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

Case No: 12891/2021

In the matter between:

MARTIN LENNARD KORVER Applicant

and

THE REGIONAL MAGISTRATE, SPECIALISED CRIME COURT BELLVILLE, WESTERN CAPE First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Third Respondent

Coram: Justice J Cloete *et* Justice L Nuku

Heard: 11 February 2022, supplementary notes filed 25 February 2022

Delivered electronically: 4 March 2022

JUDGMENT

CLOETE J:

[1] The applicant seeks (a) the review and setting aside of a certain order made by the first respondent ("the magistrate") on 23 July 2019; and (b) the permanent stay of his prosecution. The relief sought is opposed only by the second respondent ("the DPP"). The magistrate also provided short reasons for the order which the applicant seeks to impugn.

[2] The applicant faces the following charges in the Specialised Commercial Crime Court, Bellville, namely (a) two counts of fraud, alternatively theft, totalling R6.8 million; (b) five counts each of forgery, uttering and theft amounting to some R5.5 million; and (c) one count of money laundering, being a contravention of section 4 of POCA.[1] He has not yet pleaded to the charges and is out on bail.

[3] The applicant's first appearance was on 12 October 2018. Until about 23 March 2020 he was represented by a different counsel and/or attorney. Neither have deposed to affidavits in support of his allegations in the matter before us, although there is no indication on the papers that these legal representatives were approached and were unwilling or unable to do so.

[4] From the record provided to the applicant in terms of uniform rule 53 the following entries of the proceedings made by the magistrate (or her colleague, where indicated) are relevant to determination of the matter.

---

[1] Prevention of Organised Crime Act 121 of 1998.

[5] On 23 November 2018 the applicant's attorney informed the magistrate that he (i.e. the applicant) wished to appoint *'auditors'*. The matter was subsequently postponed for purposes of obtaining the auditor's report.

[6] On 26 April 2019 the applicant's counsel advised the magistrate that a provisional report had been received, but from that report it seemed that the defence would need to request further particulars from the State. The magistrate postponed the matter to 4 June 2019 *'for the above request, State's response and defence auditor's report'.*

[7] On 4 June 2019 the matter was postponed again to 23 July 2019. One of the reasons was that the auditor's final report was not ready since the State had provided poor copies of certain documents to the defence. The magistrate granted that postponement *'for State's response* [to the further particulars] *and finally for defence financial instructions'.*

[8] When the matter was called on 23 July 2019 the prosecutor informed the magistrate that the State was ready to hand over the further particulars to the defence, and the applicant's counsel confirmed this. The relevant portion of the magistrate's notes recording what transpired thereafter reads as follows:

> *'SA: The documents requested in re Sec 87 application will be handed over to the Defence Adv. today – in electronic format. Defence have to provide a memory stick.*
>
> *On 26/4/2019 Defence Adv. said they possess a provisional auditors report. Defence Adv. promised to hand it over to the SA on that day. They did not.*

We need it to determine our next strategic step – before we get the final report.

Adv Smith: *We need time to peruse the response.*
We will not hand over our provisional auditors report today because we want to discuss the State's Sec 87 response with our auditors…

Defence Adv. Still request a remand to consider the state response to their Section 87 Act 51/77 request…

We request a remand till end Aug…
SA: *No objection.*
We just request an order of court for the Defence to release their provisional auditors report.
Court: *Remanded 4/9/19 for the above. Accused's bail extended and warned 8:30am until called.*
Court orders:

1. *Defence have 14 days to consider the state's response to Section 87 Act 51/77 application.*
2. *If the Defence are going to use the same auditors final forensic report at trial stage, the provisional report or the amended version of it to be handed to the state on or before 21 August 2019…'* (emphasis supplied)

[9] Accordingly, counsel for the applicant did not dispute that he had previously "promised" to hand over the provisional auditor's report, nor did he object to handing it over at a later stage. All that he was not prepared to do was hand it to the prosecutor on that day. Where the waters become muddy, however, is when the prosecutor thereafter requested the magistrate to order the defence to hand over the provisional report and *ex facie* the magistrate's notes, without affording the defence the opportunity to address her, or even take instructions from the applicant, she made an order to that effect.

[10] On 4 September 2019 the prosecutor advised the magistrate that he had just been handed the provisional auditor's report and that the State required time to peruse it. The following is recorded in the magistrate's notes thereafter:

> *'Attorney:* *We ask a remand for final auditors report. Our Defence advocate mandate has been ended.*
> *Accused:* *I'm satisfied with that decision of my attorney.'*

[11] There is no indication in the magistrate's notes as to what exactly the applicant meant by stating that he was satisfied with *'that decision'* of his attorney. There is also a dispute of fact in this regard.

[12] This particular aspect was not dealt with by the applicant in his founding affidavit. The magistrate did not deal with it in her reasons either. The DPP's answering affidavit was deposed to by Lt Col Elizabeth De Villiers, the investigating officer, who stated that its contents fall within her personal knowledge. According to her:

> *'14.* *The provisional report was disclosed to the second respondent's representative on the 04th of September 2019 by the defence attorney… At that stage the applicant indicated that he is satisfied with his attorney's decision…'*[2]

And

> *'107* *…neither the applicant and/or his legal team at any stage objected to disclose the draft progress forensic auditor's report to the second respondent. To the contrary the applicant confirms on the 04th of*

[2] See also Record para 96, p409 where this averment is repeated.

> *September 2019 that he is satisfied with his attorney's decision. Therefore, the applicant waived his attorney/client privilege when he indicated that he was satisfied with his attorney's decision…'*

[13] In his replying affidavit the applicant denied this to be the case and stated that:

> *'12. On 4 September 2019 my attorneys terminated the mandate of my then-counsel… The Court enquired from me whether I was satisfied with the decision of my attorney to terminate counsel's mandate. I confirmed that indeed I was…'*

[14] The applicant added that in any event, by that stage, neither he nor his attorney had any choice but to disclose the draft report in terms of the impugned order, and that this was the advice which he had received from his legal team after the order was granted.

[15] There is also a dispute about the reason why the magistrate ordered the provisional auditor's report to be handed over. In her reasons she stated that *'the order was granted for pre-trial purposes and for plea negotiation purposes and to minimise unnecessary delays in the matter'.* She also stated that the defence had previously requested postponements *'specifically to place the State in possession of their auditors report'.*

[16] However the DPP does not suggest that the defence ever requested postponements specifically for the purpose of providing the prosecutor with their auditor's report and, indeed, that no such request was made previously is borne out by the magistrate's own notes. The DPP appears to agree with

the applicant that the reason for these earlier postponements was for the defence to appoint a forensic auditor to assist with the applicant's case or, put differently, the preparation of his defence.

[17] Further, according to the DPP, it was only on 8 November 2019 that the matter was postponed for the purpose of plea negotiations. This was 4 months after the impugned order was made, and just under 2 months after the provisional auditor's report was handed to the prosecutor on 4 September 2019. The DPP's averments are supported by the notes of the magistrate's colleague who stood in for her on that day:

> *'ON: 8/11/2019*
> *PO: RCM C. NZIWENI*
> *PP: D. COMBRINK*
> *DEF: MR. J.P JOUBERT*
> *PP: Adv. Joubert appear. Matter set down for formal pre-trial. Attorney has requested me to relay information to the complainant.*
> *Defence next strategy with the state.*
> *COURT: What is meant by the defence next strategy.*
> *PP: Possible plea negotiation. Mr Joubert confirms.*
> *Remanded 31/01/20 plea negotiation, bail extended and warned 8:30am RC 5.'*

[18] It is entirely unclear from the record why the applicant's erstwhile counsel allegedly agreed to make the provisional auditor's report available to the prosecutor on 26 April 2019. There is no record of this in the magistrate's notes and such a discussion may well have taken place outside court, whether formally or informally. The applicant confirms that he did not instruct

his counsel or attorney to make any report available to the prosecutor, and the DPP is unable to refute this. The applicant also confirms that at the time the impugned order was made, plea negotiations had not yet commenced.

[19] This uncertainty could have been cleared up by evidence in affidavit form from the applicant's erstwhile counsel and attorney as well as the prosecutor who is still involved in the prosecution and in fact represented the DPP in the hearing before us. We are thus left in the somewhat invidious position of having to determine this issue on the objective recordals of the magistrate, her reasons, and the available evidence weighed against the inherent probabilities.

[20] When regard is had to the aforegoing, one is compelled to conclude that the magistrate is mistaken in her assumptions that (a) the defence themselves wished to make the report of their auditor available to the prosecutor; (b) there was no resistance at all by the defence (for the simple reason that they were not afforded the opportunity to raise any resistance) before she made the order; and (c) the applicant confirmed his satisfaction with his attorney's "decision" to hand that report to the prosecutor on 4 September 2019.

[21] Apart from the fact that the notes themselves do not support these assumptions, the DPP itself does not support most of them. But on careful consideration, not even those which the DPP supports withstand scrutiny. At the risk of repetition, the claim that the defence did not resist the making of the impugned order lacks merit since objectively they were not afforded an

opportunity. Moreover, the DPP's reliance on the applicant's confirmation of his so-called satisfaction with his attorney's "decision" is misplaced.

[22] The inherent probabilities favour the applicant's version for the following reasons. First, it is difficult to conceive of a situation where a sophisticated individual such as the applicant, facing extremely serious charges and lengthy sentences of imprisonment if convicted, would willingly wish to assist the State in his own prosecution. Second, the magistrate's notes record that it was the *prosecutor* who on 23 July 2019 demanded that the report be handed over because *'we need it to determine <u>our</u> next strategic step'*. (emphasis supplied)

[23] Third, as a matter of logic, the applicant could not have confirmed the "decision" of his attorney to hand over the report since there was by that stage no decision for the attorney to make – he was simply complying with the impugned order. It is far more probable that the applicant was confirming his satisfaction with the decision of his attorney to terminate his counsel's mandate, as he alleges.

[24] In the founding affidavit the applicant alleged that as a consequence of the impugned order various of his auditor's reports (which appear to have been works in progress) were handed over to the prosecutor. In the answering affidavit the DPP stated unequivocally that the only report which the prosecutor in fact received from the applicant's erstwhile legal team was the one dated 4 June 2019 ("the report"). The applicant is not able to refute this

and the argument before us thus understandably focussed only on that report (the disclosure by the applicant himself of the contents of other such reports in these proceedings, and whether or not they may be admitted in evidence in a subsequent criminal trial is something for the trial court, and not us, to decide).

[25] The applicant maintains that in making the impugned order the magistrate acted irregularly and unlawfully in that there is no empowering provision which permitted her to make such an order. He further contends that the aforementioned irregularity is so egregious that it will render his trial *per se* unfair, hence him seeking a permanent stay of prosecution.

[26] There is no sound reason to doubt the magistrate's own *bona fides* when she made the order, but the fact of the matter is that on the material and evidence before us we must conclude that she failed to properly apply the fundamental principle of *audi alteram partem*. This alone amounts to an irregularity, viewed objectively, and without in any way seeking to cast aspersions on her impartiality, integrity and competency. Put simply, it appears that in the context of a very busy court she made a genuine mistake, as is borne out by her subsequent erroneous assumptions which are contained in her reasons. The question which then arises is whether the irregularity vitiated the applicant's constitutionally enshrined right to a fair trial. This in turn involves close scrutiny of the auditor's report of 4 June 2019 viewed against the applicant's allegations on this score.

[27] I acknowledge that it is settled law that determination of an application for a permanent stay also entails a balancing of interests: *Sanderson v Attorney-General, Eastern Cape.*[3] However a further difficulty that we face in this matter is how much weight we should attach to the defences raised by the DPP, since frankly it is difficult to fathom a consistent thread in relation thereto.

[28] As far as can be gleaned from the papers they vary and are in certain respects contradictory. I will attempt to summarise them as follows:

28.1 The application for a permanent stay is premature since the applicant has not yet pleaded and the report is thus not yet before the trial court;[4]

28.2 The report does not contain privileged information and/or any information which infringes any of the applicant's constitutional rights;[5]

28.3 It is the investigating officer's opinion that *'it is not surprising that the applicant wished for his own forensic auditor's report to be omitted as it directly implicates him and shows his lack of credibility'.*[6] This is also the view of the prosecutor himself, as is reflected in the transcript of

---

3 1998 (2) SA 38 (CC) esp. at para [36] in the context of unreasonable delay.
4 Record para 6, p394.
5 Record para 20, p397.
6 Record paras 99 to 101, p409.

certain bail proceedings held on 14 July 2021 (before a different magistrate);[7]

28.4 The applicant was charged with the offences before the report was obtained by the State. Therefore *'the applicant's trial would not be unfair as there is sufficient evidence to establish a prima facie case against the applicant'* without the report;[8]

28.5 The DPP *'fails to comprehend'* how the disclosure of the report will render the applicant's trial unfair because the evidence is not yet before the trial court;[9]

28.6 The complainants are interested parties and have the right to refute any allegations made by the applicant and/or his forensic auditor, thus *'it would have been in the interests of justice to allow the complainants to peruse any reports'*;[10]

28.7 The report does not mention any aspects which refute the State's case. Therefore the applicant cannot argue that he suffers irreparable trial prejudice;[11]

---

7 Record p464, annexure RA1 to the applicant's replying affidavit.
8 Record para 149, p418.
9 Record para 150, p418.
10 Record para 176, p422.
11 Record para 180, p423.

28.8 The report *'does not put the State at any advantage. Therefore the applicant* [similarly] *cannot argue that he suffers irreparable trial prejudice'*;[12] and

28.9 It is *'unfortunate'* for the applicant if the report contains facts that corroborate the State's case *'as this report was obtained at the behest of the applicant'.*[13]

[29] I believe it fair to say, in light of the "defences" raised by the DPP that little, if any, weight should be attached to them in determining objectively whether the applicant will suffer irremediable prejudice if the trial proceeds. I say this because the scattershot approach adopted by the DPP in truth amounts to no more than the expression of varying, contradictory, subjective opinions, not facts.

[30] The report of 4 June 2019 was not annexed to the applicant's founding affidavit because apparently he had not been able to locate a copy at the time when he launched this application (he has not explained why he simply did not ask the auditor for one). His complaint of irremediable trial prejudice is that as a result of the State having sight of the contents of the report *'those aspects which were raised to refute the State's case will now, as a result of the order, be known to the State, including the State witnesses and anticipated…'* together with the attendant potential consequences.

---

[12] Record para 181, p423.
[13] Record para 195, p425.

[31] He also maintains that this "prejudice" will not be cured or alleviated if the report is declared inadmissible at trial; or the trial is heard by another magistrate; or even if the prosecution is conducted by a different prosecutor, since this will not take away the *'advantage'* which the complainants and other State witnesses have obtained by having seen the contents of the report.

[32] The report itself consists of 49 numbered paragraphs. On a plain reading it is abundantly clear that it is a preliminary, draft progress report and that the auditor is unable to complete his investigation about certain allegations levelled against the applicant by the complainants due to outstanding information and documentation.

[33] The auditor lists the allegations made against the applicant as set out in an affidavit by one of the complainants. He records that the report includes hearsay evidence based on interviews with certain unidentified individuals. He also summarises the applicant's version of events as conveyed to him by the applicant himself, which appears to be consistent with what the applicant has claimed in a prior dispute(s) between himself and the complainants, and accordingly this does not qualify in this sense as confidential or privileged.

[34] The auditor then lists the documentation provided to him at that stage. This essentially amounts to an affidavit of one the complainants, correspondence between the applicant and complainants as well as the applicant and a previous accountant(s) of one of the corporate entities involved, draft financial statements and a draft trial balance of one entity; the draft trial balance of

another; extracts from the applicant's loan accounts in these entities for a certain period; and the contents of the SAPS docket itself.

[35] The above would however no doubt be available to the complainants (and thus the prosecutor) in any event, given that the complainants are the applicant's former co-directors of these entities, and the docket itself is obviously available to the prosecutor.

[36] The auditor then records that a conclusion cannot be reached on the validity of certain money transfers allegedly made by the applicant without reviewing the general ledgers and financial statements of the entities, and detailed loan accounts of the applicant and complainants for a particular period. However he states that a preliminary review of the bank statements of one entity *'may indicate'* that the full amount of R6.8 million, which is the subject matter of some of the charges, was not transferred to bank accounts associated with the applicant (which would presumably militate in his favour and not against it).

[37] In any event this amounts to no more than the expression of an opinion based on independent financial documentation, which, it can fairly be assumed, could nevertheless be procured by the prosecutor in terms of the usual mechanisms available to the State for purposes of presenting the State's case.

[38] Upon careful scrutiny it would appear that the report contains only four instances where the applicant provided the auditor with explanations that might notionally not be discernible from any objective documentation which the State would probably be entitled to procure in any event. These are set out at paragraphs 27, 30, 41 and 45 of the report.

[39] In paragraph 27 it is stated that the applicant informed the auditor that all transfers pertaining to the second batch of charges against him were made from the entities' accounts on the understanding that they would be processed by the accountants, and the transactions recorded against the applicant's loan account and reflected in the financial statements.

[40] In paragraph 30 it is stated that the applicant informed the auditor that the complainants also incurred personal expenditure with company funds from time to time and that these transactions were also required to be recorded against their respective loan accounts.

[41] In paragraph 41 the auditor noted that the R6.8 million in issue was (initially) transferred into the bank account of one of the entities and stated that, according to the applicant, this was the full amount transferred from Investec, Mauritius.

[42] In paragraph 45 it is stated that the applicant informed the auditor that amounts transferred out of that account thereafter were appropriately recorded in his loan accounts if used by him for his personal expenditure.

[43] I have used the words "might notionally" deliberately. First, there is no evidence before us to indicate that the explanations purportedly given by the applicant to the auditor will not be recorded somewhere in the records of the entities concerned, such as minutes of directors' meetings, written instructions to the accountants and the like. Second, we do not even know if the applicant confirms that he indeed gave these explanations to the auditor. He has not taken us into his confidence in this regard, despite having himself annexed the report to his replying affidavit.

[44] As the DPP submitted in its answering affidavit the applicant *'does not disclose any of the aspects he raised to refute the State's case; queries raised by the auditors for him to clarify; admissions and/or aspects that were corrected and revisited in the draft reports'.*[14] Although in his replying affidavit the applicant sought to refute this, he only dealt with the contents of later reports which were in fact never made available to the State.

[45] It has also not escaped my notice that, according to the rule 53 record, just over 5 months after the applicant appointed his current legal team he appeared before the magistrate again on 8 September 2020. The prosecutor informed her that the State and defence were ready to set a trial date. The applicant's counsel placed on record that *'we are indeed trial ready'.* Not a murmur was made of the prejudice about which the applicant now complains. The matter was then postponed until 12 to 16 April 2021 for *'plea and trial'*.

---

[14] Record p422, para 178.

[46] On 12 April 2021 it was again postponed, but this was because the prosecutor was not ready to proceed due to personal issues. The applicant's counsel placed on record that *'we don't object – 23 to 27 August 2021 suits us all'*. Because the magistrate could not accommodate the parties on 27 August 2021 she postponed the matter until 23 to 26 August 2021, again for *'plea and trial'*.

[47] But on this occasion too the applicant raised no concerns about his alleged irremediable trial prejudice. He instead waited until a mere 3 weeks before the trial was finally due to commence to launch the current application on 30 July 2021, as a consequence of which the trial had to be postponed pending its outcome. There is no explanation whatsoever in his affidavits for this sudden change of stance, notwithstanding the fact that he was represented by, at least, the same attorney from 23 March 2020 onwards, and thus for a period of some 16 months prior to launching this application.

[48] In *Sanderson*[15] the Constitutional Court stated, in relation to a permanent stay of prosecution as a remedy for the infringement of an accused person's fair trial rights (albeit as a result of delay):

> *'…the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's*

[15] Fn 3 above at para [38].

rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused…'

[49] During argument *Mr Combrink*, who appeared for the DPP, placed on record that the State will not and cannot make reference to the report in the criminal trial because of its provisional nature as well as the qualifications and disclaimers it contains. On the other hand *Mr Webster SC*, who appeared together with *Mr Prinsloo* for the applicant, argued that this does not matter since the damage has already been done, given that the prosecutor and State witnesses have as a fact had insight into the report.

[50] The contention advanced on the applicant's behalf was however firmly rejected in a similar context by the Supreme Court of Appeal in *S v Van der Westhuizen*.[16] What happened there is that plea negotiations as contemplated in s 105A of the Criminal Procedure Act ("CPA")[17] had failed, but during the course of those negotiations the defence furnished the prosecution with certain reports that were seen by various State witnesses. One of these witnesses, a Dr Panieri-Peter, had regard to them and intended referring to them in her evidence in the trial.

[51] It is necessary to quote at some length from the judgment since it places the lack of merit in the applicant's complaint in proper perspective:

'[16] ...The appellant's attorney submitted that this constituted an irregularity inasmuch as s 105A(10)(a)(i) provides:

[16] 2011 (2) SACR 26 (SCA).
[17] Act 51 of 1977.

> *"Where a trial starts* de novo *as contemplated in subsec (6)*(c) *or (9)*(d) —
> *(*a*) the agreement shall be null and void and no regard shall be had or reference made to —*
> *(i) any negotiations which preceded the entering into the agreement."*

The section contains no reference to a situation such as the present where there was no agreement, but it must apply equally in such a case. Normally, an accused cannot consent to an incorrect procedure being followed: S v Lapping*; but the section contains a proviso in the following terms--*

> *"unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admissions so recorded shall stand as proof of such admission;".*

The effect of the proviso is that an accused may waive the protection afforded by the section and agree to the recording of admissions. A fortiori, then, can an accused agree to the use of documents-- brought into existence for the purposes of s 105A proceedings-- which do not contain admissions, but which are unfavourable or, for that matter, favourable to the accused. And that is exactly what happened here.

[17] After Dr Panieri-Peter had read her report into the record, the appellant's attorney pointed out that the reports of the appellant's experts, sent to the prosecution as part of the s 105A proceedings, had come into her hands. The court then adjourned for the day. The following morning at the commencement of proceedings the appellant's attorney said:

> *"Edele, dit is nog steeds my submissie dat die verslae was ingehandig in Artikel 105A verrigtinge, en dat dit bespreek was in daardie omstandighede. Ek gaan egter, of ek was gister geskok gewees dat hierdie getuie dit genoem het, dat hierdie verslae oorhandig aan haar was. Ek het dit egter met die Staat bespreek, die Staat het my 'n verduideliking daaroor gegee. Ek gaan nie beswaar maak dat sy dan getuienis daaroor gee nie. Indien daar enige aspekte is wat ek voel wat verkeerdelik genoem word, of 'n verkeerde afleiding uit daardie verslae, dan sal ek dit laat uitblyk in kruisondervraging."*

After further discussions, the court, addressing the prosecutor, said that the appellant's attorney did not object to Dr Panieri-Peter continuing with her evidence--obviously by dealing with the appellant's expert reports--but that he (the appellant's attorney) would deal with that evidence in cross-examination.

The prosecutor confirmed that that was so. The learned judge then asked the appellant's attorney whether the position, as had just been explained, was correct, and the appellant's attorney confirmed that it was. Dr Panieri-Peter continued with her evidence but, before dealing with the reports from the defence, said:

> *"I have deliberately left out the inconsistencies in this Psychologist and the Psychiatrist reports about memory. I don't know, can I comment on those, because that is also relevant to the inconsistency of memory, but I just want to be clear, because there was a dispute about documents. I want to be clear on that information first."*

The judge then addressed the appellant's attorney and enquired: 'Ek wil net seker maak wat u houding is daaromtrent.' The appellant's attorney asked for an opportunity to take instructions, to which the judge responded:

> *"Ja, maar u moet nou besluit, meneer, watter kant toe u wil gaan daarmee, want ek verstaan u het dit oorweeg om te sê u het nie 'n beswaar as daar na verwys word nie, want u gaan in elk geval daarmee handel in kruisverhoor. Nou kom dit nou by die punt, en volgens die getuie is daar belangrike inligting daarin, feitlike weergawes wat vir haar van belang is om 'n mening uit te spreek."*

The court then adjourned at the request of the appellant's attorney and on resumption, the latter said:

> *"Dit is my instruksies om nie beswaar te maak teen die getuienis wat gelei word nie, maar versoek spesifiek dat daar spesifieke verwysing gemaak sal word na 'n persoon se verslag . . . dat die verslae nie in een bespreek word, hetsy van Charlotte Hoffman of van Niel Fouché nie, maar indien sy dan net 'n verwysing sal maak van 'n spesifieke verslag, na wat verwys word."*

[18] In the circumstances, the proposition that the appellant did not have a fair trial because reports handed to the State in the course of s 105A proceedings had come into the hands of a State witness and were commented on by the State witness, is untenable. The attitude of the appellant's attorney, as reflected in the exchanges summarised above, was eminently sensible if the defence intended to call the witnesses whose reports had been handed to the prosecution. It would have been the duty of the appellant's attorney to put the contents of the reports to State witnesses, who could comment thereon, and that included Dr Panieri-Peter. Allowing the

> *State to lead such comments in her evidence-in-chief had the advantage that the defence could consult its expert witnesses after her comments were known, and then put the reply of the defence witnesses to her criticism of their reports in cross-examination, so obviating the necessity for an adjournment during cross-examination to enable the defence to take instructions.'*

[52] At the conclusion of argument counsel were invited to provide us with supplementary notes dealing with (a) the application to the present facts of the approach in *Sanderson*; (b) the applicability, if any, of the judgments in *Bothma v Els and Others*[18] and *Broome v DPP*;[19] and (c) the extent to which this court should take the prejudice to the applicant as a fact (without independently applying our minds) when, so it was submitted by applicant's counsel in argument, such prejudice is "common cause".

[53] However in the supplementary note provided by counsel for the applicant reliance was placed on a concession made by *Mr Combrink* during argument that, given some of the allegations in the DPP's answering affidavit, the magistrate's order would (on the DPP's own version) cause *potential* prejudice. It was also submitted that the cases referred to above are not applicable to the applicant's primary contention, namely that the magistrate's irregularity was so egregious that it will render a trial *per se* unfair without more.

---

[18] 2010 (1) SACR 184 (CC).
[19] *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Others* 2008 (1) SACR 178 (C).

[54] As was stated in *Klein v Attorney-General, Witwatersrand Local Division and Another*:[20]

> *'The Court has, as the common law has always required, a clear duty to ensure that an accused person is afforded a fair trial. Apart from the right to legal representation at State expense, the common-law principles have not been broadened or accentuated by the codification of the right to a fair trial in the Constitution…*
>
> *There has, however, never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial. Such a rigid principle would operate to the disadvantage of law enforcement and the consequent prejudice of the society which the law and the Constitution is intended to serve. Before any remedy can be enforced the nature and extent of the violation must be properly considered. It is the duty of the Courts to do so in fulfilment of their obligation to give effect to the principle of public policy.*
>
> *An investigation into the nature and degree of the irregularity would, in my view, comprehend an investigation of the extent of the violation as well as the circumstances under which it took place….'*

[55] As I understand the cases referred to above *potential* prejudice is not the test. The investigation which I have conducted into the nature and degree of the irregularity complained of leads me to conclude that it did not result in irremediable prejudice to the applicant, whether by its very nature (the *per se* argument) or its effect.

[56] There is nothing to prevent the applicant from again approaching court at a later stage if he is able to demonstrate that any potential prejudice has

---

[20] 1995 (3) SA 848 (W) at 862A-B and D-F.

become such a reality during the course of the trial that his constitutionally entrenched fair trial rights have been irreparably infringed.

[57] Accordingly the case made out by the applicant falls short of demonstrating the irremediable prejudice which he asserts, and the application for a permanent stay must fail. As far as costs are concerned, it is appropriate, given my findings, that the applicant and the DPP should each bear their own.

[58] **The following order is made:**

1. **The order made by the first respondent on 23 July 2019 is reviewed and set aside.**
2. **The relief sought by the applicant for a permanent stay of his prosecution in the Specialised Commercial Crime Court, Bellville under case number SH7/60/18, in regard to the contents of police docket Somerset West CAS 23/02/2018, is refused.**
3. **The applicant and the second respondent shall each bear their own costs.**

_____

J I CLOETE

NUKU J

I agree.

_____

L NUKU