IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 3675/07

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

ANDRE LE GRANGE N.O. **First Respondent**

DAVID MICKEY MALATSI **Second Respondent**

PETER JACOBUS MARAIS **Third Respondent**

JUDGMENT

MSIMANG, J:

[1] This is an application launched by the National Director of Public Prosecutions (applicant) seeking an order reviewing and setting aside a decision made by a Regional Magistrate on or about 13 February 2007, declining to state a case in response to the applicant's notice in terms of Section 310(1) of the Criminal Procedure Act 51 of 1977 read with Rule 67(12) of the Magistrates' costs rule.

[2] At the time when the application was launched the said Regional Magistrate was cited as the only respondent in the matter. However, at the hearing of the matter on 20 March 2009, a point *in limine* was taken by an *amicus curiae* relating to the non-joinder of the two persons who had been the accused persons in the matter before the Regional Court. On that occasion

this Court, having found that those accused had a direct and substantial interest in the matter and therefore that the point *in limine* was a valid one, directed that those accused be joined in the proceedings. Pursuant to this order, those accused have since been cited in the present proceedings as, respectively, the second and third respondents, the appellation of first respondent being reserved for the Regional Magistrate.

[3] The applicant had initially sought a *mandamus* against the first respondent directing him to comply with the provisions of Section 310(1) of the Criminal Procedure Act read with those of Rule 67(12) of the Magistrates' Courts Rules of Court. However, the applicant has since abandoned this relief which accordingly means that the only relief which the applicant now seeks is the one reviewing and setting aside the aforementioned decision of the first respondent.

[4] It was by reason of this abandonment that the first respondent subsequently withdrew a notice of intention to oppose the application he had earlier filed and filed a notice to abide the decision of this Court.

[5] The second respondent does not oppose the application.

[6] The third respondent, however, filed a notice to oppose the application and has strenuously opposed the same and, for that purpose, has filed a lengthy answering affidavit comprehensively dealing with the issues raised by

the applicant in his founding affidavit. In response, the latter has delivered a replying affidavit.

[7] The provisions of Section 310(1) of the Criminal Procedure Act read as follows:-

> "When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law."

[8] It is clear from the said provisions that one of the jurisdictional facts which has to be satisfied before the applicant can require a judicial officer to state a case for the consideration of the provincial or local division having jurisdiction is that there must be a decision in favour of the accused person <u>on a question of law.</u>

[9] It was on the basis of the alleged absence of this jurisdictional fact that the first respondent declined to state a case, his contention being that his decision which he had given in favour of the second and third respondents in the criminal trial had been on the facts and that the submission that the decision had been based on a point of law was contrived. It was also on this basis that the third respondent resisted the application.

[10] The crisp issue before this Court is therefore whether the decision made by the first respondent in favour of the second and third respondents in the criminal trial had been based on the facts as contended for by the first and third respondents or that, as submitted by the applicant, that it had been based on a point of law.

[11] In **S v Nzimande** [1] **Claassen J** held that in order to answer this question:-

> "…. one must firstly have regard to the charges as such, and then the evidence relevant thereto, and lastly the finding of the magistrate." [2]

[12] The present application stems from a criminal trial with the appellation **S v Malatsi and another**, bearing case number CSH 235/2003 and held in the Regional Court, Bellville. The first respondent was a presiding officer at the said trial wherein the second respondent was cited as accused No. 1 and the third respondent as accused No. 2.

[13] Though the second and the third respondents had faced several charges at the said trial, only two of those are pertinent to the present application, namely, those pertaining to the contravention of the provisions of Section 1(1)(b)(i) read with the provisions of Section 3 of the Corruption Act 94 of 1992.

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1 2007(1) SACR 391 (T);
2 At 396 J;

[14] In Count 1 the State alleged that on or about 18 April 2002 and at Cape Town, the accused, one and the other as co-perpetrators and/or in furtherance of a common purpose, unlawfully and corruptly received or obtained or agreed to receive or attempted to obtain a benefit, namely R300000 and/or benefits in the form of being entertained and/or wined and dined, from one Count Riccardo Agusta ("Agusta"), with the intention that they should remove obstacles in the path of the approval of the Roodefontein development and/or ensure the issuance of a positive record of decision (RoD) and/or ensure the expeditious authorisation of the Roodefontein development.

[15] In Count 2 the State alleged that on or about 19 April 2002 and at Franschoek and/or Cape Town, the accused unlawfully and corruptly received or obtained or agreed to receive or attempted to obtain a benefit, namely R100 000 for removing obstacles in the path of the approval of the Roodefontein development and/or for ensuring a positive RoD and/or for ensuring the expeditious authorisation of the Roodefontein development and/or for deciding an appeal against the RoD issued, in favour of the developer.

[16] The stage has now been set for the consideration of the evidence relevant to the said charges which was adduced during the trial of the matter.

[17] The National Party, once a formidable force in South African whites' politics, had its political influence progressively waning, commencing from the

general elections held during 1994. During 2002, having changed its name to "New National Party" (NNP), the party found itself controlling only the province of the Western Cape. Both the second and the third respondents were members of the party, the second respondent holding the position of Minister of Environmental Affairs and Development Planning in the provincial government and the third respondent the position of Premier of the provincial government.

[18] It would appear that during 2001 an application had been submitted on behalf of **Agusta** to the department headed by the second respondent seeking authority which would permit the implementation of a golf country estate development referred to in the evidence as the Roodefontein development. The application was submitted in terms of the Environment Conservation Act 73 of 1989 (the ECA) and the decision to be taken was apparently referred to in that legislation as a record of decision (RoD) and the department official, at the time, charged with a duty of taking such a decision was one Ms. **Ingrid Coetzee,** a director in the department. The developer's consultant was a firm called **Hilland & Associates** and the project manager was one Mr. **Browning.**

[19] A period of 19 months had elapsed since the application had been submitted but no RoD was forthcoming from the department. The state of affairs had been a source of extreme frustration for the consultants and for the project manager who held a view that they had provided sufficient information to the department and that the application had been ripe for an RoD to be

issued but that the department officials were continuously shifting the goal posts. Those officials, including **Coetzee**, however, held a different view. According to them, the procedure which had been followed by the developer had been fatally flawed and they felt that there was insufficient information in the application for the issue of an RoD. At a certain meeting, at which **Coetzee** was present, **Browning** made his frustration known as well as his intention to approach the second respondent about the matter. Indeed, on 20 March 2002, **Browning** had a meeting with the second respondent during which meeting he conveyed his unhappiness about the slow progress in the issuing of an RoD in the matter.

[20] On 5 April 2002 the second and third respondents attended a presentation of the Roodefontein development by **Agusta** at Plettenberg Bay at which Mr. **Robert Palazzolo, Browning** and **Ms. Avierinos** were present. The latter was a representative of **Hilland & Associates**. After the presentation, the second and third respondents, **Agusta, Browning** and others conducted an inspection of, *inter alia,* the Roodefontein development. Later during that evening the second and third respondents had dinner with **Agusta** and **Palazzolo.**

[21] On 17 April 2002 a meeting was held in the office of the third respondent. The second respondent, **Browning, Avierinos, Coetzee** and the head of department, one Mr. **T Tolmay** were present. **Coetzee** apparently took contemporaneous notes as to what transpired at that meeting. She was adamant that, at that meeting, the third respondent had intimated

that the development would go through, even if it took a political decision, that he had heard only "poppycock" from the department and that he had heard nothing from the department which convinced him that the development should not proceed. Also, according to **Coetzee,** at that meeting **Browning** and the developer had threatened to withdraw the developer's substantial investment unless the department granted authorisation for the development.

[22] It is important at this stage to refer to the relevant portions of the charge sheet relating to the surrounding circumstances and to the events that unfolded during this meeting. In the charge sheet it had been alleged that –

> "..... at the meeting of 17 April 2002 ..... **Marais** *inter alia* assured **Mr. Richard Downing** .... that the proposed development would be approved even if it required a political decision."

[23] On 11 November 2003 the third respondent requested further particulars to the charge sheet requesting the State, *inter alia,* to particularize the steps taken by the second respondent to remove the obstacles in the path of the approval to ensure the issuing of a positive RoD and to ensure the expeditious authorisation of the development. In response to this request, the State furnished the following particulars:-

23.1 requested a meeting with the developers on 17 April 2003 (sic);

23.2 wanted D M Malatsi and officials of DEADP to issue a positive ROD;

23.3 gave an undertaking to the developers on 17 April 2002 that their development will be approved; and

23.4 approved tacitly and/or expressly all the steps that D M Malatsi took leading up to getting a positive ROD issued.

[24] In any event, after the said meeting, on 17 April 2002 at 17h00, the third respondent had instructed the Acting Secretary in Chief of the NNP to fax the details of NNP'S bank account to **Agusta** and this was duly done. On 18 April 2002 **Agusta,** by way of electronic transfer, paid a sum of R30000.00 into the NNP'S bank account held with ABSA Bank.

[25] On 19 April 2002 **Coetzee** declined to issue an RoD. This led to her delegated power being withdrawn by the second respondent who contemplated to issue authorisations and exemptions under the ECA relating to the development himself. However, after he had been advised against taking such a measure, the power to issue an RoD in respect of the Roodefontein development was delegated to the Chief Director of the Department, one Ms. **Elford.**

[26] On 19 April 2002 the second respondent received a phone call from **Agusta** to meet him at his farm in Franschoek, which he did. There, **Agusta** handed that respondent a cheque in the sum of R100 000, payable to the Khayelitsha NNP. The cheque was deposited into the bank account of the NNP's Khayelitsha constituency.

[27] In May 2002 **Elford** issued a positive RoD in respect of the Roodefontein development but imposed various conditions. The developer noted an appeal against some of these conditions.

[28] On 24 October 2002, the second respondent heard the developer's appeal and varied certain conditions. In effect he upheld the appeal.

[29] Apart from the aforegoing narration, the following further evidence had been placed before the Regional Court by the State.

[30] Firstly, there was evidence given by **Adams** who testified that he had been asked by the third respondent to erase from the computer the letter which he had faxed to **Agusta** on 17 April 2002 relaying NNP's bank account.

[31] Secondly, one **Mattefin** had testified that, on their way from Plettenberg Bay, the second respondent had informed him that **Agusta** or **Palazzolo** had given a sum of R300 000 to the NNP.

[32] It was also not disputed that, during the investigations into the matter, the second respondent had furnished a sworn statement wherein he had, *inter alia,* made certain allegations of undue influence which had been brought to bear upon him. The statement was entered in evidence and marked "CC2".

[33] Finally, it became common cause during the proceedings that **Agusta** had concluded a plea and sentence agreement with the State. Clause 14.1 of the said agreement reads as follows:-

> "The NDPP does not seek the deportation of Count Agusta, nor requires his further involvement in any way in any continuing or further prosecution or investigation concerning or arising from

> his relations with Marais and Malatsi at all times and in any respect, including the loans set out in paragraph 12 above. "

[34] The above constitutes a brief synopsis of the evidence upon which the State relied to prove the conviction of the second and third respondents on the two counts of corruption. Both had pleaded not guilty to both counts and the second respondent testified in his defence while the third respondent closed his case without adducing any evidence.

[35] In evaluating this evidence the first respondent took into account that one of the elements of each crime was that the second and third respondents must have received financial consideration with a view to the issuing of a RoD and/or to ensure the expeditious authorisation of the Roodefontein development.

[36] Indeed, after sketching the background allegations, particularly those which stemmed from the State case, he intimated that the State wished the Court to draw an inference that it had been during a dinner held on the evening of 5 April 2002 that the second and third respondents had solicited money from **Agusta** in return for the authorisation of the development. He rejected the State's suggestion that such an inference can be drawn and gave a number of reasons for such rejection.

[37] Firstly, he stated that the second respondent had testified and emphatically denied that anyone of them had solicited any monies from **Agusta** at the dinner in question.

[38] He also referred to the plea and sentence agreement concluded by **Agusta** and the State, particularly, to clause 14.1 thereof and made an inference therefrom that it was:-

> ".... highly unlikely that the National Director of Public Prosecutions will authorise a plea and sentence agreement where one of the terms of the agreement is that the accused person will not be used as a witness in subsequent criminal proceedings knowing hat the accused possessed valuable information which may assist the prosecutor to secure a conviction against other perpetrators."

[39] Regarding **Mattefin's** evidence that the second respondent had informed him that **Agusta** or **Palassolo** had given a sum of R300 000.00 to the NNP, he mentioned that even the police officials who had interviewed this witness had not been satisfied with the allegations which he made about the second respondent. The first respondent accordingly concluded that little reliance could be placed on his evidence in that regard.

[40] It was therefore on the basis of the aforegoing that he concluded that the version of the second respondent that he had not solicited any money from **Agusta** and that he had not mentioned the fact of the NNP getting a sum of R3000 000.00 to **Mattefin** was reasonably possibly true.

[41] He then moved on to what he termed "the substratum of the State's case against" the second and third respondents, namely, what transpired at and the circumstances revolving around the meeting held on 17 April 2002.

[42] Referring to the evidence which had been given by **Coetzee** thereanent implicating those respondents, he pointed out that hers was the

evidence of a single witness which, though sufficient to sustain a conviction, should be clear and satisfactory in every material respect.

[43] He then took notice of the fact that none of the witnesses who had attended the said meeting could corroborate **Coetzee's** version regarding the remarks allegedly made by the third respondent. It is perhaps apposite to quote in full the first respondent's evaluation of this part of the evidence which runs as follows:-

> "Averinos testified that the meeting was businesslike and accused 2 as Premier at the time wanted to know from the Department what was going on. After he gave each party present an opportunity to state their case he then made a comment that 'you have got the information please go and evaluate it and make a decision'. According to her evidence accused 2 did not say that it must be a positive decision. Browning testified that accused 2 asked accused 1 to use his discretion in producing a decision and at no time did accused 2 mention that it must be a positive decision. He also stated that the attorney's firms Stadler Swart of George had formally initiated a process of seeking an audience with the office of accused 1. (Indistinct) testified that accused 2 had merely stated that the Department or to the Department that they should go and make a decision without specifying what type of decision should be made.
> Mr. Tolmay, the head of the Department, testified that accused 2 never said he wanted a positive decision only that a decision should be made. Tolmay also expressed the view that having regard to the circumstances of this matter and the complaints by the developer the response of accused 2 had been appropriate at the meeting."

[44] He also referred to the fact that, under cross-examination, **Coetzee** had conceded that the second respondent, at no stage, issued her with an instruction to issue a positive RoD in respect of the Roodefontein development, and that the essence of what this respondent had said at that meeting was that a decision had to be made. She also admitted that she had

not been influenced by what was said at the meeting and that she had continued to apply her mind and maintained a balance in the process. Furthermore, she testified that she had sought and obtained the advice of **Tolmay** who advised her to maintain a balanced approach in the process.

[45] The first respondent further found that the evidence of the State did not support the allegation made in the charge sheet that the initiative for the meeting of 17 April 2002 had emanated from the third respondent. The same applied to the allegations made in the charge sheet that the third respondent had given assurances to **Browning** that the development would be approved. He also concluded that the allegations that he wanted the second respondent and the officials of the Department to issue a positive RoD was open to doubt.

[46] Turning to the evidence of **Adams** referred to in paragraph 30 hereof, the first respondent pointed out that, during cross-examination, this witness had conceded that he might have misunderstood what had been indicated to him by the third respondent and that it was possible that the third respondent had merely requested him not to leave the letter lying around as it was the usual practice to maintain confidentiality regarding the identity of donors and the amounts of the donations.

[47] Having analysed and evaluated all this evidence, the first respondent arrived at the following conclusion:-

> "The bulk of the evidence before me seem to suggest that Marais did nothing out of the ordinary to influence a positive decision regarding the development. The fact that Mr. Marais ordered the banking details of the New National Party to be

> forwarded to Augusta immediately after this meeting however suspicious and untimely does not lead to the inescapable or only reasonable conclusion that his comments during this meeting amounts to an act or to acting in a corrupt manner. There is insufficient evidence to prove beyond a reasonable doubt that accused 1 had any knowledge that Augusta paid an amount of R300 000 into the New National Party on April 2002. The evidence of Mr. van Schalkwyk does not take this matter any further."

[48] Regarding the second count of corruption, insofar as the third respondent was concerned, the first respondent remarked as follows:-

> "Having regard to the totality of the evidence I am satisfied that the State proved beyond a reasonable doubt that accused 1 is guilty on count 2. In respect of count 2 the prosecutor conceded that given the probabilities in this matter, there is insufficient evidence to prove beyond a reasonable doubt that accused 2 was aware of the cheque in the amount of R100 000 that was given to accused 1 and Mr. Morrison, the prosecutor in this case, did not seek a conviction for Mr Marais on this count."

[49] Before dealing with the grounds upon which the applicant relies for submitting that there were decisions in this matter which the first respondent made in favour of the second and third respondents based on the points of law, it is, perhaps, apposite to first give a brief survey of the legislative history of the provisions of Section 310(1) of Act 51 of 1977.

[50] Prior to the promulgation of the Criminal Procedure Amendment Act 31 of 1917 (the 1917 Act) the position in South African Law was that a prosecutor could not appeal a decision of a competent Court acquitting an accused person. Such a bar operated whether the basis for such an appeal was a question of fact or a question of law. [3] The bar was based on what was:-

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[3] Rex v Brasch 1911 AD 525; Rex v Gasa and another 1916 AD 241;

> "..... conceived to be a general principle of South African Criminal Law that a person who, after trial by a Court having competent jurisdiction, is acquitted of a charge, is entitled to the full benefit of such acquittal, so that he cannot again be tried on the same charge." [4]

and on the spirit of the English Law that once a person has been acquitted of a criminal offence :-

> "..... he should never be put in jeopardy again ....." [5]

[51] The position was altered by the introduction of Section 372 of the 1917 Act which provided that a question of law could be reserved for the consideration of a Court of Appeal by the Court on its motion or at the request of either the prosecutor or of the accused but added the following sub-section (2) :-

> "Whenever the Superior Court reserves any such question and the accused is convicted, the Court shall state the question or questions reserved and shall direct such case to be specially entered in the record and a copy thereof to be transmitted to the Registrar of the Court of Appeal."

[52] Interpreting this sub-section, **Centlivres JA** remarked as follows in **Rex v Herbst** [6] :-

> "It is clear from this sub-section that a question of law can reach the Court of Appeal only if the accused is convicted of the charge laid against him and, that being the position, it follows that a question of law can be stated only if an answer in favour of the accused might result in some benefit to him." [7]

[53] It was probably because of these remarks that the Criminal Procedure Amendment Act 37 of 1948, by means of Section 12 thereof, introduced an

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4 Brasch (supra) at 530;
5 Ibid. at 528;
6 1942 AD 434;
7 Ibid. at 436;

amendment to Section 374 of the 1917 Act by couching the provisions of sub-section (3) of that section in the following forms :-

> "Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the Court of Appeal has given a decision in favour of the prosecutor, the Court of Appeal may order that such of the steps referred to in section three hundred and seventy five be taken as the Court may direct."

[54] Referring to the decision in **S v Gani and others,** [8] **Ogilvie-Thompson JA** (as he then was) in **R v Solomons** [9] held that the effect of this amendment altered the position as it existed prior to the amendment in that a question of law could be reserved at the instance of the State also in cases where the accused had been acquitted.

[55] When the Criminal Procedure Act 56 of 1955 (the 1955 Act) was enacted, the provisions of sub-section (3) of Section 374 of the 1917 Act were retained verbatim in sub-section (3) of Section 369 of the 1955 Act. The position which then applied before the promulgation of the present Criminal Procedure Act 51 of 1977 (the 1977 Act) was that a question of law could be reserved at the instance of the State for the consideration by the Appeal Court in cases where accused were acquitted, the effect of the legal position being that, in that event, the State could take a matter on appeal only on that question of law.

[56] Section 310(1) of the 1977 Act therefore constitutes a codification of the legal position as existing at the time of its promulgation which, pursuant to

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8 1957(2) SA 212 (AD);
9 1959(2) SA 352 (AD) at 359 G-H;

that section, was made to apply to the lower courts, with specific reference to any decision given in favour of an accused person on any question of law.

[57] In the Heads and during argument it was submitted, on behalf of the applicant, that when the first respondent was engaged in the determination as to whether there was corroborative evidence to the evidence of Ms. **Coetzee,** he was involved in issues which, as the submission termed it, plainly involved a question of law. For this submission Mr. **Schippers,** who appeared for the applicant, relied on the decision in **Rex v Thielke.** [10]

[58] In that case the Court had to interpret the provisions of Section 285 of the 1917 Act the provisions of which ran as follows :-

> "Any court or jury which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge, under trial, on the single evidence of any accomplice: Provided that the offence has by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court or jury (as the case may be) to have been actually committed."

[59] One of the questions of law which had been reserved in terms of the provisions of Section 370 of that Act in that case had been couched in the following terms :-

> "That the proceedings in respect of counts 1 and 3 were irregular and not according to law, inasmuch as the jury were directed that there was evidence on which they might convict accused, whereas the only evidence for the prosecution that was inconsistent with the innocence of the accused was the evidence of accomplices, and there was no competent evidence other than the single and unconfirmed evidence of accomplices that the offences were actually committed."

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[10] 1918 AD 373;

[60] After distinguishing between the procedure contemplated in the provisions of Section 370 [11] from the one contemplated under Section 372 [12], **Innes CJ** concluded as follows :-

> "Applying it to the present case, it is clear that the matters referred to under the first head of the special entry cannot be properly regarded as irregularities or illegalities in the proceedings. There was no departure from due and legal procedure. The presiding Judge had to consider a question of law – whether the evidence adduced by the Crown complied with the requirements of Section 285." [13] (My emphasis)

[61] **Thielke (supra)** therefore provides no authority for the submission that the question whether there was corroborative evidence for the evidence of a single witness, is a question of law. The Court there grappled with the provisions of the Section which made it mandatory for such evidence to be corroborated. That requirement has since been omitted from the provisions of Section 208 of the present Criminal Procedure Act which provides that:-

> "An accused may be convicted of any offence on the single evidence of any competent witness."

[62] In **S v Sauls and others** [14] **Diemont JA** held that :-

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness....." [15]

[63] Again, in **Zeffert** [16] the authors expressed themselves as follows on the subject:-

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[11] The Honourable Chief Justice held this precedent should properly be reserved for cases where the formalities and rules of precedent had not been complied with;
[12] Holding that the provisions of this section dealt with matters bearing more directly on the merits;
[13] Thielke (supra) at 376;
[14] 1981(3) SA 172 (A);
[15] Ibid. at 180E;

> "..... precisely because the single-witness 'rule' is not a rule of law, but reflects common sense – a recognition of the danger inherent in having to rely on a single witness and, as a consequence, the caution that the courts require in dealings with it." [17] (My emphasis).

[64] Clearly therefore when the first respondent evaluated the evidence of **Coetzee** as to what had transpired at the meeting of 17 April 2002, compared the same to the evidence of the persons who had been present thereat and found that the evidence of those persons had not corroborated **Coetzee's** version thus rejecting this version, the first respondent was not applying any rule of law but was considering the credibility of **Coetzee's** evidence applying the aforementioned common sense. It accordingly follows that when the first respondent was involved in this determination he was involved in a factual inquiry which had nothing to do with legal issues.

[65] Another issue which Mr. **Schippers** argued involved a question of law was when the first respondent drew an inference from the provisions of the plea and sentence agreement concluded between the State and **Agusta,** as, according to him,

> "It was an analysis of the nature and consequences of a plea and sentence agreement and its affect (sic) on subsequent cases."

[66] In a helpful judgment on the subject **Botha J** once made the following remarks :-

> "I am unable to accept counsel's widely-based and generalised proposition that in all cases the question whether a particular

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[16] Zeffert et al The South African Law of Evidence;
[17] Ibid. at 801

> inference is the only reasonably possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under sec. 104 of Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated. One example of those possibilities that were canvassed during the argument will suffice. Suppose that an accused is charged with an offence of which a specific intent is an element, e.g. assault with intent to do grievous bodily harm. On the evidence, the magistrate finds that such intent is not the only reasonable inference to be drawn from the facts, and consequently he convicts the accused of common assault. I cannot for one moment imagine that the Attorney-General will have a right of appeal upon the footing that an intent to do grievous bodily harm was the only reasonable inference to be drawn from the facts." [18]

[67] The passage was quoted with approval by **Corbett CJ** in **Magmoed v Janse van Rensburg and others.** [19]

[68] In **S v Basson** [20] the Constitutional Court held that the purpose of an inquiry is a determining factor. Where the inquiry is aimed at determining what a fact really is, an inference would be regarded as an inference of fact, in contra-distinction to the findings which are in reality, conclusions of law. [21]

[69] Returning to the nature of the inference drawn by the first respondent in the present matter, it is evident that the purpose thereof was to determine what the factual situation was, namely, whether **Agusta** was possessed of any information which could have advanced the case for the prosecution. The inference that he did not was drawn from the proven facts and did not involve any conclusions of law. As he had not been called upon to determine

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[18] S v Petro Louise Enterprises and others 1978(1) SA (T) at 280 B-D;
[19] 1993(1) SACR 67 (A) at 95 a;
[20] 2005(1) SA 171 CC);
[21] Ibid at para 49 pp 193-194;

any issues of law when he drew the said inference, it accordingly follows that the inference drawn by the first respondent was purely a factual one.

[70] The third ground upon which it was argued that the first respondent's decision involved a determination of a question of law revolves around his inquiry into whether the second and third respondents had acted with a common purpose. As I understood Mr. **Schippers'** submission based on this ground, the gravamen of the applicant's complaint is that, in his evaluation of the evidence and in determining the culpability of the second and third respondents, the first respondent had omitted to apply the doctrine. The issue in the matter, so the argument contended, was therefore not whether the only reasonable inference to be drawn from the proven facts was that the second and third respondents had formed a common purpose to commit corruption, which issue would, on the authority of **Magmoed (supra),** be a factual one.

[71] In his Heads Mr. **Schippers** concludes his submission on this ground with the following paragraph :-

> "It is accordingly submitted that the omission to apply the doctrine of common purpose is a question of law."

[72] Applicant's submissions based on this ground are accordingly anchored on his hypothesis that, during his evaluation of the evidence, the first respondent omitted to apply the doctrine of common purpose which, admittedly, was pleaded in the charge sheet.

[73] The hypothesis is, however, not borne out by the contents of the judgment of the first respondent the perusal of which shows, not only that he had been mindful of the fact that the second and third respondents had been charged "as co-perpetrators and in furtherance of a common purpose", but also that, later in the judgment, he made remarks which indicated that he had concluded that there had been insufficient evidence to justify a finding that those respondents had acted as co-perpetrators and in the furtherance of that purpose.

[74] Discussing the doctrine in **Magmoed (supra), Corbett CJ** pronounced himself as follows:-

> "Common purpose arises most frequently in the cases of murder involving groups of two or more perpetrators, but the doctrine is also applicable in cases of culpable homicide ..... where it appears that a participant (A) knew this or foresaw it as a possibility and yet persisted in his participation reckless of the consequences, then if an unlawful killing did ensue such a participant will be guilty of murder irrespective of the fact that another participant actually perpetrated the murder and irrespective of the fact that there was no causal connection between his (A's) own conduct and the death of the deceased....."[22]

[75] Lower down on the same page he continued to hold as follows :-

> "A common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement ..... It is seldom that there is direct evidence of such an agreement. Usually the Court is asked by the prosecution to infer it from the proven facts. But the fact that in a particular case the prosecution relies upon inference to prove the agreement to accomplish a common aim does not make the question as to whether the prosecution succeeded in

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[22] Magmoed (supra) at 96 b-c;

> establishing this inference beyond a reasonable doubt one of law." [23]

[76] Acquitting the second respondent on the first count of corruption the first respondent found as follows in his judgment:-

> "There is insufficient evidence to prove beyond a reasonable doubt that accused 1 had any knowledge that Agusta paid an amount of R300 000 into the New National Party in April 2002. The evidence of Mr. van Schalkwyk does not take this matter any further."

[77] In any event, despite Mr **Schippers**' reference to it as "applying the requirements of the doctrine of common purpose" it remains a straightforward inquiry into a factual situation.

[78] Regarding the second count of corruption, it seems to have been common cause between all the parties (it was certainly conceded by the prosecution) that, given the probabilities in the matter, there was insufficient evidence to sustain proof beyond a reasonable doubt that the third respondent had been aware of the cheque in the amount of R100 000 that had been given to the second respondent. Accordingly the prosecution did not press for a conviction against the said respondent on this count.

[79] Clearly therefore in the findings referred to in paragraphs 76 and 78, the first respondent dealt with the doctrine declaring that there had been insufficient evidence of prior agreement between the second and third respondents regarding the acceptance by the third respondent of the amount

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[23] Ibid. 96 e-f;

of R300 000 and regarding the acceptance by the second respondent of the amount of R100 000.

[80] In the view I have taken on this ground, it is unnecessary to decide the issue raised by the concluding paragraph on this ground in Mr. **Schippers'** Heads.

[81] It would appear that, during the police investigations into the matter, the second respondent, accompanied by his erstwhile legal representative, had approached the investigating team and made an offer for this respondent to give evidence for the prosecution against the third respondent. It was, as a result of these negotiations that the second respondent's erstwhile representative had furnished the investigating team with a sworn statement which was entered in evidence and marked "CC2".

[82] During the proceedings in the Regional Court the prosecution wished to have the statement admitted in evidence, the admissibility of which was apparently strenuously resisted by the second respondent's legal representatives. The first respondent accordingly ruled that a trial-within-a-trial be held so that the admissibility of the statement could be established.

[83] The statement is headed "Strictly Confidential" and contains what appears to be incriminating statements. For instance, in sub-paragraph 17.4 the second respondent states:-

> "I was aware that he had given Mr. Marais a R300 000 donation to the party and I assumed that he might want to give a further donation."

and in sub-paragraph 17.11 he deposes as follows :-

> "There were however subtle pressures put on me by various persons to make decision (sic)."

[84] In his judgment in the trial-within-a-trial the first respondent ruled that the said statement was inadmissible in evidence, finding that :-

> "Op die getuienis voor my bevind ek dat die woorde 'strictly confidential', soos vervat op bewysstuk cc2, bedoel dat die inhoud van die verklaring slegs vir die oë van die party aan wie dit gerig was, bedoel is en sal beskuldigde nommer 1 se Grondwetlike reg tot privaatheid geskend word indien dit openbaar word. Die diskressie wat ek het om dit toe te laat ten spyte dat dit die beskuldigde se Grondwetlike reg skend, moet oorweeg word met faktore, soos byvoorheeld, sal die uitsluiting van die getuienis nadelig wees vir regspleging?
> Op die getuienis voor my en die argumente wat voorgehou was deur meneer Raymond en advokaat Morrison, bevind ek dat die uitsluiting van die getuienis nie die regspleging sal benadeel nie. Ek bevind dat die inhoud van die verklaring soos vervat in bewysstuk CC2 sal indruis tot beskuldigde 1 se reg tot 'n billike verhoor en bevind ek dat die inhoud van die verklaring ontoelaatbaar is."

[85] The first respondent's ruling that the said sworn statement was inadmissible in evidence, Mr. **Schippers** further argued, involved a question of law in respect of which, as it was in favour of the second and third respondents, in terms of the provisions of Section 310(1) of the Criminal Procedure Act, he ought to have stated a case.

[86] As it was stated in **Magmoed (supra),** the admissibility of evidence may, in a particular case, depend both upon law and fact. [24] This, in my judgment, is exactly the case with the admissibility of the statement in question. Regarding the first respondent's finding that the intention to be inferred from the words "Strictly confidential" which headed the statement, namely, that the statement had been meant only for the eyes of the party to whom it had been addressed, that is clearly a question of fact. However, when the first respondent involved Constitutional issues and found that the admission of the statement would infringe the second respondent's right of privacy as guaranteed in the Bill of Rights of the Constitution and when he ruled that such admission would, in terms of Section 35(5) of the Constitution, render the trial unfair, he was dealing with the questions of law. It accordingly follows that, insofar as his decision on the admissibility of the sworn statement involved decisions on the questions of law, he, in terms of Section 310(1) of the Criminal Procedure Act, ought to have stated a case and that he erred when he declined to do so.

[87] Should this Court, as a result of the said error, grant the present application and set aside the decision of the first respondent declining to state a case in this matter. The answer to this question would depend upon what this Court considers would be the result should the questions of law involved be decided in applicant's favour on appeal.

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[24] Magmoed (supra) at 167 a;

[88] As it was held by the Judges of Appeal **Streicher** and **Navsa** in **S v Basson.** [25]

> "Of die Verhoorhof se feitebevindings reg of verkeerd is, is gevolglik totaal irrelevant ten einde te bepaal of hy regtens fouteer het. Dit volg dat 'n regsvraag slegs onstaan wanneer die feite waarop die Verhoorhof sy uitspraak baseer 'n ander regsgevolg kan hê as die regsgevolg wat die Verhoorhof bevind het." [26]

and on the next page that :-

> "Dit volg dat wanneer die Staat wens te appelleer teen 'n onskuldigbevinding op grond daarvan dat 'n regsfout begaan is, 'n regsvraag slegs voorbehou sal word indien daar 'n redelike vooruitsig bestaan dat die beskuldigde skuldig bevind sou gewees het indien die regsfout nie begaan is nie. Indien daar nie so 'n redelike vooruitsig bestaan nie is daar geen rede om 'n nuwe verhoor te gelas nie. Die regsfout is dan in werklikheid irrelevant wat betref die onskuldigbevinding."

[89] Returning to the sworn statement the evidence of which was declared inadmissible by the first respondent in this matter, it is true that it contained certain admissions. However, the contents of the same cannot constitute evidence against the third respondent. Regarding the second respondent, I have carefully perused and considered the contents in the context of the totality of the evidence and have concluded that, even if the relevant question of law could be decided in applicant's favour on appeal, no prospects exist that a conviction of the second respondent on count 1 would ensue. The issue would therefore only be of academic value.

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[25] 2004(1) SA 246 (SCA);
[26] Ibid. at 258 B;

[90] The applicant has consequently not made out a case for the relief which he seeks and no valid reason exists why the costs in this matter should not follow the results.

The order I accordingly propose is the one dismissing the application with costs.

I agree

PRELLER, J

It is so ordered

MSIMANG, J