IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 8845/08

In the matter between:

GARY WALTER VAN DER MERWE Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS Second Respondent

THE MINISTER OF SAFETY AND SECURITY Third Respondent

SENIOR SPECIAL INVESTIGATOR PHILLIPUS DU TOIT HAYWOOD Fourth Respondent

INSPECTOR LIONEL TAYLOR Fifth Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Sixth Respondent

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COVER SHEET

Counsel for the APPLICANTS	**:**	Adv PB Hodes SC Adv A Katz Adv PF Mihalik
Instructed by	**:**	Carl van der Merwe Attorneys
Counsel for the RESPONDENTS	**:**	Adv A la Grange SC
	:	Adv AE Erasmus
Instructed by	**:**	State Attorneys
Date of hearing	**:**	9 and 10 September 2008, 14 January 2009
Date of Judgment	**:**	8 April 2009

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JUDGMENT HANDED DOWN ON 8 APRIL 2009

Introduction

1. The Applicant is Mr Gary Walter van der Merwe. On 13 July 2004, and at Cape Town International Airport, the Applicant was arrested by Inspector Gululu, a member of the South African Police Services, Border Unit, Cape Town. The State alleged that the Applicant had contravened the Exchange Control Regulations, 1961. After his arrest he was kept in custody at Ravensmead police station.

2. On the next day, 14 July 2004 the Applicant was informed by Inspector Lionel Taylor of the Commercial Branch, South African Police Services, Bellville of his constitutional rights in the presence of his counsel, Mr Mihalik. Later that day he was taken to the Bellville Magistrates Court where a bail-application was brought and, by agreement, he was released. Subsequently the Applicant was charged with contravening the Exchange Control Regulations, 1961 and with defeating the administration of justice.

3. The State alleges that the Applicant sent foreign currency out of South Africa in the amounts of Euro 130 000 and US $ 21 249 approximately R 1.1 million in total, in contravention of regulation 3(1)(a) read with regulations 1 and 22 of the Exchange Control Regulations (Government Gazette extraordinary 123, dated 1 December 1961) read with section 9 of the Currency and Exchanges Act, 9 of 1933, and of defeating the administration of justice.

4. The Applicant had previously brought an application for the return of the foreign currency which had been confiscated from him at the airport. That application resulted in reported decisions by the Cape Full Court: Van der Merwe and Another v Nel and Others 2006 (2) SACR 487 (C) and by the Constitutional Court: Van der Merwe and Another v Taylor N.O. and Others 2008 (1) SA 1 (CC).

5. The Applicant has not yet pleaded. His trial was scheduled to commence on 9 June 2008 in Regional Court Bellville. On 9 June 2008 the Applicant approached this Court as a matter of urgency. Traverso AJP postponed the application by agreement on 9 June 2008. The application served before me on 9 September 2008. Mr Hodes with Mr Mihalik appeared for Mr van der Merwe (Mr Katz assisted Mr Hodes in the drafting of the additional heads, but did not appear on the 12th of January). Mr la Grange, together with Ms Erasmus, appeared on behalf of the Respondents. The hearing continued into the next day whereafter it resumed on 12 January 2009.

6. The relief sought on 9 June 2008, as a matter of urgency, was a *rule nisi* as to why the following substantive relief should not be granted:

> "*3.1 Declaring that the Second Respondent* (the head of the Directorate of Special Operations) *and the Fourth Respondent* (Investigator Haywood) *have acted outside of the legislative and operational mandate of the Directorate of Special Operations, and accordingly unlawfully and that their conduct, as*

reflected in the founding affidavit of the Applicant, has been inconsistent with the Constitution[1] and invalid; and

3.2 Declaring the laying of the two criminal charges brought against the Applicant in the regional court, Bellville, under case number SH5/86/07 by the Second and/or the First Respondents, to be unlawful, unconstitutional and invalid."

7. The Third Respondent, the Minister of Safety and Security, the Fifth Respondent, Inspector Taylor, and the Sixth Respondent, the Minister of Justice and Constitutional Development, abide the outcome of the application.

8. The alleged violation of the Applicant's fundamental constitutional rights, including the rule of law, in outline, is as follows:[2]

(a) the investigation into the alleged foreign exchange currency contraventions against him has since its inception and at all material times been conducted and controlled by Inspector Haywood either on the instructions of the head of the Directorate of Special Operations, or by Inspector Haywood acting on his own, and that Inspector Haywood have used or "*puppeteered"* other agents to assist him.

(b) the head of the Directorate of Special Operations and/or Inspector Haywood and/or Adv Mopp[3] have not

[1] The Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution")

[2] See for instance par 13 of the founding affidavit, record page 10-11

[3] Adv Mopp is the Regional Head of the Directorate of Special Operations Western Cape of the Directorate of Special Operations. Adv Mopp is a deputy director, as envisaged by section 7(4)(i)(aa) of the NPA Act.

(i) acted in an accountable and transparent manner, in violation of section 195[4] of the Constitution; and

(ii) acted in a manner that is reasonable and procedurally fair but have in fact acted arbitrarily.

(c) Inspector Haywood's role was hidden, because at all times the relevant Directorate of Special Operations officers were aware that they were acting out side of their legislative or operational mandate. Inspector Haywood's role in the investigation was only disclosed in his affidavit made on 22 April 2008[5] and before then the Applicant was unaware of Inspector Haywood's involvement.

(d) by persisting in this unauthorised conduct, the Directorate of Special Operations officers have embarked on a course of conduct calculated to mislead him and create a false impression about who was really responsible for the investigation against him. By so doing the Directorate of Special Operations, acting with the assistance of

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[4] *195.* ***Basic values and principles governing public administration.*** *– (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
(a) a high standard of professional ethics must be promoted and maintained.
…
(d) services must be provided impartially, fairly, equitably and without bias.
…
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
…"

[5] The affidavit was annexed to a letter of the same date by Adv Mopp

the South African Revenue Services (Customs) and South African Police Services attempted to set him up and put him on the aeroplane so that he could be arrested for an alleged offence. The head of the Directorate of Special Operations and/or Inspector Haywood and/or Adv Mopp have deliberately sought to hide and/or obfuscate the involvement of the Directorate of Special Operations and Inspector Haywood in the investigation against the Applicant and in his prosecution.

(e) Inspector Haywood's vast power and that of the Directorate of Special Operations have been used for an ulterior purpose, namely an attempt to secure a conviction against the Applicant at all costs.

(f) the inevitable conclusion is that the Directorate of Special Operations sought to hide its investigatory role because it had conducted the investigation from the beginning that was *ultra vires* and had been done with an ulterior purpose.

(g) In the premises, the investigation and resulting prosecution is unlawful, unconstitutional and invalid.

9. The Applicant relies upon alleged violations of sections 1,[6] 2,[7] 10,[8] 12,[9] 14,[10] 33,[11] 35,[12] 179[13] and 195[14] of the Constitution.

10. The Applicant relies, in particular, upon section 172(1)(a) of the Constitution, namely that a Court *"must declare that any law or conduct that is inconsistent with the Constitution is invalid,"* but does not seek any relief as

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[6] *1. **Republic of South Africa** – The Republic of South Africa is one sovereign, democratic state founded on the following values:*
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[7] *2. **Supremacy of Constitution.** – This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.*

[8] *10. **Human dignity.** – Everyone has inherent dignity and the right to have their dignity respected and protected.*

[9] *12. **Freedom of security of the person.** – (1) Everyone has the right to freedom and security of the person, which includes the right –*
(a) not to be deprived of freedom arbitrarily or without just cause;
…
(e) not to be treated or punished in a cruel, inhuman or degrading way; …

[10] *14. **Privacy.** – Everyone has the right to privacy, which includes the right not to have –*
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

[11] *33. **Just administrative action.** – (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons.
(3) National legislation must be enacted to give effect to these rights ….

[12] *35. **Arrested, detained and accused persons.** – (1) Everyone who is arrested for allegedly committing an offence has the right*
(a) remain silent;
…
(3) Every accused person has a right to a fair trial, which includes the right –
….
(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[13] *179 **Prosecuting authority.** – There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –*
(a) a National Director of Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the National Executive, and
(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

provided for in terms of section 172(1)(b). The latter section provides that the Court may make -

> *"any order that is just and equitable, including*
>
> (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
>
> (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."*

11. The Applicant accordingly does not seek any relief consequent upon the determination of the issues in dispute and said that he is not trying to stop the prosecution or have evidence excluded because, as he had conceded, this is the function of the trial court. It matters not, as Mr Hodes correctly pointed out, that the relief sought is *res nova*. That mere fact cannot deprive the Applicant of his constitutional rights. Mootness is not in dispute, nor is ripeness. Accordingly, as will be set out below, it was submitted that there is no discretion vested in the Court, but to declare the conduct to be invalid.

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(3) National must ensure that the Directorate of Public Prosecutions
…
(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
…."

[14] *See footnote 4 above*

12. The Applicant also expressly does not rely upon any violation of his rights in terms of section 38[15] of the Constitution. I shall return to this aspect.

The events giving rise to the instant application

13. An investigation in terms of section 28(1) of the National Prosecuting Authority Act, Act 32 of 1998 (the NPA Act) was declared on 8 April 2003 with regard to allegations of fraud, theft and various contraventions of the Companies Act allegedly committed by one Killian, one Oates and the Applicant in respect of World Online Ltd, Wealth International Network (Pty) Ltd and Wellness International Ltd (the fraud case). Inspector Haywood is the lead investigator of the investigating team.

14. On 7 July 2004 Inspector Haywood received information from a source who knew him because he was investigating the fraud case. The information was to the effect that the Applicant had purchased foreign exchange in excess of R 1 million and that the Applicant was booked to fly to London on Sunday 11 July 2004. Inspector Haywood went to his superiors, the then deputy director, Adv Jerome Wells, and they then approached Adv Adrian Mopp. They did not consider the matter to fall within the mandate of the Directorate of Special Operations. It was agreed that this information should be handed to the relevant law enforcement agencies and Inspector Hay-

[15] *38. **Enforcement of rights.** – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*
(a) anyone acting in their own interest;
…"

wood was authorised accordingly. Though it is not readily apparent from the papers it is clear upon analysis that this meeting took place prior to Inspector Haywood contacting Senior Superintendent Leon Lucas, at South African Police Services (Commercial Crime) on Friday 9 July 2004.

15. Inspector Haywood brought the information to the attention of Mr Hilton Decye, South African Revenue Services (Customs), Senior Superintendent Leon Lucas, and also spoke to South African Police Services (Border Unit). These officials would be authorised to deal with the Applicant if he were to leave the country with this amount of foreign exchange.

16. On 11 July 2004 Inspector Haywood drove to Cape Town International airport with a South African Revenue Services investigator, Mr Snyman, and a South African Revenue Services member Mr Louw, and ascertained that the Applicant had changed his flight. He pointed the Applicant out to a member of South African Revenue Services (Customs).

17. On 13 July 2004 Inspector Haywood again travelled to the airport with another Directorate of Special Operations member, Mr Koekemoer, and met with Inspector Gululu, a member of the South African Police Services (Border Police), Mr Guerreiro of the South African Revenue Services (Customs) and captain Koegelenberg of the South African Police Services (Border Police) – Inspector Gululu's superior officer. Inspector Haywood informed them that he had been given information that the Applicant had foreign cur-

rency in excess of what was allowed. He later identified the Applicant to the South African Police Services (Border Police).

18. Mr Guerreiro requested Mr Nico Maree of South African Revenue Services (Customs) to assist him in stopping the Applicant and have him fill in the prescribed customs declaration. The Applicant proceeded through the security check point. Mr Maree requested the Applicant to fill in the prescribed declaration (the contrary allegation by the Applicant is that he requested to fill in the form – the resolution of this factual dispute is not relevant to the adjudication of this application).

19. The Applicant completed the form and handed it to Mr Maree. The Applicant agreed to the examination of his luggage. He explained that he was also carrying currency on behalf of members of his family.

20. Mr Guerreiro handed the matter over to the South African Police Services (Border police) and called Inpector Gululu over who took charge. Mr Guerreiro also informed members of the Directorate of Special Operations present elsewhere in the building of the foreign currency found. Mr Guerreiro did not see the Applicant again.

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21. Inspector Gululu reported to captain Koegelenberg that foreign currency was found. Inspector Gululu was uncertain as to which regulation found application.

22. Captain Koegelenberg could not give a final direction and they, Captain Koegelenberg and Inspector Gululu, agreed to allow the Applicant to board the flight. The Applicant boarded the airplane. Captain Koegelenberg says he spoke to Commercial Branch of South African Police Services regarding regulations. He was told regulation 3(1)(a) was the applicable regulation. Captain Koegelenberg also informed Inspector Haywood that the Applicant had been searched and foreign currency was found. Inspector Haywood told him, when asked, that it could be a contravention of regulation 3(1)(a). As the doors of the aircraft were about to close, Inspector Gululu was informed of the regulations in question. He proceeded to have the Applicant removed from the aircraft and arrested, and also confiscated the currency. The Applicant was advised that the matter would be taken over by members of the Commercial Branch. Detective Inspector Nell attached to the Commercial Crimes Unit, Bellville, subsequently arrived and interviewed the Applicant in the presence of his counsel, Mr Mihalik. Inspector Nell opened the docket.

23. There exists a dispute as to whether captain Koegelenberg did indeed telephone Mr Haywood to obtain from him the exact exchange control regulation which was being contravened. Captain Koegelenberg did not say so in his affidavit annexed to the Applicant's affidavit, but later did depose to an affidavit wherein this fact was conveyed.[16]

[16] Koegelenberg, par 10, Record p 257

24. Inspector Haywood, in turn, stated on oath that captain Koegelenberg had informed him that the Applicant had been searched and the money had been found and enquired from Inspector Haywood which regulation may have been contravened and that Inspector Haywood had informed him, section 3(1)(a) of the Exchange Control Regulations.

25. The declaration form had disappeared and this gave rise to the further charge of defeating the administration of justice.

26. The next morning Inspector Taylor, a detective inspector attached to the Commercial Branch, Bellville, was assigned to the case as Inspector Nell had already tendered his resignation. Inspector Taylor was not present the previous night and did not know the Applicant. Inspector Taylor conducted an interview 14 July 2004 in the presence of Mr Mihalik. The Applicant told Inspector Taylor that the Directorate of Special Operations was victimising him and he was certain that they had followed him to the airport.

27. Inspector Nell, Inspector Gululu, Captain Koegelenberg and Inspector Taylor are all adamant that they never took any instructions from Inspector Haywood. Inspector Haywood also never had any contact with Inspector Nell. Inspector Guerreiro denied reporting back to Inspector Haywood.

28. On the morning of 14 July Inspector Haywood had gone to see Adv Mopp and informed him that the Applicant has been arrested for taking R1 million in foreign currency out of the country. Adv van Vuuren was present when

this was conveyed. Adv Mopp advised that he should speak to Adv de Kock, the Director or Public Prosecutions, Cape of Good Hope, if there was going to be a bail application Adv de Kock should assign a prosecutor to handle the bail application. Adv van Vuuren and Adv Haywood then went to speak to Adv de Kock. Adv de Kock asked Adv van Vuuren to attend the Bellville Magistrates court and take charge of the bail application on behalf the Director of Public Prosecutions' office.

29. On 14 July 2004 the Applicant's bail application was heard with Adv van Vuuren appearing on behalf of the Department of Public Prosecutions. Despite the protestations to the contrary, there can be no criticism for the fact of a senior counsel appearing at a bail application in the Magistrates' Court. It is also uncontroverted that Adv Mopp insisted that Adv van Vuuren obtain a written delegation from Adv de Kock which he duly received. The authority in terms of section 22(8)(b) of the NPA Act to Adv Bunguzana and Adv van Vuuren are both dated 14 July 2004 and signed by Adv de Kock.[17] Inspector Taylor informed Adv van Vuuren about the bail amount and conditions. The Applicant was released on bail. Inspector Haywood was also present at the bail hearing.

30. The Applicant launched an urgent application on 15 July 2004 for the return of the confiscated currency.

[17] AM8 and AM9, Record page 334-335

31. As at September 2004 Inspector Taylor was satisfied that his investigation into the foreign exchange contravention had been completed and the matter could proceed to trial.

32. On 28 October 2004 the Applicant was arrested on charges in the fraud case. Inspector Haywood says it was only then that he had his first contact with Inspector Taylor when he discussed a joinder of the foreign exchange charges and the fraud case. Inspector Taylor rebuffed Inspector Haywood.

33. On 22 April 2005 Adv Bunguzana informed the court that the "*case (was) initially investigated by SAPS and now by Scorpions*".[18] Adv Mopp only dealt with the issue by stating that Adv Bunguzana was acting on behalf of the Director of Public Prosecutions – this, it was submitted, was at variance with what Adv Bunguzana told the court.[19] This was at the stage when the joinder of the foreign exchange contravention charges to the fraud charges against the Applicant in the fraud case, with the Applicant's consent, was on the cards.

34. On 28 October 2005 Adv Wells appeared, at which stage Adv Mihalik confirmed the joinder of the charges. Thereafter, and until 8 March 2007 all appearances and postponements were done on the basis of single High Court trial.

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[18] Annexure GWM14(a) and 14(b) page 93 and 94, van der Merwe par 103 page 41

[19] Mopp par 22 and 40 Record page 266 and 272

35. On 16 October 2007 Adv Morrison wrote that "(t)*his prosecution (*the foreign exchange contravention prosecution*) is conducted under the banner of the DPP and not the DSO. You remember that we initially had one charge sheet but due to the mis-joinder question the prosecution was separated.*"[20]

36. In his replying affidavit,[21] the Applicant states that he was informed by Ms Heidi Mari Rohr that Inspector Haywood had attended on her with a subpoena and advised her that he was the investigating officer and interviewed her. Ms Rohr's involvement could only be in the foreign exchange contravention case and there was no suggestion that she was involved in the fraud case at all. The Respondents did not seek an opportunity to refute these allegations made by the Applicant. It was submitted that the oral evidence of Ms Rohr would be important to demonstrate Inspector Haywood's continued involvement.

37. The central allegations of the Applicant are that

(a) this matter has "*from its inception, been investigated, monitored, handled and will be prosecuted by the DSO*. *Other agencies that have been engaged by the DSO are purely incidental to this matter and were in fact carrying out Haywood's instructions."* [22]

[20] AM4, Record page 330
[21] Par 55, Record p.434
[22] Founding affidavit, par 56, record, p 26 -7

(b) *"I have always subjectively felt that the DSO had 'set me up' but up until 22 April 2008 I did not have the information available to substantiate my belief."*[23]

(c) the investigation by Inspector Haywood was malicious and the "*structuring the whole operation against me, which operation was akin to a trap if not in fact a trap operation.*"[24]

38. The response to that, by Inspector Haywood is that he denies, in the strongest terms, that the role of other law enforcement agencies was "*purely incidental."* The relevant authorities to investigate the exchange control contraventions are the South African Revenue Services (Customs), the South African Police Services (Border Unit) and the South African Police Services (Commercial Crimes). Inspector Haywood states that he merely alerted the agencies to the commission of a possible offence, which the agencies followed up and exposed. He only divulged the information and at no stage had anything to do with the investigation. Nowhere does the Applicant allege that he had been enticed into committing the offence through any request on the part of any person or that someone had gone beyond providing an opportunity for him to commit an offence.

39. The Applicant was informed on 27 March 2008 that Inspector Haywood had been present at the airport when he was arrested in July 2004, nearly four

[23] Founding affidavit, par 49, record, p 23
[24] Founding affidavit, par 94, record, p 38

years earlier. His application has already been to the Constitutional Court, and yet it is only now that he states that information came available to "*substantiate my belief*". Inspector's Haywood's name, however, never featured in the application brought for the return of the foreign currency.

40. The Applicant points out that

(a) the statement by Adv Bunguzana that the "*case (was) initially investigated by SAPS and now by Scorpions*" remains unexplained.

(b) He queries why it was necessary to send a senior prosecutor such as Adv van Vuuren to a bail application, and why was Adv Morrison SC included in the email of 6 November 2007? All court appearances, save one, were by prosecutors of the Directorate of Special Operations. All correspondence was on Directorate of Special Operations letterheads.

(c) Inspector Haywood had informed Ms Rohr that he was the investigating officer and he interviewed her.

(d) Inspector Taylor does not say who took over in the docket from him when he had resigned in April 2006. It is inconceivable that a police docket would not be allocated to another detective from April 2006 to date, unless this is a Directorate of Special Operations investigation.

(e) Inspectors Taylor and Nell both allege that they did not know who the Applicant was - this can only mean that Superintendent Lucas did not instruct any of his members to follow up on the information passed on by Inspector Haywood. This is unlikely, the only inference is that Inspector Haywood drove the investigation.

(f) The NPA Act requires that the Directorate of Special Operations not make inroads on the South African Police Services investigations. Otherwise the inevitable inference to be drawn is that this is a personal vendetta and an abuse of the powers of the Directorate of Special Operations.

41. The Applicant contends that there was a deliberate and conscious violation of the Directorate of Special Operations' mandate and also of his constitutional rights. He contends that the investigation and prosecution is irregular, unlawful and unconstitutional. He also believes that the evidence obtained cannot be used against him. The Applicant states that the "*DSO has an insatiable appetite to investigate and prosecute me.*"[25]

42. The Applicant submitted that *"it is a totally irregular for a specialised unit which was established under a restricted mandate to victimize me by way of irregular investigations, invasion of my privacy and my prosecution."*[26] It

[25] Replying affidavit, par 10, record p 415
[26] Replying affidavit, par 61, record p 437

defies credulity, he stated, to suggest a South African Police Services investigation when he clearly was being prosecuted at the instance of the Directorate of Special Operations.

43. Section 172(1)(a) of the Constitution provides that when a Court, deciding a constitutional matter within its power, finds that any law or conduct is inconsistent with the constitution then it '*must*' declare it to be invalid to the extent of its inconsistently with the constitution.

44. Section 28 of the NPA Act provides as follows:

> "*28.* ***Inquiries by Investigating Director***
>
> *(1)(d)If the Investigating Director*[27] *at any time during the conducting of an investigation, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the Investigating Directorate concern he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.*"

45. The *"Investigating Director"* is the second respondent. In terms of section 7 of the NPA Act the Investigating Directorates have the aim to investigate

[27] the "*Investigating Director*" is

> *(a)* "*a Director of Public Prosecutions appointed under section 13(1)(aA) or (b)*
>
> (i) *to the Directorate of Special Operations; or*
>
> (ii) *as the head of an investigating directorate established in terms of section 7 (1)(A),*
>
> *as the case may be; and*
>
> *(b) in Chapter 5, includes the head of the Directorate of Special Operations.*"

and carry out any functions incidental to investigations, gather, keep and analyse information, and where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings relating to offences or any criminal or unlawful activities committed in an organized fashion or such other offences or categories of offences as determined by the President by proclamation in the Gazette.

46. In terms of section 16 of the NPA Act prosecutors shall be appointed on the recommendation of the National Director or a member of the Prosecuting Authority designated for that purpose by the National Director. Prosecutors may be appointed to the office of the National Director, or the office of the Investigating Directorates.

47. From the aforegoing statutory provisions followed the two main prongs of the attack first, on the conduct of Inspector Haywood, namely that he had investigated an offence which did not fall within the scope of authority of the Directorate of Special Operations to investigate and that he also had transgressed section 28(1)(d) of the NPA Act in that he disclosed the commission of an (alleged) offence to someone other than the National Commissioner.

48. The second attack is that, in terms of section 16, by necessary implication, the Directorate of Special Operations prosecutors must prosecute offences which fall under their jurisdiction and may not be the prosecutors in respect of other offences.

49. The Applicant, accordingly, seeks an order declaring that the above (alleged unlawful) conduct on the part of Inspector Haywood and the Directorate of Special Operations prosecutors infringed his rights as is contemplated under section 172 of the Constitution. Mr Hodes emphasised that this was not an application to stay the prosecution.

A summary of the Respondents case

50. The Respondents' case, in brief, is that the prosecution is not at the instance of the Directorate of Special Operations and accordingly no reliance was placed upon any mandate given to Inspector Haywood to investigate or prosecute the Applicant.

51. Inspector Haywood stated that, besides divulging the information, which he was duty bound to do, he had nothing to do with the investigation, and that he only helped to identify the Applicant. Section 28 (1) of the NPA Act provides for exchange of information. In practice, Inspector Haywood stated, information is passed on to the branch that has authority to further investigate the information. Adv Mopp had the authority to authorise Inspector Haywood to pass on the information to the relevant investigating officers, which he duly did. It was contended that there was a responsibility, right and duty to ensure that such information was given to those who could deal with it appropriately.

52. Inspector Haywood denied ever giving any instructions or conducting any investigation. He was openly present at the bail hearing as he had a strong interest in keeping track of the Applicant's movements. He goes on to say that it was incumbent on him to pass information on and could not then just stand back:

> *"to demand of me to stand aside and not do anything further after having passed on information ... would have been contrary to my obligations in terms of those sections. I went to the airport due to my constitutional responsibility to assist ."*

53. Inspector Gululu had mistakenly believed that he needed to know the specific regulation in order for him to arrest the Applicant. Inspector Gululu denied taking instructions from Inspector Haywood or that he was part of a set up or acted at the instigation of the Directorate of Special Operations. Inspector Haywood only later found out that Inspector Gululu had permitted the Applicant to board the aircraft. There was no evidence to suggest an entrapment nor was there an attempt to set the Applicant up.

54. Inspector Guerreiro had openly mentioned that a Directorate of Special Operations member was close by. The Applicant knew at least since August 2004 that another Directorate of Special Operations' member, other than Wright, was present on the night of his arrest. It was only in February 2008 that the Applicant had enquired as to which members of the Directorate of Special Operations were present that evening of 13 July 2004

55. Captain de Villiers, group head of the South African Police Services (Commercial) supervised Inspector Taylor. Inspector Taylor was seized with the investigation at all times, and he denied that the Directorate of Special Operations played any part in his investigation. He stated that he acted on own initiative, under the guidance of and supervision of only his superior officers. He had no contact with Inspector Haywood. He only followed up on requests by Adv Bunguzana in his capacity as a prosecutor. He stated that it was a normal run of the mill investigation and denied that he was a mere puppet for the Directorate of Special Operations or Inspector Haywood.

56. Adv de Kock, is responsible for prosecuting the foreign exchange contravention case. Adv de Kock had delegated certain Directorate of Special Operations prosecutors to act on his behalf, as they are versed in the identity and profile of the Applicant making the prosecution more efficient. Adv van Niekerk was authorised by Adv Kahn on 16 October 1998 to prosecute matters on behalf of Director of Public Prosecutions and that authority remains in force. In addition thereto Adv van Niekerk was specifically requested to conduct the foreign exchange contravention prosecution. The Applicant has known since February 2007 that Adv van Niekerk would be conducting the prosecution.

57. There was an agreement on joinder of the charges and on 28 October 2005 the Court was informed accordingly by Mr Mihalik.

58. It was conceded that it was unfortunate that letters were sent out on Directorate of Special Operations letterhead. There was nothing sinister in Adv Morrison and Inspector Haywood being copied on email of 5 November 2007.

59. It was denied that there was any evidence of an abuse of any of the powers of the Directorate of Special Operations.

60. It was suggested that the Applicant sought to delay the criminal trial, that the application was an abuse of the process of Court, and that each possible issue was raised by the Applicant in a piecemeal manner.

61. It was contended that

(a) the trial court would be the proper forum to determine the issues raised by the Applicant and that this Court will only grant relief when the State is overwhelmingly at fault and fair trial is in jeopardy; this Court will not order a declaratory order amounting to permanently stopping the prosecution.

(b) there are other effective remedies available:

(i) section 106(h) of the Criminal Procedure Act, 51 of 1977, entitles an accused to plead that the prosecutor has no title to prosecute; and

(ii) the Applicant could still appeal or review the proceedings of the trial court.

62. The Applicant contended that the Respondents' answers were ambiguous, suspect and at variance with common sense. The discrepancies could only be resolved by way of oral evidence and it was in the interests of justice to refer the matter to oral evidence.

The hearing

63. The Applicant is seeking that the application be referred to oral evidence so that the witnesses could be called on the issue whether the Directorate of Special Operations did, in fact, investigate the foreign exchange contravention, and, whether, in fact, as the Applicant suspects, the prosecution is indeed a prosecution at the behest of the Directorate of Special Operations. It was furthermore pointed out that it was not asked that the prosecutors themselves be called as witnesses, but I was invited to consider whether I should do so.

64. Though the notice of motion is cast in the form of a rule *nisi* Mr Hodes argued that in the event of the application for referral to oral evidence be refused, then I should deal with the application as one for final relief and he submitted that I should then grant the relief set out in para 3.1 and 3.2 of the notice of motion as set out in paragraph above.

Oral evidence

65. By way of a notice of an application in terms of Rule 6(5)(g), dated 22 August 2008, the Applicant sought a referral to oral evidence of a number of witnesses, being Haywood, Nicolas Stephanus Snyman, Jacobus Wynand Koekemoer, Hilton Decye, Paul Louw, Miguel Guerreiro, Marius Koegelenberg, Mandlakayise Gululu, Edward Nell and Lionel Taylor as well as that leave be granted to the Applicant to subpoena Heidi Rohr and senior superintendent Leon Lucas to testify orally as witnesses. Mr Hodes contended that given the disputes of facts it would be appropriate to refer the matter to oral evidence in terms of Uniform Rule of Court 6(5)(g).[28]

66. Factual disputes in motion proceedings are to be dealt with in accordance with the rule laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C, namely that, subject to certain exceptions, a court should rely on the evidence given by the deponents for the respondent save where the respondent admits averments made by the applicant. That is, unless the respondent's version is so untenable that it can be dismissed.

[28] Rule 6(5)(g) provides as follows: *"Where an application cannot properly be 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, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."*

67. A party who is obliged in law to bring proceedings by way of notice of motion, i.e. application proceedings, and seeks to discharge the onus of proof which rests upon him, should not be lightly deprived of that opportunity (AECI Ltd and Another v Strand Municipality and Others 1991 (4) SA 688 (C) at 698J – 699A). It does not, however, follow that such an application will be granted as a matter of course.

68. In Khumalo v Director-General of Co-operation and Development and Others 1991 (1) SA 158 (A), Van Heerden JA cited with approval the conclusions drawn by Kumleben J, as he then was, in Moosa Bros & Sons (Pty) Ltd v Rajah 1975 (4) SA 87 (D) at 93 as follows:

> *"(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.*
>
> *(b) The illustrations of 'genuine' disputes of fact given in the Room Hire[29] case at 1163 do not – and did not purport to – set out the circumstances in which cross-examination under the relevant*

[29] Murray, ADJ held in Room Hire (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

(a) *"(i)t does not appear that a respondent is not entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his deponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the disputed fact conclusive of such existence"* (at 1163 with reference to Peterson v Cuthbert 1945 AD 420, per Watermeyer CJ at 428).

(b) *"While it may be, once a genuine dispute of fact has been shown to exist, that a respondent should not be compelled to set out his full evidence in his replying affidavits, a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure a relief by motion proceedings in appropriate cases"* (at 1165).

(c) *Enough must be stated by a respondent to enable the Court (as required by the Peterson's case (supra)) to conduct a preliminary examination of the position and to ascertain whether the denials are not fictitious, and intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voca evidence has been heard."* (at 1165)

Transvaal Rule of Court could be authorised. They a fortiori do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised."

69. In Wightman t/a J W Construction v Head Four (Pty) Ltd and Another 2008 (3) SA 371 (SCA) Heher JA stated at para [12] – [13] that:

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton N.O. and Others 2005 (3) SA 141 (C) at 151A – 153C with which I respectfully agree. (I do not overlook that a reference to Evans in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or counter availing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the

court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party...."

70. In Ripoll-Dausa v Middleton N.O. and Others 2005 (3) SA 141 (C) Davis J at 154A-C quoted with approval from Erasmus *et al,* Superior Court Practice at B1-50A:

"In exercising its discretion under the sub-rule, the Court will to a large extent be guided by the prospects of viva voce evidence tipping the balance in favour of the applicant. If on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. The more the scales are depressed against the applicant, the less likely the Court will be to exercise its discretion in its favour. Only in rare cases will the Court order the hearing of oral evidence where the preponderance of probabilities of affidavits favours the respondent."

71. Davis J held, in the matter before him, that it could not be said that the preponderance of probabilities based on the affidavit evidence favours the respondent. However, the respondent's evidence has raised a sufficient dispute about the single most important question of fact, being the existence of a permanent life partnership between the applicant and another. The benefit of oral evidence could well tip the scales in favour of the applicant on a balance of probabilities.

72. Mr la Grange argued that it would be inappropriate to accede to the request to refer the issue of the conduct of Inspector Haywood, and whether he "*investigated*" the foreign exchange contravention charges, to oral evidence.

73. Mr la Grange submitted that the issues between the parties will have to adjudicated twice – once by this Court to determine whether the conduct of Inspector Haywood and the prosecution has been unlawful, unconstitutional and invalid and once again, by the regional court, to determine whether the alleged unlawful conduct has had any impact on the Applicant's rights to a fair trial and the admission of evidence obtained by the alleged unlawful conduct. Reliance was placed upon what Marais J, in his minority judgment, said in Hlophe v Constitutional Court of South Africa and Others [2008] ZAGPHC 289 (25 September 2008) at paragraph 34, namely that "*it is inherently undesirable that two tribunals enquire into the same conduct, this being a waste of time, money and expertise.*" Mr la Grange submitted that the question of Mr Haywood's involvement is the very selfsame issue which will, in due course, again arise in the criminal trial.

74. Though it apparently was not anticipated that it would be conceded, the Respondents never contended that the foreign exchange contravention charges fell within the Directorate of Special Operations' mandate pursuant to section 7(1)(a)(aa) and (bb) of the NPA Act. It was, however, submitted that the concession in this regard made by Inspector Haywood,[30] raised as vital the factual issues as to why the Directorate of Special Operations members have been so extensively involved in the foreign exchange contraventions.

[30] Haywood, par 25, Record p.122

75. It was not contended that there was a bald denial of the involvement of Inspector Haywood and Adv Mopp – to the contrary, the criticism was that they had sought to explain their role and that of other Directorate of Special Operations members in the foreign exchange contraventions and these explanations were to be tested in evidence.

76. It was contended that Inspector Haywood's role has *"vacillated"* from that of informer, to civilian, to that of a Directorate of Special Operations member acting in mutual assistance of other agencies. It was submitted that these various *"roles"* that Inspector Haywood played – and its veracity – could only be properly tested by way of *viva voce* evidence.

77. It was submitted that the question which remains unanswered by the Respondents was, on what basis was it permissible for Inspector Haywood to have been involved in the Foreign Exchange contravention matter at all. It was submitted that it was *"absolutely vital for the proper determination of this matter"* that the Applicant be permitted to cross-examine the various deponents referred to in the Rule 6(5)(g) application so that this issue could be determined properly.

78. It was submitted that a dispute of fact arose by virtue of the admission of Inspector Haywood surrounding his and other Directorate of Special Operations members' presence at relevant times, but, whom in turn, alleged other facts as to what they were in fact doing or what role they were playing at the relevant times. It was submitted that a finding has to be made as to the role

of Inspector Haywood and the Directorate of Special Operations throughout in the investigation and prosecution of the foreign exchange contravention.

79. It is, of course, only if such an adverse finding was made, that the Applicant could succeed in the relief he was seeking. It was submitted that these factual disputes as to Inspector Haywood's role be determined by way of *viva voce* evidence and that, once it was found that Inspector Haywood was indeed acting in the capacity of a senior special investigator in the employ of the Directorate of Special Operations and that he had been directly involved in the foreign exchange contravention investigation, or of acting outside of the mandate, the inevitable conclusion would follow, namely that either the Directorate of Special Operations or Inspector Haywood had acted with an ulterior purpose, irregularly, unconstitutionally and indeed illegally.

80. It was submitted that vital to this determination and to the application for a referral to oral evidence, was the issue of prejudice, the public interest and the interests of justice. The constitutional rights of the Applicant are at stake and the only potential prejudice to the respondents is that of costs. Given that the respondents are all public officials, the cost issue can never be a bar to the right of the Applicant to have the matter fully ventilated in open court. It was submitted that the Applicant should, accordingly, not be bound by the strictures imposed by Plascon-Evans.

81. Are there reasonable grounds for doubting the allegations made by, in particular Inspector Haywood, or regarding his conduct?

82. Reliance was placed upon what Inspector Haywood had stated on oath, namely that:

> *" [37] I deny that my participation as outlined below has any bearing on fulfilling executive investigative functions (i.e. those investigative functions as authorised by legislation and the State), or that I have conducted any investigation. An investigator fulfilling executive investigative functions cannot merely provide information, or for that matter, urge the authorities to do something to bring to book a perpetrator who was in the process of committing a crime or merely point out what should be done. He or she has to do more."*[31]

83. It was submitted that contrary to the instruction to pass on the information, and as from 7 July 2004 to 14 July 2004 and perhaps thereafter, Inspector Haywood continued gathering information, invading the Applicant's privacy,[32] and running an investigation without reporting to any superiors that he was engaged in this activity, and without any authorisation in terms of section 7 or 30 of the NPA Act. The Applicant submitted that it is for that reason that Inspector Haywood's role has been so "*conspicuously withheld in this whole matter.*"

84. It was submitted that this entailed that Inspector Haywood could only investigate matters which fell within the purview of section 7 of the NPA Act, and

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[31] Paras 36 and 37, Record pp.126 – 127

[32] In passing I point to footnote 72 in the judgment by Sachs J in Mistry v Interim Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC) at where reference is made to the observation by Wacks Privacy and Press Freedom (Blackstone Press, London 1995) at vii. Tribe in American Constitutional Law 2nd ed (The Foundation Press Inc, New York, 1988) at 1302:
"Justice Louis Brandeis defined the constitutional right to privacy as 'the right to be let alone – the most comprehensive of rights and the right most valued by civilised men.'. That eloquent formulation reveals the animating paradox of the right of privacy: it is revered by those who live within civil society as a means of repudiating the claims that civil society would make of them. It is the right that has meaning only within the social environment form which it would provide some degree of escape.
…
Much judicial and scholarly ink has been spilt in the task of expounding this paradoxical right."

then only subject to the control and direction of the Head of the Directorate of Special Operations (the Second Respondent).

85. The facts do not support the inference which is sought to be drawn, namely that Inspector Haywood had conducted his own investigation. Inspector Gurreiro stated that he was instructed by his superiors to keep a lookout for the Applicant. He requested of Mr Maree to assist him and he called Inspector Gululu when the currency was found on the Applicant. Inspector Haywood's role was restricted to identifying the Applicant and no more.

86. There is no evidence to support the central theme, namely that Inspector Haywood was himself actively investigating the matter and that he was co-ordinating all the role players required in order to arrest and prosecute the Applicant.

87. It was submitted with reference to Reuters Group PLC v Viljoen and Others 2001 (1) BCLR 1265 (C) at par 2, p.1266 that the Respondents' versions were to be rejected as unreliable. It is apt to quote what Traverso DJP and Davis J had to say:

> *"Press freedom is not the foundation of the applicants' challenge of this decision. It concerns honesty and integrity in public administration. The case for the applicants rests on five interrelated propositions which are foundational to a constitutional State based on the rule of law namely:*
>
> *2.1 Public officials are bound to act honestly and ethically;*
>
> *2.2 They are bound by their lawful undertaking;*

2.3 They may not embark on a course of conduct calculated to mislead or create a false impression;

2.4 They are bound to make full disclosure of all material facts before seeking to exercise or invoke the exercise of any power in circumstances where the affected parties are denied a hearing;

2.5 They are bound to act fairly and lawfully."

(See also Pharmaceutical Manufacturers Association of SA and Another: in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at paras 85, 89 and 90.)

88. I pause to point out that although serious allegations have also been leveled at the prosecutors, implicating them in the withholding of the role allegedly played by Inspector Haywood, no application was made for any of them to testify – this was left for me to decide whether I should order them to testify. For the reasons already set out above I am not inclined to do so.

89. In my view the Respondents' version is neither far fetched nor untenable so as to make me reject it.[33] Should I then, in the exercise of a discretion, nonetheless, order oral evidence to be adduced, as I was invited to do?

90. Bearing in mind that, although the application raises questions of the infringement of the Applicant's constitutional rights, no consequential relief is sought, nor will the Applicant be deprived of exercising his rights to a fair trial, or his reliance on those rights at the trial. Taking all these factors into account I am not persuaded that I should exercise any discretion beyond the

[33] National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) at par 20 *et seq*

application of the rule in Plascon Evans in ordering oral evidence to be adduced.

91. In the premises I refuse the application for oral evidence.

92. Do the facts as disclosed in the application, and in applying the rule in Plascon-Evans, support the Applicant's case that his rights have been infringed?

The conduct of Inspector Haywood

93. Inspector Haywood contended that, first, he had a duty (and a right) as a civilian to report crime to the relevant authority and to assist that authority. Second, as a Directorate of Special Operations member, he not only had a right, but also an obligation pursuant to section 28(1)(d) of the NPA Act to report information not essential to his investigation to another appropriate law enforcement agency. Third, as a member of a law enforcement environment, he was obliged pursuant to the Constitution to co-operate, assist and support. He denied that he ever gave any instructions to persons within the law enforcement environment and further, as stated by other South African Police Service officials, given any instructions would have been useless due to the prevailing climate at the time. [34]

94. Inspector Haywood stated that his role in the foreign exchange contravention case was –

[34] Paragraph 36, record p 127

"... limited to co-operating with other law enforcement agencies by providing information and assisting them by identifying the applicant to SARS (Customs) officials. Although section 31 of the NPA Act specifically provides for a Ministerial Co-ordinating Committee, such a committee was never put into operation. This section provides for the communication and transfer of information regarding matters falling within the operation and scope of the DSO and the transfer of investigations to and from the DSO.

Moreover, section 28(1)(d) of the NPA Act provides that it is an obligation resting upon the investigating director when he is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the investigating directorate concerned, he must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter."

95. Section 31 of the NPA Act provides for a ministerial coordinating committee which may determine procedures to coordinate the activities of the Directorate of Special Operations including procedures for the communication and transfer of information regarding matters falling within the operational scope of the Directorate of Special Operations and the transfer of investigations to or from the Directorate of Special Operations and other relevant government institutions.

96. Section 41(6) of the NPA Act in turn provides that no person shall without the permission of the National Director disclose to any other person any information which came to his knowledge in the performance of his functions in terms of this Act except "*for the purpose of performing his or her function in terms of his or her functions in terms of this Act or any other law.*"

97. It was contended that Haywood had no authority as contemplated in terms of section 41(6) of the NPA Act and his conduct fell foul of this section. Mr

Hodes argued that the provisions of section 41(6) of the NPA Act is similar to section 4 of the Income Tax Act, Act 58 of 1962 (see Sackstein NO v South African Revenue Service and Others 2000 (2) SA 250 (SE)).

98. Erasmus J in Sackstein in considering section 4(1) of the Income Tax Act (and the similarly worded section 6 (1) of the Value-Added Tax Act, Act 89 of 1961), found that an official shall reveal confidential information only to the extent that such act is an integral part of or a necessary concomitant to the performance of his duties (at 259E –G).

99. In terms of the provisions of section 30 of the NPA Act, Inspector Haywood:

> *"may, ..., exercise such powers and must perform such duties as are conferred or imposed upon him ... by or under this Act or any other law and must obey all lawful directions ..."*

100. Section 41(1)(h) of the Constitution provides that all spheres of government and all organs of State within each sphere must co-operate with one another in mutual trust and good faith by, *inter alia,* assisting and supporting one another (sub-sub-section (ii)) and informing one another of, and consulting one another on, matters of common interest (sub-sub-section (iii)) and adhering to agreed procedures (sub-sub-section (iv)).

101. Section 41(1)(h) of the Constitution, of course, must be read taking into account the provisions of sections 28, 31 and 41 of the NPA Act, as well as the obligations imposed upon Inspector Haywood in terms of section 30 of

the Act. The *"agreed procedures"* are set out in sections 28(1)(d) and 31 of the NPA Act. These procedures are clear and peremptory, but as was explained by Inspector Haywood, the Ministerial Co-ordinating Committee was never put in place and the practice is to communicate relevant information amongst the various authorities. I am not convinced that provisions of section 28(1) preclude the exchange of the information in this manner.

102. In Pharmaceutical Manufacturers Association of SA and Another: in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) Chaskalson P

(a) stated as follows at para [20]:

> *"The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of our law."*

(b) He continued as follows at para [85]:

> *"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."*

(c) And at para [90]:

> *"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that falls to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful ... A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decisions."*

103. In the final instance it was submitted that Inspector Haywood had invaded the Applicant's right to privacy, dignity and Inspector Haywood had acted without a mandate, flouted the provisions of the NPA Act, acted irregularly and in a manner that was inconsistent with the Constitution. He may even have acted unlawfully (see section 41(6) of the NPA Act).

104. It seems to me that Inspector Haywood did what was required of him in terms of section 30 of the NPA Act. He was obliged to report the commissioning of a crime, even if that entailed an invasion of the Applicant's rights. The information he conveyed to the other law enforcement agencies, it seems to me, was an integral part of or necessary concomitant of the performance of his duties. Not to have done so, would have been contrary to his obligations as an officer of the peace.

105. Once Inspector Haywood knew (or suspected) that a foreign exchange transgression was taking place he could not stand by and knowingly allow the offence to take place without making an attempt to prevent the commissioning of the offence – Mazeka v Minister of Justice 1956 (1) SA 312 (A) at 317 (see also Minister of Police v Rabie 1986 (1) SA 117 (A) at 127C-D).

106. There is no basis, in my view, for holding the decision to share the information as being unlawful or against the principles as set out by Chaskalson P in the Pharmaceutical case.

The conduct of the prosecutors

107. Mr Hodes emphasised that a prosecutor stands in a special relationship *vis-à-vis* the court. His paramount duty is not to procure a conviction, but to assist the court in ascertaining the truth.[35] In S v Shaik and Others 2009 (2) SA 208 (CC) para 67 the Constitutional Court referred with approval to Boucher v The Queen[36]

> "*The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings"*

108. In Smyth v Ushewokunze and Another 1998 (3) SA 112 (ZS) Gubbay CJ had to consider whether the applicant would be afforded a fair hearing in the event of the first respondent prosecuting the charges against him at the trial. Gubbay CJ referred to Boucher, *supra,* and found on the undisputed facts that, regrettably, they revealed that the first respondent's behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor (at 1132 I—J).

109. Gubbay CJ accordingly observed that he had no difficulty in acknowledging the inherent danger of unfairness to the applicant attendant upon the first respondent prosecuting at the trial. He then turned to consider the question whether the applicant's right to a fair hearing by an independent and impar-

[35] S v Jija 1991 (2) SA 52 (E) 68A-C
[36] [1955] SCR (16) (1955) 110 CCC 263 dictum at 23-24

tial court established by law, as enshrined in section 18(2) of the Constitution:[37]

> **"***To put the enquiry more pertinently, whether the words 'impartial court' are to be construed so as to embrace a requirement that the prosecution exhibit fairness and impartiality in its treatment of the person charged with a criminal offence.*
>
> *In arriving at the proper meaning and content of the right guaranteed by section 18(2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the Court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.*
>
> *...*
>
> *Section 18(2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner so as to include within its scope and ambit not only the impartiality of the decision-making body but the absolute impartiality of the prosecutor himself, whose function, as an officer of the court, forms an indispensable part of the judicial process. His conduct must of necessity reflect on the impartiality or otherwise of the court. See generally, Chaskalson et al, Constitutional Law of South Africa at 27-18—237-19.*
>
> *To interpret the phrase 'impartial court' literally and restrictively would result in the applicant being afforded no redress at this stage. It would mean that in spite of prejudicial features in the conduct of the first respondent towards him, the applicant would have to tolerate the first respondent remaining the prosecutor at the trial. I cannot accede to the obvious injustice of such a situation."* (113C-I).

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[37] *"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

110. Mr Hodes submitted that the reference to "*conducted under the banner of the DPP*" is mere smoke and mirrors. He, in particular questioned why Adv Louis van Niekerk would copy to Adv Morrison and Haywood a communication directed at Adv P Mihalik and Mr Carl van der Merwe[38] (representing the Applicant).

111. Adv Mopp in his affidavit explained that Adv Morrison and Inspector Haywood were copied on this e-mail because they had been asked to be informed of the progress of the foreign exchange contravention case and Adv Mopp submitted that "*nothing sinister can or should be read into this fact*". He refers to the affidavit of Inspector Taylor, which reflects that he was the "*true investigator*".[39]

112. Mr Hodes pointed out that it was common cause that Adv J Wells, a Directorate of Special Operations deputy director had no mandate to appear in the foreign exchange contravention matter and no authority to have (orally, or otherwise) requested Adv van Niekerk (Directorate of Special Operations) to prosecute the matter. Adv Wells, who answers to Adv Mopp, does not explain why he appeared in court on the foreign exchange contravention prosecution.[40] Mr Hodes read into the letter of 4 September 2008, written on behalf of Adv de Kock, an implied concession that Adv van Niekerk should not have been the prosecutor to begin with.

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[38] AM12, Record page 339

[39] Record 285/286 affidavit Adv Mopp

[40] Applicant's heads para 54, record Mopp para 39 p271

113. When considering the facts one has to consider that Adv Wells, who appeared as prosecutor on two occasions, was not properly authorised to do so; but Mr la Grange submitted that had no impact on the legality of the proceedings. A valid warrant had been issued and the Applicant had been lawfully arrested. The further appearances were all properly authorised – can this then have any effect on the proceedings, particularly where the Applicant has not yet been charged?

114. There are no facts which support the contention that the prosecutors had acted in a partial manner. The arguments to a large extent revolved around the authority of the various prosecutors to have appeared at various times.

115. In National Director of Public Prosecutions v Moodley,[41] the SCA was called upon to pronounce on the effect which unauthorised conduct by prosecutors (which occurred during the course of criminal proceedings before the accused was called upon to plead to the charges) had on the further prosecution of such accused. Moodley and his co-accused were arraigned on charges in terms of section 2(4) of the Prevention of Organised Crime Act, Act 121 of 1998. The appeal turned on the question whether the fact that the accused had been "charged" on the counts of racketeering prior to obtaining written authorisation as required in terms of section 2(4) of the aforesaid Act, would render the further prosecution of the accused on racketeering charges unlawful.

[41] [2008] ZASCA 136 (23 November 2008).

116. In upholding the appeal, Scott JA said:

> *"In my view counsel for the appellant correctly submitted that once the prosecution is authorised in writing by the National Director there can be no reason, provided the accused has not pleaded, why the further prosecution of the accused on racketeering charges would not be lawful, even if the earlier proceedings were to be regarded as invalid for want of written authorisation. The respondents contended, however, that in the latter event the further prosecution would be 'tainted' and would remain invalid. But they were unable to advance any proper basis to support this contention. Indeed, until an accused has pleaded the State would be at liberty to withdraw the charge and recharge the accused once the authorisation had been granted.[42] But such an exercise would serve no purpose and I can see no reason why it should be necessary."*

117. Mr la Grange, accordingly, submitted that had any given prosecutor acted without proper authorisation during pre-trial proceedings (that is, proceedings which pre-date the rendering of a plea by the accused in terms of section 105 of the Criminal Procedure Act), the effect of the invalidity of his or her involvement would be limited to the proceedings in which such prosecutor(s) was or were directly involved.[43] Mr la Grange submitted that the mere involvement of an unauthorised prosecutor along the line would not *per se* taint the further prosecution to the extent that the further prosecution would be unlawful.

118. He pointed out that the Applicant had not yet pleaded to the charges and, in any event, has not shown that he has suffered any prejudice as a result of

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[42] See section 6(a) of the Criminal Procedure Act, 51 of 1977

[43] See Hall v Inspector of Police 1931 NPD 102; Johnson and Others v Durban Corporation 1931 NPD 102; State v Dwalath 1963 (3) SA 763 (B); State v Willie Breedt (Pty) Ltd and Another 1964 (2) SA 672 (T); S v Chan 1964 (3) SA 624 (T) and Claymore Court (Pty) Ltd and Another v Durban City Council 1986 (4) SA 180 (N),

the involvement of any specific *"unauthorised"* prosecutor or, for that matter, any of the Directorate of Special Operations prosecutors mentioned in the papers. Section 106(1)(h) of the Criminal Procedure Act permits an accused to plead that the prosecutor has no title to prosecute. Should that plea be upheld the accused will in terms of section 106(4) be entitled to demand that he or she be acquitted[44] (at 303A and 306A). I agree with these submissions.

119. There was also no suggestion that the prosecution was brought for any other reason than to the secure the conviction of the Applicant, nor was it alleged that there were not reasonable and probable grounds for prosecuting the Applicant (paragraphs 37 and 38 in National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) per Harms DP).

120. Any deficiency in regard to the authority to prosecute was, in any event, cured by the decision to appoint a prosecutor from the offices of the Director or Public Prosecutions.

121. In the premises I am of the view that there is no merit in the second leg of the attack. In the premises the application falls to be dismissed.

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[44] See Ndluli v Wilken N.O. en Andere 1991 (1) SA 297 (A).

122. In the event of me being wrong on either of the conduct of Inspector Haywood (and the sharing of the information) and the conduct (and authority) of the prosecutors I turn to consider whether the Applicant should succeed with an order for declaratory relief.

The constitutional and legislative background

123. The new constitutional order incorporates common law constitutional principles and gives them greater substance. The rule of law is specifically declared to be one of the foundational values of the new constitutional order. The content of the rule of law principle under our new constitutional order cannot be less than what it was under the common law.

124. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, and that law or conduct inconsistent with it is invalid and the obligations imposed by the Constitution must be fulfilled.[45]

125. In Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (205) (6) BCLR 529) the Constitutional Court sketched the role of the rule of law as a form of constitutional control on the exercise of public power as follows:

> *"Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give*

[45] Compare also section 1(c) of the Constitution. See also President of the Republic of South African and Another v Hugo 1997 (4) SA 1 (CC) (1997) (6) BCLR 708) para 28; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (1999) (10) BCLR 1059) para 38; Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) para [172] (618G—619C).

> *effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.*
>
> *The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and form no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."*[46]

126. There is, of course, a heightened expectation of procedural fairness in criminal trials. Our Constitution recognises this by entrenching the right of an accused to a fair trial and provides a non-exhaustive list of the requirements of a fair trial.[47]

127. It is also clear from section 39(3) of the Constitution that *"the Constitution was not intended to be an exhaustive code of all rights that exist under our law"*.[48] (Ngcobo J in Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) at para [188].)

128. The application crystallized as an application for a declarator in terms of section 172 of the Constitution. No consequential relief is sought.

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[46] Paras [48]—[49]

[47] See section 35(3) and Veldman v Director of Public Prosecutions, 2007 (3) SA 210 (CC) par 61

[48] Pharmaceutical Manufacturers Association of SA and Another: in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) para 49.

129. In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) Harms DP said the following with regard to section 179 of the Constitution:

> "*[57] Before dealing with the whole wording of the provision it must be placed in context. Section 179 is to be found in chapter 8 of the Constitution, which deals with 'courts and administration of justice'. This chapter does not purport to deal with rights of accused persons - they are contained in chapter 2, the Bill of Rights, more particularly section 35. I accept that the chapter must be so interpreted that it promotes the spirit, purport and object of the Bill of Rights and fits seamlessly into the Constitution as a whole."*

130. Section 179 deals with the prosecuting authority. Section 172 is also part of chapter 8 of the Constitution.

131. The arguments ultimately boiled down to one issue: does this Court enjoy any discretion in relation to the declaratory orders sought by the Applicant? The Respondents suggested that this Court has a discretion and that it should exercise it against the Applicant, and thus decline to grant him the declaratory order sought. The Applicant on the other hand contented that this Court has no discretion in relation to the declaratory order sought and that, in any event, even if it did have the discretion contended for, then it should exercise that discretion in favour of the Applicant and grant him the declaratory order sought.

132. Section 172(1)(a) of the Constitution provides as follows:

> "*172. **Powers of courts in constitutional matters**. – (1) When deciding a constitutional matter within its power, a court –*
>
> *(a) must declare that any law or conduct that is*

inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court of the validity of that Act or conduct."

133. Mr Hodes argued that once conduct is found to be inconsistent with the Constitution it must be declared invalid. The Court, he argued, has no discretion as the relief was sought in terms of the Constitution itself, and not under section 19(1)(a)(iii) of the Supreme Court Act, Act 59 of 1959. Mr la Grange argued that without consequential relief being sought the application did not meet the requirements for declaratory relief in terms of section 19(1)(iii)(a) of the Supreme Court Act, Act 59 of 1959. Without consequential relief the declaratory order would be purely academic. Mr Hodes responded that section 19 did not find application, that once it is found that the conduct infringed the Applicant's constitutional rights, he was entitled in terms of section 172 of the Constitution to an order declaring that to be the

case, notwithstanding the fact that no consequential relief was being sought. Put differently, section 172 did not have a discretionary threshold.

134. Mr la Grange on the other hand, submitted that the Applicant has not made out a proper case for the granting of relief under section 172(1)(a) of the Constitution. The court is not faced with a situation contemplated in section 172(1)(a) where it is required to declare a law or conduct to be invalid for its unconstitutionality. Mr la Grange referred me to Hlophe v Constitutional Court of South Africa and Others [2008] ZAGPHC 289 (25 September 2008, per Mojapelo DJP at paragraph 108 Gildenhuys J, at paragraph 26 and Marais J at paragraph 7. In short, all three judges held that section 172 did not find application where declaratory relief was sought in terms of section 19 of the Supreme Court Act.[49] Mr Hodes submitted that the declaratory order the Applicant seeks is in terms of the Constitution itself, and not under the Supreme Court Act. Mr Hodes, correctly, in my view, distinguished the Hlophe case which was an application in terms of section 38 and not section 172.

135. Because the Applicant seeks declaratory relief[50] in terms of the Constitution itself, and not in terms of section 19(1)(a)(iii) of the Supreme Court Act, the considerations set out in Myburgh Park Langebaan (Pty) Ltd v Langebaan

[49] This aspect was not the subject matter of the subsequent appeal to the SCA

[50] All the relief the applicant seeks in terms of section 172 (1)(a) of the Constitution, *viz* (i) a declaratory order that the Head of the Directorate of Special Operations and Phillipus Du Toit Haywood have acted outside of the legislative and operational mandate of the Directorate of Special Operations ("*DSO*") and that their conduct is inconsistent with the Constitution and invalid [Notice of motion: 3.1:2], and (ii) a declaratory order that the laying of the two criminal charges '*brought against the applicant*' in the forex case by the second respondent and/or the first respondent, to be unlawful, unconstitutional and invalid. [Notice of motion: 3.2:2]

Municipality and Others[51] and Cordiant Trading CC v Daimler Chrysler Financial Services,[52] and relied upon by the Respondents, do not seem to be immediately relevant to these proceedings, but as will be set out below in paragraph , there remains, on the face of it, a discretion in deciding applications under section 172.

136. Reliance was placed upon Dawood, Shalabi and Thomas v Minister of Home Affairs 2000(3) SA 936 (CC) at para [59] and [60] and Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) 2007(6) SA 477 (CC) at par [87] for the proposition that if the issue raised by the Applicant is a constitutional issue within this Court's jurisdiction, and if the Court concludes that the conduct in issue is inconsistent with the Constitution, then the Court is compelled to make the declaratory order sought.

137. In Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC) O'Regan J held at paras [59] and [60] that section 172 obliges the Court, once it has concluded that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution. The Court may then also make an order that it considers just and equitable including an order suspending the declaration of invalidity for some time.

> *"It seems clear from the language in section 172(1), in particular, that as long as a Court is deciding a constitutional matter 'within its power', it*

[51] 2001 (4) SA 114 (C) at 1153 – 1154.
[52] 2005(6) SA 205 (SCA) at para [16] – [18]

has the remedial powers conferred by that section, as broad as they may be."

138. In Matatiele Municipality and Others v President of the RSA and Others (No. 2) 2007 (6) SA 477 (CC) Ngcobo J found that the conduct of the Provincial Legislature of KwaZulu-Natal, in failing to comply with its constitutional obligation to facilitate public participation prior to taking a decision to approve legislation that transfers the area that previously formed Matatiele Local Municipality from the province of KwaZulu-Natal to the Eastern Cape and which affected Matatiele, was a violation of the provisions of section 118(1)(a) and section 74(8) of the Constitution. That conduct on the part of KwaZulu-Natal must, pursuant to section 172(1)(a) of the Constitution, be declared to be inconsistent with section 118(1)(a) and section 74(8). (Paragraphs [85], [86] and [87] at 501B-I.)

139. In Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) Ngcobo J again referred to the obligations of a court under section 172(1)(a) (at para [46] at p.440H—441B).

140. Langa DCJ (as he then was) in Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC) put it thus at paragraph [10]:

"*What is clear is that the High Court erred in approaching a prayer for Constitutional invalidity as if there were a prayer for discretionary relief in terms of section 19(1)(a)(iii). The relief was sought in terms of the Constitution itself and not under the Supreme Court Act".*
(underlining added)

141. Mr la Grange rather argued that before deciding to rule upon the issue, the anterior question arises, and needs to be considered, namely as to whether there should be a ruling on the issue at all – in that regard, he submitted, the Court still had a discretion.

142. Reliance was placed upon Islamic Unity Convention v Independent Broadcasting Authority and Others, *supra*, where Langa DCJ held as follows at para [10]:

> *"A Court's power under section 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court decides a constitutional matter, it must declare invalid any law or conduct inconsistent with the Constitution. It does not, however, expressly regulate the circumstances in which a Court should decide a constitutional matter. As Didcott J stated in JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others:*[53]
>
> > *'Section 98(5)*[54] *admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.'"*

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[53] 1997 (3) SA 514 (CC) (1996) (12) BCLR 1599) at para [15].

[54] Section 98(5) of Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) provided as follows:
"*(5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or the provision, which shall then remain in force pending correction or expiry of the period so specified.*
(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or provision thereof –
(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before coming into effect of such declaration of invalidity; or
(b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

143. Langa DCJ continued that in determining when a Court should decide a constitutional matter, the jurisprudence developed under section 19(1)(a)(iii) will have relevance, as Didcott J pointed in the JT Publishing case, but the constitutional setting may well introduce considerations different from those that are relevant to the exercise of a judge's discretion in terms of section 19(1)(a)(iii). Langa DCJ continued to point out that it is settled jurisprudence that a Court should not ordinarily decide a constitutional issue unless it is necessary to do so and it should also not decide a constitutional issue which is moot.

144. Mr Hodes retorted that first, there are no other issues to decide – it is only a constitutional issue which arises in the application and, two, it is certainly not moot. He is correct, in my view, with regard to the sharing of information. In my view the issue of the authority of the prosecutors is moot. As Langa DCJ pointed out,[55] a constitutional matter remains one governed by the Constitution with its imperatives and not one determined solely by a consideration of the circumstances in which declaratory relief under section 19 of the Supreme Court Act would be granted.

145. The Islamic and JT Publishing cases were decided under the Interim Constitution, section 98(5). Mr la Grange placed great reliance on the concession, made for the purposes of argument, that it was not placed in issue that any finding by this Court on the issue will not, as in the case of Spies,[56] necessarily render it impossible for the Applicant to enjoy a fair trial.

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[55] At par [12]

[56] Spies and Another v The State [2000] 2 All SA 205 (A).

146. In Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) O'Regan J considered section 172(1)(a) of the Constitution as a special constitutional provision, different to the common law rules governing the grant of declaratory orders.[57]

147. O'Regan J continued:

> *"It does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed section 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief.*
>
> *...*
>
> *Unlike under section 172(1)(a) the Courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act, will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.*
>
> *[107] It is quite clear that before it makes a declaratory order a Court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declaratory, a court will consider all the relevant circumstances."*

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[57] O'Regan J referred to the discussion of the difference between the jurisdiction of the High Court to grant declaratory relief and section 172 of the Constitution in Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) (2002) (5) BCLR 433) at paras [8]—[12] and National Director of Public Prosecutions and Another v Mahomed N.O. and Others 2003 (4) SA 1 (CC) (2003) (5) BCLR 476) at paras [55]—[56].

148. In Key v Attorney-General, Cape Provincial Division and Another 1996(4) SA 187 (CC) Kriegler J held as follows at 195G-196B, at paragraph [13], in the context of the admissibility of unconstitutionally obtained evidence:

> "*In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trail. Ultimately, as was held in Ferreira v Levine fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there also be times when fairness will require that evidence, albeit obtained unconstitutionally nevertheless be admitted.*"

See also Spies and Another v The State 2000(2) All SA 205 (A)

149. State v Mhlungu 1995 (3) SA 867 (CC) was a matter where Kentridge AJ dealt with the practice of referrals to the Constitutional Court under section 102(1) of the Constitution. Kentridge AJ pointed out that the Constitutional Court would only hear a matter if the issue is one which may be decisive for the case and if it considered it to be in the interests of justice to do so. He points out that it would be exceptional and would arise, for instance, where the declaration by the Constitutional Court of the invalidity of a statute would put an end to the whole prosecution. He equated it with the practice

of the High Court with regard to reviews of criminal trials. It is only in very special circumstances that the High Court would entertain a review before verdict, and added that the convenience of a rapid resort to the Constitutional Court would not relieve the trial court from making its own decision on a constitutional issue within its jurisdiction.

150. On this lucid argument Mr la Grange placed great reliance for his submission that now was not the moment for the Applicant to approach this Court for relief. He had to seek is remedies before the trial court – which remedies were to hand – particularly I might add – where the Applicant himself disavowed any reliance upon section 19 of the Supreme Court Act for declaratory relief.

151. Mr la Grange, in effect, submitted that the Court should refrain from making a declaratory order which would anticipate facts that have yet to come about, which would pre-empt what may yet take place in the Magistrate's Court. Mabukane v Port Elizabeth Divisional Council and the Solicitor-General 1957 (4) SA 293 (E) was a case where De Villiers JP pointed out that unless the facts are not in dispute or are agreed upon or are irrelevant to the determination of the declaratory order, such an order would not be competent on affidavit as it cannot have the effect of *res judicata* between the parties. He also held that the case before him was not a proper one for a declaratory order. He referred to Attorney-General of Natal v Johnstone and Co Ltd 1946 AD 256 at 261, where Schreiner JA sounded a note of warning against entertaining an application for a declaratory order in a case where a

criminal case against the Applicant has already been commenced. Schreiner JA held as follows:

> *"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 been 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."*

152. Schreiner JA, nonetheless, held that there may be exceptions to the cautionary rule mentioned by him. De Villiers JP held that an application for a declaratory order in the matter before him, would almost be tantamount to holding that whenever a person is charged with an offence in a lower court, he can obtain postponement of the trial, and a declaratory order from a Superior Court (at 297H).

153. Secondly, Mr la Grange submitted, with reference to Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another 2006 (4) SA 355 (C) at paras 119 and 120, that even if there had been an invalid administrative action (bearing in mind that there is no review before this Court either) and, until it was set aside by a court in proceedings for judicial review, it remained in existence and had legal consequences that could not simply be overlooked – with reference to Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para [26] at 242A, where Howie P and Nugent JA dealt exhaustively with what was described as the

"apparent anomaly ... that an unlawful act can produce legally effective consequences" (paras [27]—[37] at 242C—247). The conclusion was that legal validity or invalidity is never absolute, but can be described only in relative terms. The SCA referred to the following citation in Wade & Forsyth, Wade on Administrative Law, 7th edition, at 342-4:

> *"The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another ... 'Void' is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the Court's willingness to grant relief in any particular situation."*

154. Mr Hodes made it quite clear that the Applicant is not seeking to enforce his right to a fair trial as he would have been able to do in terms of section 38,[58] but he is seeking to enforce his rights in terms of section 172. Mr Hodes submitted that if the declaratory order is granted, the First Respondent should reconsider the decision to prosecute the Applicant and/or the Applicant will reconsider his legal options, including making representations to the first respondent and/or the Director of Public Prosecutions.

155. Mr la Grange pointed out that section 38, Enforcement of Rights, of the Constitution, gave the Applicant the right to approach a competent court, to allege that a right in the Bill of Rights has been infringed or threatened and

[58] see footnote 15 above

the court may then grant appropriate relief, including a declaration of rights. This declaration, Mr la Grange pointed out, would again involve the exercise of a discretion. It is precisely in order to avoid the Court exercising a discretion that the Applicant steered away from any reliance upon section 38 and brings his application strictly within the confines of section 172. He submitted that the proper approach would have been to have proceeded in terms of section 38.

156. It seems to me that the an order in terms of section 172(1)(a) can not, and should not, be given when appropriate relief is not also sought under section 172(1)(b). To render such relief may very well result in unintended consequences and improper results. I may, for example, if I were asked to do so, have held that very little turned on this breach and ordered the trial to proceed. But a finding in isolation may be interpreted as finding that no prosecution should take place. The fact that Inspector Haywood may have infringed the Applicant's right to privacy by sharing the information with other authorities and a finding in that regard, should therefore not used to bind another decision maker (in this case the National Prosecuting Authority, on whether to proceed with the prosecution, or the trial court (which may not, in any event, be bound by the finding – see Hollington v Hewthorne [1943] KB 587 (CA)). They should all make those decisions and findings independently.

157. I therefore find it inappropriate to exercise a discretion, in the sense anticipated by Langa P in Islamic Unity Convention, *supra*, to decide the consti-

tutional issues raised by the Applicant. It seems to me that these issues are best reserved for the trial court as stated in Key's case.

158. In the premises I would, on this basis also, dismiss the application.

159. I agree with the submission made by Mr Hodes that in view of the importance of the issues raised that I should not saddle the Applicant with a cost order. Accordingly I make the following order:

The application is dismissed. No order to costs is made.

SVEN OLIVIER, AJ