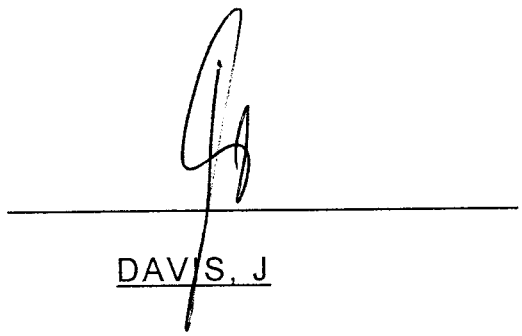
careful search was unable to find the transcript of the bail proceedings, to which have already made mention. This recorded communication by the respondent emerged after the applicant launched the interlocutory application to compel respondent to discover. If the applicant, in Mr Omar's view, had not instituted this application to compel respondent to discover, respondent would not have supplied the documents and information in the manner in which it did.

[43] I have to confess that on these papers the sequence of events becomes difficult to determine. It appears as if the applicant's complaint turns on when the withdrawal took place as opposed to when the documents were provided. I am not entirely certain as to how the sequence was in fact followed through, that is to what extent the documents were provided after the launch of the application and to the extent to which nothing of significance occurred after the initial letter on 30 January 2006, dispatched by applicant to respondents. For this reason I do not propose to make any order of costs with regard to the interlocutory application.

[45] In regard to the balance of the costs I would be reluctant to make a punitive costs order in that applicants have a

right to bring a challenge such as this. It may well be, as I have found, that the challenge has no basis by which to sustain relief but courts must be careful before ordering punitive costs orders on the basis of challenges which may well not be either articulated or conceived with the precision that should be required of them.

[46] For these reasons therefore the application is dismissed with costs, including the costs of two counsel.



DAVIS, J