

The flight from rights: Rule aversion in dealing with the criminal process

*Molimi, Zuma, Thint (Holdings), Shaik and Zealand*

Frank Snyckers BA (Hons) LLB (Wits) BCL (Oxon) Member of the Johannesburg Bar

In an adversarial criminal justice system, rules tend to favour the accused. Rules, when applied strictly, create rights. The fewer the rules, the more likely the conviction. The longer the view taken by a justice system, the more generous the system to those at its barrel-end. Due process intrudes upon the immediate desire to punish with an appeal to the perennial need to be humane. It arrives at the critical moment, embodying the conscience of society, to spoil the quenching of the bloodlust at the hanging party. Woe betide the accused whose case is considered with regard only to its own facts, to the crime he stands accused of committing, and to the need to do something about it. More often than not, his salvation will lie in the extent to which he is able to invoke rules, rights and principles that were created for the benefit of others, for other situations than his, and for the long-term benefit of society. He will want the judge to apply an ancient rule uncritically, instead of asking whether, in the case at hand, society's interests in fighting crime outweigh the merits of whatever complaint he has raised about the way the trial is being conducted. Such balancing exercises will tend, in the nature of things, to end badly for him.

In the judgments dealing with the criminal process in the year under review,<sup>1</sup> one may identify a tendency to be rule averse, coupled with a tendency to shorten the relevant view, the logical extension of which would be to reduce all questions of rights violation in the criminal justice sphere to ad hoc determinations of admissibility at the criminal trial. The rule aversion at times spawned an element of fluff, in the form of a substitution of platitude for analytical rigour.<sup>2</sup> In four of the five cases under

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<sup>1</sup> *S v Molimi* 2008 (3) SA 608 (CC); *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma v National Director of Public Prosecutions & Others* 2009 (1) SA 1 (CC) ("Zuma"); *Thint Holdings (Southern Africa) Ltd & Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC) ("Thint Holdings"); *S v Shaik & Others* 2008 (5) SA 354 (CC) and *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC).

<sup>2</sup> I am grateful to Stu Woolman for drawing my attention to the (at times loud) echoes in this article of the lament issued by Woolman in *S Woolman 'The amazing, vanishing Bill of Rights'* (2007) 123 *South African Law Journal* 762, upon which Frank Michelman commented in the first issue of this journal ('On the uses of interpretive "charity": some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa', 2008 CCR 1), upon which, in turn, Tshepo Madlingozi commented in the same issue ('The Constitutional Court, court watchers and the commons: a reply to Professor Michelman on constitutional dialogue, "interpretive charity" and the citizenry as *sangomas*', 2008 CCR 63). The echoes are at their loudest in Woolman's complaint that the Court's liking for outcomes-based jurisprudence and ultra-minimalism could, at its logical extreme, amount to a violation of the rule of law, or what is still sometimes called palm tree justice, at the cost of institutional legitimacy. Two phenomena struck me most about Woolman's focus: the Court's hard preference for indirect application of the Bill of Rights (as opposed to rights within it) at the cost of direct application of rights, and the aligned or consequential withering away of the textual purchase of

review,<sup>3</sup> the particular manifestation of rule aversion at issue worked against the subject, in favour of the state.<sup>4</sup> In one of them,<sup>5</sup> the subject benefited and the state suffered, when the Court declined to consider a particular doctrinal question that lay at the heart of the matter before it.

What is ironic about these cases, in the light of the theme of this article, is the fact that one may identify a feature as uniting them that would be expected to contradict a tendency towards rule aversion. An arguably striking feature common to these matters is the extent to which their peculiarly 'constitutional' character was not readily apparent. Where once a combination of the principle of legality<sup>6</sup> and the constitutional imprimatur to interpret all law in the light of the Constitution<sup>7</sup> threatened to make every matter constitutional, and to make nonsense of the Court's jurisdictional confinement to 'constitutional matters', and matters linked to such matters, the need arose for laying down principles that would

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particular rights in the Bill, i.e. the increasingly arbitrary link between the nature of the intellectual exercise at issue and the wording of the particular right in the Bill that is ostensibly being analysed in such exercise. I am not sure how much of either phenomenon lies behind the rule aversion, view-shortening and/or doctrinal agnosticism I consider in the cases under review. As far as the second phenomenon is concerned, it does seem potentially fruitful to ponder whether a more serious look at which precise right of which precise category of rights-holder (the accused, the arrestee, the detainee, the person not yet an accused but soon to become one) is engaged in the problem before the Court might act as a deterrence against the talismanic attraction of a reduction of all questions dealing with the criminal process to issues of fairness in relation to the admissibility of evidence at the trial itself. Had the criminal justice rights jurisprudence of the Court seen a history of fostering a self-conscious discipline of affording to particular rights their doctrinal autonomy, the apparent ease with which the Court appears to forge ahead on its path towards doctrinal agnosticism would no doubt have been absent, or, at least, such flights would have sounded a more jarring note.

<sup>3</sup> *Molimi, Zuma, Thint Holdings and Shaik*.

<sup>4</sup> *Molimi* was ambivalent in this regard. It entailed rule aversion at a higher order level, to the detriment of the subject, and something approximating (albeit coy) rule creation at a lower order level to the benefit of the subject. At the higher order level, the Court declined an opportunity to save a common law right in the hands of accused persons from being subsumed in a balancing exercise that would tend to work to the prejudice of the accused. However, in performing the balancing exercise, at the lower order level, the Court came very close to laying down a principle or rule with respect to the inherent unfairness of admitting hearsay evidence against an accused in certain circumstances. It was, however, careful not to do so expressly. The particular subject came off well in the end, as to the finding on the facts. The higher order approach, however, was unfortunate for the future subject, particularly given that the manner in which the lower order exercise yielded the result was not necessarily fully persuasive, or at least went against the run of play.

<sup>5</sup> *Zealand*.

<sup>6</sup> *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC).

<sup>7</sup> See, for example, *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), par. [13].

undo, or at least circumscribe, the logical extension of the combination.<sup>8</sup> A valiant attempt was made in *S v Boesak*.<sup>9</sup> There it was determined that the (axiomatic) implication of fair trial rights in findings on the evidence did not of itself mean that an assessment of such findings implicated the Constitution sufficiently for such an exercise to be a constitutional matter founding the jurisdiction of the Court. The fact that the constitutionally entrenched presumption of innocence required the evidence to establish guilt beyond a reasonable doubt accordingly did not mean that a conviction on evidence that, as a matter of fact, did not establish guilt beyond a reasonable doubt infringed the presumption of innocence. Or, at least, whatever it meant for the presumption of innocence, that kind of implication of the fair trial rights at issue did not engage the Constitution sufficiently to warrant the assumption of jurisdiction by the Court.

In the five cases under review, one might be forgiven for regarding the constitutional character of each as tenuous, on *Boesak* thinking. In *Molimi*, what was at issue was the use of admissions made by a co-accused against an accused. This became a matter of determining the application of the statutory factors regulating the admission of hearsay evidence. In *Zuma*, the question was whether certain search warrants were invalid. The main questions were the extent to which the empowering statute had been correctly applied, in particular as to the requirement that the warrants be necessary, and the extent to which the state had obtained the warrants on the strength of a material non-disclosure of important facts. In *Thint Holdings*, the question was the validity of a letter of request issued to the government of Mauritius. Once again, the issue was whether the empowering statute had been correctly applied. One of two candidate empowering sections had been invoked, and the argument was that this had been the wrong section. In *Shaik*, the issue was the application of a statutory provision empowering forfeiture of the proceeds of crime – and whether the extent of the forfeiture in question lay within the bounds of the discretionary power laid down by the statute. In *Zealand*, the issue was whether a prisoner had been lawfully detained in circumstances where some orders that he be remanded in custody were issued in ignorance of the withdrawal of certain charges against him, and other orders that he be remanded in custody were issued in ignorance of an earlier order that he be released on warning. In essence, the matter ultimately concerned the question whether the cause of action pleaded in a delictual claim for unlawful detention properly covered detention that was more restrictive than the detention that would, in the circumstances, have been lawful. The claim pleaded was one of having been detained unlawfully. The nub of the grievance, or the wrong, was having been detained in maximum security, rather than in medium security, as medium security would, in the circumstances, at least for part of the period in question, have been lawful. Some lawyers may say that the real question in *Zealand* was nothing more than a matter of pleading or identifying a delictual wrong accurately.

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<sup>8</sup> See the discussion in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC), pars. [35] to [39].

<sup>9</sup> 2001 (1) SA 912 (CC).

Whether and to what extent these cases fell on the right side of the *Boesak* divide, and whether and to what extent the *Boesak* divide is in any event capable of non-arbitrary application that avoids fundamental incoherence, is not the focus of this analysis. The relevance of the precarious relationship between these cases and the *Boesak* divide lies in the apparent tension between the facility with which jurisdiction was assumed, on the one hand, and the tendency towards doctrinal agnosticism or rule aversion on the other. It is not as if the Court were unwilling to make general rulings or pronouncements;<sup>10</sup> rather, it was averse to having these lay down general rules effectively vindicating rights with a degree of solidity upon which future accused could rely. Instead, it went to lengths to assert the hegemony of the particular over the general, of fact over principle.

The most noteworthy example of this occurred in *Zuma*. The majority of the Court deemed it appropriate to speak on the question whether it was desirable to grant ‘preservation orders’ of evidence unlawfully acquired, for the purpose of ensuring that such evidence could later potentially be used in the trial against the accused. This was despite the fact that this excursion was entirely *obiter*, given the majority finding that the warrants in question were not invalid, and that the material in question had accordingly not been acquired on the strength of unlawful conduct.<sup>11</sup> As the minority judgment of Ngcobo J in *Zuma* regarded it as futile for a dissenting judgment to enter the debate on the appropriateness, desirability or competence of a preservation order,<sup>12</sup> the *obiter* excursion on preservation orders by the majority entailed the quirk that none of the majority judgments in the *Zuma* matter, from first instance through to the Constitutional Court, actually authorized a preservation order. At first instance, the warrants were held unlawful and the material ordered returned.<sup>13</sup> In the Supreme Court of Appeal, the minority were of the view that the warrants were unlawful, and would have issued a preservation order.<sup>14</sup> The majority were of the view that the warrants were lawful, and did not consider the preservation order issue. But, as pointed out in the majority judgment in the Constitutional Court,<sup>15</sup> the majority of the Supreme Court of Appeal had, in *National Director v Public Prosecutions & Another v Mahomed*,<sup>16</sup> a matter that formed part of the pretrial saga of the Zuma prosecutions, held

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<sup>10</sup> In this sense, therefore, the Court was specifically not exercising minimalism or restraint, as discussed in the article by Stu Woolman referred to above (S Woolman ‘The amazing, vanishing Bill of Rights’ (2007) 123 *South African LawJournal* 762), or avoiding ‘width’ (Frank Michelman ‘On the uses of interpretive “charity”’: some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa’, 2008 CCR 1, at 35).

<sup>11</sup> *Zuma* pars. [216] to [223].

<sup>12</sup> *Zuma* par. [383].

<sup>13</sup> *Zuma* par. [36].

<sup>14</sup> *National Director of Public Prosecutions & Others v Zuma & Another* [2008] 1 All SA 197 (SCA), pars. [60] to [69].

<sup>15</sup> See *Zuma* footnote 155.

<sup>16</sup> [2008] 1 All SA 181 (SCA).

incompetent, or at least undesirable, a preservation order issued for the purposes of seeking to adduce the unlawfully seized evidence at trial against the accused.<sup>17</sup> This means that the *obiter* excursion of the majority of the Constitutional Court in *Zuma* assumed great significance. The Court in *Zuma* went out of its way to embark, *obiter*, on a flight from rights.

Apart from *Molimi*, each of the five cases under review was concerned with the interaction between the state and the subject at a stage in the criminal proceedings outside the confines of the criminal trial. *Molimi* also possessed this feature, but to a lesser extent. The immediate context in *Molimi* was the trial itself, but what was at issue was the use made at the trial of that which happened outside it (an admission by a co-accused). In *Zuma*, and in *Thint Holdings*, the context was the exercise of coercive powers with the aim of facilitating the ultimate prosecution of the subject. In *Shaik*, the context was the exercise of coercive powers at a stage after the criminal trial had run its course. In *Zealand*, the context was the exercise of coercive powers before, around, and after, the trial sphere, to detain the subject, either for the purposes of securing his attendance for trial, or as punishment for having been convicted at trial.

In each of these cases, the matter involved, in one way or another, the relationship between the trial process and the relevant context outside of that process.

In *Zuma* and in *Thint Holdings* the tendency to view due process criminal procedure rights as a function of the admissibility of evidence at the trial came most starkly to the fore. Both cases manifested an irritation with the notion that violations of rights in the lead-up to the trial should be adjudicated at all, or, if adjudicated, should be adjudicated independently of the question of admissibility at the trial, or of the effect of the alleged wrong upon fairness at the trial. These decisions were victories for the centrality of the trial court as the forum for adjudicating complaints about due process violations, and for the idea that most such questions were ultimately reducible to the discretion entailed by the question of admitting evidence under section 35(5) of the Constitution. They were defeats for the effective vindication of rights violations as a matter of rule or principle.

*Zuma* also saw a victory for the particular over the general, of fact over rule, in the approach adopted by the majority to the question of the need for the warrant to speak for itself. The preferred approach deprived the subject of the right to demand that the ambit of the search authorized by the warrant be intelligible with reference to nothing outside the confines of the warrant. Instead, the relevance of an item to the suspected offence could be based upon the knowledge of the person executing the search, and did not need to appear from a fair reading of the warrant itself. In this way, the particularity of the facts on the ground was allowed to trump the generality of the protection that could arise out of secure reliance on the four corners of the executive document that was the source of the coercive powers being exercised against the subject. This preference led the majority to a telling non-sequitur: Because

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<sup>17</sup> Although it countenanced the preservation of the material for a different purpose, namely to identify material upon which the accused may later rely for a claim that the legal professional privilege had been violated (see in particular pars. [26] to [33]). Ponnar JA was opposed to any form of preservation in *Mahomed* (par. [35]).

the subject was unable, after the search and seizure, to identify any item seized that was, as a matter of fact, not relevant to the offence alleged, this meant that the warrants themselves had to be regarded as sufficiently intelligible in their identification of the items subject to seizure.<sup>18</sup>

In *Molimi*, a common-law rule, which operated as a meaningful right in the arsenal of an accused, not to have the extra-curial admission of a co-accused used against him, was subsumed under the general quasi-discretionary<sup>19</sup> regime governing the admission of hearsay evidence. In the process, the retention of this right in absolute form in the statute, in cases when the admission of the co-accused took the form of a confession, gave rise to a serious anomaly that could with justification be regarded as leaving the law in a state of absurdity. The Court declined to resolve or address this absurdity squarely, despite the fact that it formed the subject of an equality challenge. What it ended up doing was to decline to retain a common-law right that operated with a measure of certainty, instead substituting for it the expectation of the exercise of a quasi-discretion, which, when scrutinized closely, would tend in its logical or consistent application in future to threaten the complete removal of the erstwhile protection against the prejudice of such evidence. It left the absurd distinction between confessions and admissions in that particular context as decisive of the extent to which the protection operated effectively, thereby depriving the exercise of the quasi-discretion of any potential coherence in future cases. It did, however, in its particular application of the exercise of the quasi-discretion, come close to laying down a rule pronouncing upon what would amount to inherent unfairness in cases such as that before it. In this, it let float a welcome Mae West to which future accused could cling when bobbing in the ocean of ad hoc assessment, if not of discretion. But the inevitable force and authority of the tides of that ocean were left more deeply entrenched by the Court's approach.

In *Shaik*, the Court avoided squarely addressing the critical relationship between the sentencing or punishing component of the trial and the subsequent decision to order the forfeiture of property as proceeds of the crime. Had it considered the forfeiture as unashamedly penal, as the state urged it to do, it might have been required to consider the potential application of the principle against double punishment arguably entrenched as part of the double jeopardy protection enshrined in section 35(3)(m) of the Constitution. Faced with what appeared to be a doubling of the benefit derived from the crime as the extent of the forfeiture, the Court proceeded to justify this doubling by begging the question of the appropriate boundaries of the extent of the benefit derived, invoking instead general statements about the seriousness of crime and the need for deterrence that possessed little or no capacity for laying down principles to guide courts on the identification of the appropriate extent of the forfeiture in future.

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<sup>18</sup> *Zuma* par. [171].

<sup>19</sup> It is important not to label the decision whether to admit hearsay evidence in the interests of justice in terms of section 3 of Act 45 of 1988 as an exercise of 'discretion', if only to avoid hyper-deference on appeal. See in this regard *S v Ndhlovu* 2002 (6) SA 305 (SCA), par. [22] and *S v Shaik & Others* 2007 (1) SA 240 (SCA), par. [170].

In *Zealand*, the Court avoided addressing the most important doctrinal question before it – namely the extent to which court orders made at the criminal trial could be effectively and appropriately challenged collaterally without the necessary prerequisite of the setting aside of the orders in question. It was clear that a right had been violated and that some form of effective redress was required. Whether the respondent's approach to obtaining redress was appropriate or correct in the circumstances was not so clear. The Supreme Court of Appeal appeared to have adopted a contradictory stance with respect to the collateral challenge issue. Analytical rigour on this doctrinal question was important, given the implications for institutional integrity the issue of collateral challenge entailed. This dimension was absent from the Court's effort to establish the principle that a more restrictive form of detention than would have been lawful remained a violation of the freedom right entrenched in section 12. In this case, the subject benefited from this doctrinal agnosticism. Perhaps a hard case made for the absence of law, if not necessarily bad law.

### **Molimi**

In *S v Molimi and Another*<sup>20</sup> the Supreme Court of Appeal upheld a conviction in disquieting circumstances.<sup>21</sup> Accused number 1 and accused number 3 had made extra-curial statements that had implicated themselves and accused number 2 in a robbery. At the end of the state case, accused number 2 applied for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 ("the Code"). The discharge was refused, on the basis that the statements of accused 1 and 3, at that point 'provisionally' admitted, implicated accused number 2. There was no discussion of the appropriateness of this manner of proceeding, considered in *S v Lubaxa*,<sup>22</sup> in the Supreme Court of Appeal (or in the Constitutional Court). At no point in the trial had any formal ruling on the admission of the statements been sought, despite the warnings issued in *S v Ndhlovu*<sup>23</sup> about ensuring that hearsay evidence, if employed to convict, should not have taken the accused by surprise, and should issue in a ruling about its admissibility at the earliest opportunity. The statements were treated by the Supreme Court of Appeal as admissions, rather than confessions, so that the absolute prohibition against the use of confessions against a co-accused, contained in section 219 of the Code, did not apply. This was odd, given that the statement of accused number 1 was accepted and dealt with at the trial as a confession,<sup>24</sup> and that the statements were regarded by the Supreme Court of Appeal as the only evidence that

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<sup>20</sup> 2006 (2) SACR 8 (SCA).

<sup>21</sup> See the discussion by Frank Snyckers in 2006 *Annual Survey of South African Law* at 804 to 806.

<sup>22</sup> 2001 (2) SACR 703 (SCA).

<sup>23</sup> 2002 (6) SA 305 (SCA).

<sup>24</sup> *Molimi* par. [29].

convicted their makers (apart from the existence of cellphone records held not to have been sufficient).<sup>25</sup> What was more, the statements had been disavowed by their makers in evidence.

The treatment of the matter in the Constitutional Court went some way towards establishing the principles laid down in *Ndhlovu* as prerequisites for the fair admission of hearsay evidence against an accused. This was a welcome approximation of pronouncing the inherent unfairness of proceeding in a particular way, or, in the spirit of the theme of this article, a victory for the general over the particular, for rule over fact.

In essence, the Court allowed the appeal for three reasons:

- (1) The statement of accused number 1 was in fact a confession and not an admission, and was accordingly inadmissible against accused number 2 as a result of the absolute statutory prohibition in section 219 of the Code;<sup>26</sup>
- (2) The statement of accused number 3 was an admission, and accordingly fell to be considered as hearsay in terms of section 3 of Act 45 of 1988, but the trial court had failed to apply or consider all the factors set out in section 3,<sup>27</sup> and
- (3) The admission of the evidence in the circumstances of the case violated the principles laid down in *Ndhlovu*, in particular (a) that the reception of the hearsay evidence should not come at the end of the trial when the accused was unable to deal with it and (b) that the accused had to understand the full evidentiary ambit of the case against him.<sup>28</sup>

Analysis of the interplay between reasons (2) and (3) above in the judgment must yield the conclusion that the second was due entirely to the third.<sup>29</sup> Without bringing itself to say so in so many words, the Court held that a violation of the “safeguards” laid down in *Ndhlovu* would entail inherent unfairness. This must mean in all cases. The approximation of a notion of inherent unfairness thus arrived at was, however, still captive to the need to pronounce it as the result of an assessment, in the particular circumstances of the case, of the impact the reception of the evidence might have on confidence in the system of justice, rather than as a self-avowed creation of a rule crystallizing an acknowledged incident of unfairness. In this critical regard, the Court’s pronouncements achieved a level of mystery:

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<sup>25</sup> SCA par. [16].

<sup>26</sup> *Molimi* par. [30].

<sup>27</sup> *Molimi* pars. [38] and [44].

<sup>28</sup> *Molimi* par. [44] and footnote 76.

<sup>29</sup> See in particular pars. [37], [38], [39], [40], [41] and [44].

“It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused’s right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.”<sup>30</sup>

The first sentence is a fair step towards laying down a general rule in relation to inherent unfairness. The second is opaque to an extent that is impenetrable. The third is a truism (egregiously unfair trials are to be avoided) that does not assist in determining whether the admission of such evidence in such circumstances would or should be regarded as unfair.

It is interesting to note the degree to which the Court was coy about whether it was laying down the *Ndhlovu* principles, which it referred to as “safeguards”,<sup>31</sup> as rules. Its finding that the evidence had been incorrectly admitted was based upon non-compliance with “the provisions under section 3(1) of the Act” and “the approach enunciated in [*Ndhlovu*].”<sup>32</sup> Its aversion to state expressly that it was laying down the *Ndhlovu* “approach” as a rule entailing a necessary safeguard of fairness was all the more noteworthy in light of the fact that the Supreme Court of Appeal had employed quotation marks to describe the “rules”<sup>33</sup> laid down by section 3 of Act 45 of 1988 with respect to the admission of hearsay, and had specifically and pertinently held that the following proposition expressed in *Ndhlovu* in apparently peremptory terms did not purport to lay down “an inflexible rule”:<sup>34</sup>

“[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court’s judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial judge must rule on its admissibility, so that the accused can fully appreciate the full evidentiary ambit he or she faces.”<sup>35</sup>

It is a pity that the fair trial jurisprudence of the Court, when it does yield rules and principles, must do so with such apparently dogmatic rule aversion as one found in *Molimi*. This avoids necessary or useful

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<sup>30</sup> *Molimi* par. [42].

<sup>31</sup> *Molimi* pars. [36] and [38].

<sup>32</sup> *Molimi* par. [44].

<sup>33</sup> Par. [11].

<sup>34</sup> Par. [13].

<sup>35</sup> *Ndhlovu* par. [18].

debates such as that between Yacoob J and the majority in *S v Thebus & Another*<sup>36</sup> about the extent to which the Court ought to be laying down certain recurring kinds of conduct or circumstance as inherently unfair.

The disquieting conviction in *Molimi* was overturned. What was, however, left entirely unscathed was the acceptance in the Supreme Court of Appeal of the notion that the use of extra-curial admissions of a co-accused, that did not amount to confessions, against the accused, was not prohibited in the same way as was such use of confessions, and that admissions should be treated merely as admissible by quasi-discretion, on the application of the principles applicable to the reception of all hearsay, in terms of section 3 of Act 45 of 1988. This was a proposition established by the Supreme Court of Appeal in *Ndhlovu*, although in that case the distinction between admissions and confessions did not arise.

*Ndhlovu* had, in the context of admissions by a co-accused employed to convict an accused, considered and upheld the constitutionality of doing so in terms of section 3 of Act 45 of 1988, and as not violating the right to challenge evidence. The Court in *Molimi* declined to consider the correctness of *Ndhlovu* in this regard, as its correctness had not been challenged in the Supreme Court of Appeal.<sup>37</sup>

It was, however, open to the Court to consider this question afresh, at least in the context of the use of the admissions of a co-accused, given the “equality” challenge to the distinction between confessions and admissions arising out of the fact that section 219 of the Code applied to confessions only. The Court declined to consider the “equality” challenge “although the argument may be sound”, because it had been raised for the first time before it.<sup>38</sup> This was almost certainly, for all practical purposes, the last opportunity to have considered the correctness of *Ndhlovu* (at least as far as using admissions by co-accused against an accused was concerned).

Whether the absurd distinction between confessions and admissions left in the wake of *Ndhlovu* and *Molimi* is best considered in the light of equality, or is simply acknowledged to be absurd, is a question for another discussion. Whatever the absurdity is called, an accused whose co-accused incriminates him in a confession enjoys absolute protection against the use of such confession against him, whereas an accused whose co-accused incriminates him in an admission is left to the vagaries of section 3 of Act 45 of 1988, for a court to consider whether the interests of justice would justify admission of such evidence against him. This is so because the absolute prohibition is contained in section 219 of the Code, which,

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<sup>36</sup> 2003 (6) SA 505 (CC), in particular pars [97] and [109]. *Thebus* saw a rare instance of considering a violation (of what was contentiously regarded as the right to silence) as inherently unfair. Yacoob J wanted to know why the majority was able to lay down rules of inherent unfairness in the teeth of the Court’s entrenched rule aversion. One might equally have asked why such an approach, if good for the right to silence, was not also good for other violations.

<sup>37</sup> *Molimi* par. [47].

<sup>38</sup> *Molimi* pars. [48] and [49].

as the Court pointed out, was not supplanted by Act 45 of 1988,<sup>39</sup> and because section 219 is confined to confessions.

The distinction between confessions and admissions is important for the purposes of considering what kind of statement is at issue when deciding whether such statement may be used against its maker. A confession can convict its maker as it relates to every element of the crime; an admission does not go so far – it requires further evidence to assist. Hence the different requirements for admissibility against the maker, section 217 applying to confessions and section 219A to admissions. For these purposes, the fact that the statute declines to define a confession requires some rigidity in drawing bright lines between the two concepts for the purposes of knowing whether one is dealing with section 217 or with section 219A. When it comes to deciding to what extent an extra-curial statement by the co-accused should be admitted against an accused, however, the need for this distinction is absent. Indeed, the venerable principle that a confession by a co-accused is not admissible against the accused is one that does not depend on any such distinction – the very cases cited by the Court<sup>40</sup> for its absolute finding that the confession could not be used against accused number 2 did not draw this distinction.

In England, whence the principle sprang, no such distinction is drawn. In fact, the definition of a “confession” in section 82 of the Police and Criminal Evidence Act 1984 covers both admissions and confessions.<sup>41</sup> An attempt by the Supreme Court of Appeal in *S v Ralukukwe*<sup>42</sup> to justify its proposition that the reason for the distinction was “not hard to find” was worded thus:

“Courts are reluctant to exclude evidence when the interests of justice - the touchstone for the admission of hearsay evidence in terms of s3(1) – require its admission.”<sup>43</sup>

That, with respect, was it. Why do the interests of justice require an admission by a co-accused to be more amenable to being used against his accused than a confession? The essence of the distinction is

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<sup>39</sup> *Molimi* par. [30].

<sup>40</sup> *Molimi* footnote 57. *R v Baartman & Others* 1960 (3) SA 535 (A) did deal with a confession. It cited, however, the English common law principle and precedent, which were not confined to confessions (at 542). The statement in *R v Nkosi & Zulu* 1959 PH H91 (A) referred to in *Baartman* at 542 as South African precedent was also not a confession. *S v Banda & Others* 1990 (3) SA 466 (B) considered the difficult exception relating to “executive statements in the furtherance of a common purpose” (a species of *res gestae*), and dealt with the case law which barred reception of confessions and admissions by co-accused against an accused. At 507E, referring to section 219, Friedman J observed, as if it went without saying, “the same must also apply in regard to admissions”. *S v Makeba* 2003 (2) SACR 128 (SCA) did involve a confession.

<sup>41</sup> It includes “any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise”.

<sup>42</sup> 2006 (2) SACR 394 (SCA).

<sup>43</sup> Par. [11].

that a confession incriminates its maker more effectively and more thoroughly than does an admission. The major orthodox reason for admitting admissions (or confessions) against their maker as an exception to the hearsay rule is the inherent reliability of a statement against the interests of its maker. To the extent that the regime under section 3 is a function of inherent reliability, therefore, confessions appear to require admission more readily than do admissions. Furthermore, the great danger of using the admission of a co-accused against an accused lies in the uncanny tendency of admissions in cut-throat cases partly to incriminate their makers and partly to pass the blame from their makers. The more an admission incriminates its maker fully, the less room and incentive are left for it to pass the blame. The more equivocal an admission in relation to the extent to which it buries its maker, the more its capacity to bury 'the other guy'.<sup>44</sup> Hence, the more an admission approximates a confession, the less its capacity for mischief as far as the co-accused is concerned.

To regard confessions and admissions by co-accused as nothing more than manifestations of hearsay tends to ignore the fact that special dangers and special considerations apply to admissions by co-accused.

A recent and illuminating consideration of this question arose in the discussion in the English Court of Appeal in *R v Horncastle & Blackmore*.<sup>45</sup> The court was confronted with Strasbourg jurisprudence<sup>46</sup> to the effect that a conviction based to a sole or decisive degree on statements which the accused had no opportunity of challenging violated the confrontation right component of the right to a fair trial captured in Article 6(3)(d) of the European Convention of Human Rights. The United Kingdom had passed a statute similar to Act 45 of 1988, in terms of which hearsay in criminal proceedings was admitted subject to a consideration of a number of factors revolving mainly around reliability.<sup>47</sup> The Court of Appeal declined to follow Strasbourg. In doing so, it specifically distinguished a seminal Strasbourg decision, namely *Luca v Italy*,<sup>48</sup> on the following basis:<sup>49</sup>

“[I]n that case the evidence in question was that of a co-accused who was silent for the good reason that he relied on the equivalent to his privilege against self-incrimination. A co-accused with a plain interest in diverting blame from himself to another is a witness carrying a particular risk of unreliability. It is not difficult to see why evidence of this kind ought to be heard in person and comprehensively tested, or not heard at all.”

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<sup>44</sup> See the discussion of this danger in admissions by co-accused in *Williamson v United States* (1994) 114 S Ct 736, and see also *United States v Magana-Olvera* (1990) 917 F 2d 401.

<sup>45</sup> [2009] 2 Cr. App. R. 15 (CA) (22 May 2009).

<sup>46</sup> *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 110 and *Luca v Italy* (2003) 36 EHRR 46.

<sup>47</sup> The Criminal Justice Act 2003.

<sup>48</sup> (2003) 36 EHRR 46.

<sup>49</sup> In par. 46.

Other hearsay (such as was at issue in *Horncastle*) would appear, according to the Court of Appeal, not to require confrontation in all cases to avoid violating the right to a fair trial (despite the Strasbourg jurisprudence to the contrary), although an admission by a co-accused might well. The reason invoked by the Court of Appeal applies to admissions far more coherently than to confessions, for the reasons considered above.

In *R v Hayter*<sup>50</sup> the House of Lords created a “modest adjustment”<sup>51</sup> to the absolute prohibition against using an extra-curial admission by a co-accused against his fellow co-accused. It allowed the jury to convict one accused with the help of his own admission, and then to rely upon the now found fact that such accused was guilty as a building block in convicting the other.<sup>52</sup> The Privy Council in *Persad v State of Trinidad and Tobago*<sup>53</sup> specifically declined to extend that exception beyond the narrow confines of *Hayter*. The absolute prohibition against the use of the admissions of one co-accused against a fellow co-accused is accordingly alive and well as a right in the (English) common law. It lives no longer in South Africa.

Where once the *Ndhlovu* hoops have been jumped through, most assessments whether an admission by a co-accused ought to be admitted against an accused “in the interests of justice” would tend to end with the answer “why on earth not”? This is so not only because, in the words of Lord Diplock in *R v Sang*,<sup>54</sup>

“[w]hat is unfair, what is trickery in the context of the detection and prevention of crime, are questions which are liable to attract highly subjective answers”.

Venerable protections recognized at common law, as salutary safeguards against abuse and prejudice, tend to come up short when subjected to an ad hoc assessment of the extent to which society on any given occasion demands the evidence be heard or the conviction be upheld. Over-inclusive salutary safeguards appear silly and meaningless when the desire for punishment is strong. By analogy, the rule that is averse to the use of similar fact evidence as establishing a probability of guilt through the “forbidden chain of reasoning” (from proved propensity to probable recurrence)<sup>55</sup> is, in fact, a rule of unreason. It is precisely because common sense screams out that a demonstrated propensity to commit a particular kind of crime is a hugely useful index in determining whether an accused person has done it

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<sup>50</sup> [2005] 1 WLR 605.

<sup>51</sup> Lord Steyn at par. 25.

<sup>52</sup> This was precisely what the Supreme Court of Appeal refused to countenance in the case of a confession in *S v Makeba* 2003 (2) SACR 128 (SCA).

<sup>53</sup> [2007] 1 WLR 2379.

<sup>54</sup> [1980] AC 402 at 431.

<sup>55</sup> *DPP v Boardman* [1975] AC 421 (HL); *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC) at 65.

again that such evidence tends to be excluded – for the simple reason that the conclusion is so psychologically compelling as to make it virtually impossible not to employ it, and this means that its prejudicial power tends to outweigh the extent to which it actually proves anything at all. Its power to compel the conclusion is disproportionately strong. Similarly, the use of an admission by a co-accused against an accused has a propensity for prejudicial compulsion towards a finding of guilt that is akin to that enjoyed by the capacity of the statement to convict its maker. Its prejudicial tendencies were, until *Ndhlovu*, recognized as requiring its exclusion as an absolute, when it came to the co-accused who might be thus prejudiced. The passing of this right deserves a minute’s silence.

## Zuma

The way it all ended (at least for the time being), in the courts and in the real world, is history now. Mr Zuma walked and became President; Mr Shaik sat, until he walked too. With hindsight, Mr Shaik’s complaint that his prosecution was being used as a ‘dry run’ for that of Mr Zuma<sup>56</sup> and that, stated at its lowest, separate prosecutions in that case were not a good idea, must surely be regarded as having been well levelled. In the *Shaik* case under review,<sup>57</sup> the great evil of having countenanced separate trials came starkly to the fore. The Court in *Shaik* needed to consider whether the bribery of Mr Zuma by Mr Shaik was the cause of the benefit derived from a certain transaction – and found that it was, on the basis that “given the conviction of Mr Shaik, it must be accepted for the purposes of these proceedings that Mr Shaik did pay bribes to Mr Zuma”.<sup>58</sup> The Court in *Shaik* found on the facts that Mr Shaik had bribed Mr Zuma to intervene, that Mr Zuma had intervened, and that this had created the benefit for the applicants that they avoided having to litigate about their entitlement to share in the bounty of The Arms Deal (the purpose of the intervention).<sup>59</sup>

Similarly disquietingly, the majority of the Court in *Zuma* based an important finding at least partially on the fact that, put crudely, in the light of the conviction of Mr Shaik, one could not blame the prosecution and the judge issuing the relevant warrant for not trusting the honesty of Mr Zuma:

“Mr Zuma cannot be said to be guilty based on the findings of the court that tried Mr Shaik. However, the fact that Mr Shaik has been convicted of various counts of corruption and fraud relating to certain of his dealings with Mr Zuma would, in the mind of the prosecutor and the judicial officer issuing the warrant, raise doubt as to the veracity of Mr Zuma’s denials.”

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<sup>56</sup> See *S v Shaik & Others* 2008 (2) SA 208 (CC), par. [27].

<sup>57</sup> *S v Shaik & Others* 2008 (5) SA 354 (CC) (“*Shaik*”).

<sup>58</sup> *Shaik* par. [44].

<sup>59</sup> *Shaik* pars. [41] and [42].

As suggested by the minority judgment of Ngcobo J, shorn of regarding the Shaik conviction as a legitimate basis for regarding Mr Zuma as dishonest, the finding on potential dishonesty amounted to nothing more than a licence for sufficient mistrust of any person accused of an offence of dishonesty not to rely on anything they may say or do as a basis for considering whether the issue of a warrant was necessary in the circumstances.<sup>60</sup>

Both *Zuma* and *Shaik* assumed the guilt of Mr Zuma for the purposes of determining the issue before the Court. The citizen may be forgiven in such circumstances for drawing his or her own conclusions about the guilt of Mr Zuma, the President of the country. Fair or unfair, in circumstances where Mr Zuma will almost certainly never be convicted or acquitted with respect to the crimes committed by Mr Shaik, this is not an ideal state of affairs.

*Zuma* concerned a challenge to the validity of search warrants issued in terms of section 29 of the National Prosecuting Authority Act (“the NPAA”), and the fate of material seized on the authority of such warrants.<sup>61</sup> The warrants had been issued by a judge in chambers, on an ex parte application. There were six warrants. One had been executed in the offices of the attorney of Mr Zuma, namely Mr Hulley. The applicants who challenged the validity of the warrants were Mr Zuma and the company Thint (Pty) Ltd (“Thint”).

The warrants were sought and executed in order to mount a criminal prosecution of the applicants. The prosecution was yet to come. Perhaps the most noteworthy feature of this case was the endorsement by the Court of the merits of the State’s argument that a challenge to the lawfulness of such conduct, on the part of the party sought to be prosecuted on the strength of such conduct, had no place outside the confines of the criminal trial for the purposes of which the conduct was executed. The following arguments were held to contain “certainly a great deal of merit”.<sup>62</sup>

“First, this case concerns ‘justice in theory’ not ‘justice in fact’, because the applicants have made no attempt to establish that they have suffered any actual prejudice despite having had ample opportunity to do so. Second, the applicants launched these proceedings for one purpose only, namely, to prevent the State from using the seized items as evidence against Mr Zuma and the Thint companies in a subsequent criminal trial. They thereby are trying to circumvent the application of s35(5) of the Constitution, which is the way the Constitution chooses to balance the various competing interests when deciding whether or not to admit unlawfully obtained evidence. This is particularly invidious, they argue, given that the evidence is incriminating of Mr Zuma and the Thint companies, and for that reason it is of great public importance that the truth emerges. Third, this form of preliminary litigation unduly delays the commencement of criminal trials and therefore should be strongly discouraged. The trial court, rather than

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<sup>60</sup> *Zuma* Ngcobo J, in particular at pars. [343] to [349] read with par. [377].

<sup>61</sup> 32 of 1998.

<sup>62</sup> *Zuma* par. [63].

preliminary courts, is best placed to balance the varying public and private interests at stake, namely, the public and private interests in the emergence of truth, the applicants' interests in their privacy and property, and the accused persons' fair trial rights. Leave to appeal should therefore be refused to allow the trial court to do so in this case."<sup>63</sup>

It is one thing to have a regime that does not exclude all unlawfully obtained evidence from admissibility at trial merely for having been unlawfully obtained, and instead subjects its fate to the exercise of a discretion.<sup>64</sup> Whether such a regime is preferable to one that refuses to countenance the admission of unlawfully obtained evidence is an academic question given the firm entrenchment of such a discretionary regime in section 35(5) of the Constitution. *Male captus, bene detentus*, if not for the founding of jurisdiction,<sup>65</sup> then, by virtue of section 35(5), for the admission of evidence. It is, however, quite another thing to say to the subject, "given that, when the time comes, the mere fact that an unlawful act now perpetrated upon you will not be a sufficient basis to render the fruits of such act inadmissible at your trial, you have no remedy at this point for the violation of the law of which you complain, and you should not inappropriately burden the courts with complaints about unlawful behaviour at a stage where the fruit of such behaviour has not yet had the opportunity of doing all the work the perpetrator wants it to do. Don't waste the time of the courts with justice in theory. It may be that the unlawful act never results in evidence sought to be led to your detriment. Apply again when you have a case of justice in fact."

This approach yielded the majority's *obiter* support for the competence and desirability of 'preservation orders' to secure the fruits of unlawful searches for the purposes of being employed as potentially admissible evidence at trial.<sup>66</sup>

If you break into my house with no lawful authority, and steal my possessions, I ought to be able to demand that the courts do something about it there and then. At the very least, I ought to be entitled to demand that they order you to return my possessions. If you threaten to breach my rights, and I know you will if I do not act, I ought to be able to ask a court to stop you from doing so before the harm actually occurs. The fact that you are the government, and that you want to breach my rights in order to prosecute me for a crime, should hardly be a decisive reason counting against my assumed entitlement. Quite the contrary must surely be true. The approach of the Court in *Zuma* reverse telescoped the admissibility decision into the very act of unlawfulness itself. The potential that the unlawfulness would not necessarily render the seized possessions ultimately inadmissible as evidence at a criminal trial

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<sup>63</sup> *Zuma* par. [62].

<sup>64</sup> The *Zuma* majority expressly referred to the exercise as one of discretion – par. [221].

<sup>65</sup> See John Dugard "No Jurisdiction over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus" (1991) 7 *SAJHR* 199, discussing the celebrated decision in *S v Ebrahim* 1991 (2) SA 553 (A).

<sup>66</sup> *Zuma* pars. [216] to [224].

became the sole basis for depriving the subject of the effective protection of the law against the act of aggression at a stage before the criminal trial was at issue.

The logical extension of this approach would deprive an applicant of the remedy of an interdict against a threatened act of unlawful invasion before it is executed.<sup>67</sup> There is something seriously wrong with our law if it allows this.

Forceful, if not lyrical, cries, cited in the Supreme Court of Appeal in *Zuma*, and issued in *Mahomed*,<sup>68</sup> railed against such an approach, ultimately to no avail.

The minority in the Supreme Court of Appeal in *Zuma* was not persuaded by the following remarks about the necessity for ordering the return of unlawfully seized material:

“Anything less negates the right and denies the remedy”...<sup>69</sup>

“What justification is there for ruling on the one hand that the issue of a search warrant was illegally made and in the next breath saying to the authorities – that is alright – you can use the seized articles as evidence against the accused anyway. Can it be said this clearly contradictory position will encourage police officers and persons in authority to abide by the laws designed to protect the rights of the ordinary citizen? I think not....

The rights of an accused must not be given away just to make it easier for the Crown to prosecute an accused person.”<sup>70</sup>

Not to be outdone by the Canadians, Nugent JA in *Mahomed* delivered the following powerful indictment of a preservation order issued for the express purposes of allowing the state to seek to employ the evidence at trial:

“It seems to me that the power to fashion remedies for constitutional infringements is given to courts to enable them to vindicate rights rather than to deny them. As Ackermann J said in *Fose v Minister of Safety and Security*:<sup>71</sup>

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the

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<sup>67</sup> No amount of invocation of the time-honoured elements in *Setlogelo v Setlogelo* 1914 AD 221 would assist him.

<sup>68</sup> *National Director of Public Prosecutions & Another v Mahomed* [2008] 1 All SA 181 (SCA).

<sup>69</sup> *Lagiorgio v The Queen* (1987) 42 DLR (4<sup>th</sup>) 764 (Federal Court of Appeal, Canada) at 767.

<sup>70</sup> Hugessen J in *Re Weigel & The Queen* (1983) 1 DLR (4<sup>th</sup>) 374 (Saskatchewan QB) at 379 and 380.

<sup>71</sup> 1997 (3) SA 786 (CC).

Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”

And later:

“[I]t is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”

I am not persuaded that the power to fashion remedies to redress constitutional violations are [sic] capable of being used to deny such redress so as to serve some other purpose. That is particularly so if the purpose that is to be served by denying redress is one that would not have been capable of being achieved by a court had the violation not occurred. For while it is true, as observed by my colleague, that the effective prosecution of crime is an important constitutional objective, that by itself does not confer a general discretion upon a court to augment the panoply of tools that are available to the State to achieve that objective. And if a court has no general authority to make an order that impinges upon a person’s privacy only because it is useful to do so in the interests of prosecuting crime then I would find it remarkable that the violation by the State of that privacy somehow creates an authority that would not otherwise exist.”<sup>72</sup>

Ponnan JA was equally passionate in his condemnation. He cited a dissent in the United States Supreme Court that could serve as an epigraph for the theme of this article:

“ ‘The task of combating crime and convicting the guilty’, according to Brennan J, ‘will in every era seem of such a critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy’ ”.<sup>73</sup>

He added:

“If documents unlawfully seized can be held in the manner postulated by the State, the protection afforded by the right to be secure from unlawful searches and seizures is of little, if any, value. To hold otherwise is to recognize the right in theory, but in reality to withhold its protection and enjoyment. Recognition of the right plainly operates to deter the State from gathering information and securing evidence in certain ways.”<sup>74</sup>

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<sup>72</sup> *National Director of Public Prosecutions & Another v Mahomed* [2008] 1 All SA 181 (SCA), pars [21] and [22].

<sup>73</sup> *United States v Leon* 468 US 897 (1984) at 929, cited by Ponnan JA in *Mahomed* par. [36].

<sup>74</sup> At par. [37].

“If the courts were to simply escape their responsibility for redressing constitutional violations, people will be secure only in the discretion of the police and the protections of the right would evaporate. After all, the entire point of the police conduct in this case that violated constitutional guarantees was to obtain evidence for use at a possible subsequent criminal trial. The Bill of Rights must not be reduced to a code that the State may abide at its discretion. The Constitution requires more; it demands a remedy for a violation. That remedy, one would have thought, is well-settled. But, says the State in this case, there now exists a constitutional injunction to reconsider existing remedies and to refashion them in accordance with the spirit of our new constitutional order. To my mind, there is a fallacy in that approach. It is this: Out of a remedy available to someone wronged by a rights violation, the wrongdoer seeks to fashion for itself a right that it otherwise would not have had. That can hardly be authorized by our Constitution. Moreover, the preservation order is being sought in this case in anticipation of possible criminal proceedings, not against the respondent, but against her erstwhile client, Mr Zuma. How, it must be asked, can the State resist a claim for restoration where the items were illegally seized and where, even at the date of the hearing of this appeal, there has been no firm commitment by it that fresh charges will as a fact be preferred against Mr Zuma in regard to which the seized items might be used by it as evidence?”<sup>75</sup>

The *Zuma* majority was not impressed. First of all, it took issue with the extent to which the common law assumption (you took it unlawfully and have no lawful basis for holding it; ergo you must give it back) was in fact fully entrenched in the law.<sup>76</sup> Then, having paused to refer to the fact that the discretionary regime in section 35(5) was similar to that enjoyed by the Canadians,<sup>77</sup> it considered that Nugent JA in *Mahomed* had relied on a Canadian authority as stating a proposition it did not state.<sup>78</sup> The interpretation of the authority in question attributed to Nugent JA did not readily appear from the relevant citation in the judgment of Nugent JA.<sup>79</sup> The majority then premised its countenance of such

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<sup>75</sup> At par. [39].

<sup>76</sup> *Zuma* pars. [218] to [219].

<sup>77</sup> Par. [221].

<sup>78</sup> Par. [221], with reference to the invocation by Nugent JA in *Mahomed* par. [25] of *Commodore Business Machines Ltd v Canada (Director of Investigation and Research)* (1988) 50 DLR (4<sup>th</sup>) 559 (Ont CA).

<sup>79</sup> Nugent JA had referred to those Canadian cases, such as *Re Dobney Foundry Ltd & The Queen (No 2)* (1985) 19 CCC (3d) 465, that the minority of the Supreme Court of Appeal in *Zuma* (Farlam JA, pars. [60] to [69]) had preferred as enunciating a “more flexible approach” (i.e. one that would allow such preservation orders) than the approach demanded by the cases that made the sorts of absolute pronouncements heralded in this article. He then acknowledged that *Commodore* had followed (“based itself on the decision in”) *Dobney*, and had found the trial court had properly exercised its discretion to permit such a preservation order, but felt that this had been done “without considering whether the judge had such a discretion at all” (par. [25]). It is not clear where Nugent

preservation orders squarely on the approach criticized above – that the subject should not engage the courts in “preliminary litigation” on search warrants – i.e. that the real (and only) forum for determining these issues was the criminal trial.<sup>80</sup> Thus the critical question for rights jurisprudence raised by the strongly worded passages quoted above was begged entirely by assuming the axiom that the subject really had no business bothering the courts with any context outside that of the trial when the illegality at issue was perpetrated with an eye on the trial. The elaboration then offered cited the interests of others, in particular the public interest in prosecuting crime.<sup>81</sup> But the fact that it is important to fight crime simply cannot be an answer to the questions posed in the passages cited above. It is always important to fight crime. The importance of the fight tells one nothing about how to deal with rights violations that occur in the process of the fight.

The exceptions or qualifications left by the majority appeared to add an element of anomaly and much uncertainty to the approach adopted. “Preliminary litigation” such as that at issue should be strongly discouraged, except where one was dealing with “clearly unlawful” conduct, in which case “the victim should be able to have it set aside promptly.”<sup>82</sup> Where there was a “serious violation of privacy” or “some other egregious conduct in the execution of the warrant”, then perhaps a preservation order would not be appropriate.<sup>83</sup> If one bears in mind the extraordinary breadth of the warrants countenanced by the majority in the *Zuma* case, particularly when the ‘catch-all’ paragraphs are considered in the light of the critical finding that the warrant need not speak entirely for itself as to its own scope, then one can safely say that the extent to which some room has been left for future potential accused to challenge warrants by way of “preliminary litigation”, and then to keep preservation orders at bay when their challenges succeed, is at once clearly very limited and very uncertain. One should, accordingly, not stake much on success in such challenges, and rather focus on preparing for the trial.

It may be noted that the “preservation order” has quickly acquired a life of its own outside the sphere of criminal law. It has, for example, recently been employed in the Competition Tribunal, in the context of invalid summonses issued by the Competition Commission.<sup>84</sup>

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JA could fairly be said to have thought that *Commodore* “assert[ed] that Canadian courts do not have a discretion to preserve copies of documents that had been unlawfully seized” (*Zuma* CC par. [221]).

<sup>80</sup> Par. [222].

<sup>81</sup> Par. [224].

<sup>82</sup> Par. [65].

<sup>83</sup> Par. [224].

<sup>84</sup> *Woodlands Dairy (Pty) Ltd & Another v Competition Commission In re Competition Commission v Clover Industries Ltd & Others* [2009] 1 CPLR 250 (CT).

The most important substantive question determined in *Zuma* was the extent to which the warrant needed to speak for itself in relation to what exactly it authorised. In *Powell NO & Others v Van der Merwe NO & Others*,<sup>85</sup> a victory had been achieved for principle, certainty and right: a search warrant had to convey intelligibly to the searched person the ambit of the search it authorized.<sup>86</sup> In *Zuma*, unlike Hurt J at first instance,<sup>87</sup> the majority in the Supreme Court of Appeal and in the Constitutional Court declined to accept that this meant that the subject could rely on the warrant to speak for itself, without fear that ‘the facts’, as known to the authorities, might supplement the warrant in any way. It is a great pity that the minority judgment of Ngcobo J declined to consider this issue at all,<sup>88</sup> as it held the warrants to have been invalid for other reasons than the non-exhaustive degree to which they defined the ambit of their searches.

In two critical respects, *Zuma* held that a search warrant did not have to speak for itself: it did not have to define the offences in question with a degree of particularity that would enable the reasonable reader to identify the particular count and particular incidents at issue;<sup>89</sup> and it did not have to indicate, without reference to the knowledge of the persons conducting the search, in what precise respects items it failed to identify could be said to be relevant to the offences in question.<sup>90</sup>

Accordingly, a warrant could specify the offence of, say, fraud, and then authorize the search and seizure of “any document that might be relevant to the fraud”, without indicating to the reader what precise act of fraud committed when by whom was at issue, and how anybody other than the investigating officer or prosecutor might know whether a document in the searched premises was relevant to that fraud. This effectively makes it impossible to take issue, at the search, with the extent to which a particular seizure is authorized by the warrant, as the warrant will be silent in the critical respects necessary to educate the ignorance of the subject being searched.

A noteworthy argument in support of permitting the warrant to be supplemented by the knowledge of the investigator was the following: section 29(9)(b) of the NPAA required the investigator to “supply such person at his or her request with particulars regarding his or her authority to execute such a warrant”. This was not confined to the authority to execute the warrant; it extended also to the scope or terms of the warrant (as part of what the investigator was obliged to explain if asked). Hence (and this was the non-sequitur), because the searched person could ask the investigator to explain the scope and terms of the warrant and the latter was obliged to comply, the scope and terms could be supplemented

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<sup>85</sup> 2005 (5) SA 62 (SCA).

<sup>86</sup> At par. [59]; see *Zuma* pars. [38] and [88].

<sup>87</sup> *Zuma & Another v National Director of Public Prosecutions & Others* 2006 (1) SACR 468 (D).

<sup>88</sup> Par. [383].

<sup>89</sup> Pars. [168] to [170].

<sup>90</sup> In particular, pars. [146] and [160].

in this way beyond what the warrant on its face circumscribed.<sup>91</sup> To the extent that the section extends the duty of the investigator of explaining his authority to the terms of the warrant itself, this can never, surely, be a basis for allowing such terms to be more narrowly defined, or to authorize less, than the potential explanation encompasses. Or, put differently, an explanation of authority cannot extend it.

As already mentioned above, the victory of the particular over the general was completed with a non-sequitur when the Court held that an inability subsequently to pinpoint any particular item as having been objectively irrelevant in some sense confirmed the “intelligibility” of the warrants.<sup>92</sup>

And so, the capacity of the warrant to act as a general limitation upon power irrespective of the facts was allowed to be undermined by the facts.

The reasoning of the majority severely undermined the degree to which the warrant acted as an intermediate and autonomous source and limitation of coercive power, between the empowering legislation and the facts on the ground. Analysis of the reasoning may justifiably yield the conclusion that little was ultimately left of this intermediate level of authorization. If one considers the reasoning employed particularly in paragraphs [138] to [147], [165], [166] and [176], one finds a blurring of the distinction between the ambit of the potential power authorized by the empowering statute, and the ambit of the actual power authorized by the warrant. As the statute empowered a warrant to authorize a search potentially for any item that might be relevant to any potential offence, so the ambit of what the warrant had to be taken to have authorized had to be determined with reference to the wideness of the original potential envisaged in the statute. There is something wrong here. By analogy, a statute may authorize the prosecution of an infinite number of crimes, but that is not an answer to a complaint that a particular charge formulated in terms of the wide statutory authority is not sufficiently narrowly defined. When charged, the direct authority upon which the coercive power is based is the charge, not the statute empowering any number of charges. The limits of legality must accordingly be found in the charge. When searched under warrant, the authority is the warrant, not the statute that permits any number of potential warrants. The limits of legality must be determined with reference to the warrant without recourse to what stands behind it. Consideration of the extent to which the terms of the warrant itself played any meaningful role in the reasoning employed in pars. [138] to [147] illustrates the conceptual difficulty created by the Court’s approach to the question of broadness. The finding that the ‘catch-all’ paragraph in the warrants was not overbroad, given the proper approach to be adopted by the officials empowered to conduct the search, as laid down in the statute, was perhaps the zenith of this approach.<sup>93</sup>

The minority dissented on two main grounds, although these were largely conflated and not kept distinct. The minority found that the authorities had not established the need for the warrants to be

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<sup>91</sup> Pars. [147] to [150].

<sup>92</sup> Par. [171].

<sup>93</sup> Par. [175]ff.

issued, instead of employing the less invasive mechanism of a summons, and that material non-disclosure of the extent to which the entities in question had offered their co-operation in the investigation vitiated the warrants issued on the strength of such non-disclosure. As the latter basis was important in establishing the former, it was not clear to what extent the non-disclosure ground operated independently, i.e. even if it had been found that there had been a 'need', would the non-disclosure still have vitiated the warrants?<sup>94</sup> Heavy reliance was placed, with respect to the proper interpretation to be accorded to the notion of need, on the New Zealand decision in *Tranz Rail*,<sup>95</sup> in which the distinction between the non-disclosure of an amenability to co-operate and the need for the warrant to be issued in the circumstances was also not fully developed. It is noteworthy that the main reason for the majority's rejection of the persuasiveness of *Tranz Rail* was grounded in the different wording of the respective statutes and of the conception of the respective privacy rights.<sup>96</sup> This textual finding was left entirely unelaborated and unsubstantiated, leaving the reader to wonder which critical textual difference was regarded as sufficiently decisive to put paid to any assistance that could be derived from the discussion of the normative issues in *Tranz Rail*. There was also an element of caricature of the test applied in *Tranz Rail* in the majority's declining to be impressed by it – compare the majority's attribution to *Tranz Rail* of a requirement that the authorities prove that less invasive means would as a matter of fact not produce the items required<sup>97</sup> with the minority's invocation of that decision as support for subjecting the axiom that the concept of need necessarily implied consideration of alternatives<sup>98</sup> to the test of the history and the facts of interaction with the particular subject at hand.<sup>99</sup>

Some of the features that for the majority had saved the catch-all paragraph executed in the attorney's offices from fatal overbreadth compelled an apparently undeniable conclusion from the minority that the particular warrant should accordingly never have been regarded as fulfilling the requirement of need. These features were the fact that it was clear that the state was after only very particular items, and that these were handed over without any demur.<sup>100</sup>

It may be that the permissive approach of the majority towards warrants was partially fuelled by a pragmatic and unexpressed consideration: it is better to encourage the use of warrants than to encourage their circumvention by invocations of the exigencies of the situation. Where it remains

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<sup>94</sup> See in particular pars. [313] to [314]; pars. [334] to [340].

<sup>95</sup> *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).

<sup>96</sup> Par. [123].

<sup>97</sup> Pars. [125] to [126].

<sup>98</sup> Par. [281].

<sup>99</sup> Pars. [281] to [293].

<sup>100</sup> Pars. [351] to [362].

possible to obtain searches without warrants, one should not make a warrant so inconvenient as to defeat its role in the long run. It may also be that the unique public interest in seeing the Zuma prosecution ultimately decided on its merits added some weight to the decision not to allow it to be scuppered before it began. Be these weighty realities as they might, the result of *Zuma* was to compromise the victory achieved in *Powell*, and once again to subordinate the comfort of clear rights to the murkiness of the facts on the ground, and the discretion of officials. What has undeniably happened is that the effective ability to argue with any invasion of privacy with reference to the piece of paper that constitutes its legitimacy has been severely attenuated.

### **Thint Holdings**

The Supreme Court of Appeal in *Thint Holdings* went a step further than did the Constitutional Court in *Zuma* in the process of shortening the view. At issue was a letter of request issued by the High Court to the prosecuting authorities of Mauritius, to deliver to the South African prosecuting authorities 14 original documents together with statements as to their authenticity.<sup>101</sup> It would become critical whether this was a request for “evidence” or for “information”. The enabling statute was the International Co-Operation in Criminal Matters Act<sup>102</sup> (“the Act”). The purpose of the request was to resurrect the prosecution of Mr Zuma and the Thint companies after the criminal proceedings against them had been struck from the roll in the High Court, i.e. to assist in the prosecution of the appellants. The appellants opposed the issuing of the letter of request in the High Court, and took the view that, in the circumstances, the court issuing the letter of request had incorrectly invoked an inapplicable power in the Act. They were accordingly appealing against the issue of the letter of request. The Supreme Court of Appeal not only saw this as inappropriate “preliminary litigation” (in the words of the *Zuma* Court); it held that the appellants did not even possess standing to challenge the letter of request.<sup>103</sup> The fact that the letter of request was sought for the purpose of prosecuting the appellants did not afford them a sufficient interest in the request proceedings to enjoy standing to challenge the outcome. The process was “preliminary” and did not affect the rights of the subject.<sup>104</sup>

The Constitutional Court unanimously dismissed the appeal. It accordingly declined to make a ruling as to the standing issue.<sup>105</sup> This was a somewhat unorthodox approach, given that, if there were merit in the standing point, there would have been no reason for the Court to entertain the merits of the appeal,

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<sup>101</sup> *Thint Holdings (Southern Africa) (Pty) Ltd & Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC), par. [1].

<sup>102</sup> Act 75 of 1996.

<sup>103</sup> *Zuma & Others v National Director of Public Prosecutions* 2008 (1) SACR 298 (SCA), pars. [19] to [20].

<sup>104</sup> Pars. [2] and [15].

<sup>105</sup> Par. [47].

whatever its attitude to the *Boesak* divide. Be that as it might, the Court found that it “should note” that the Constitution had adopted a broad approach to standing, and remarked as follows:

“We wish to make it clear that we are not persuaded that the approach of the Supreme Court of Appeal is necessarily correct given our constitutional approach to standing and we leave this question open for consideration in another case”.<sup>106</sup>

Why should the standing question have been left open? The question of standing was inextricably bound up with the question whether the fair trial rights of the subject were implicated when a letter of request was sought for the purpose of prosecuting the subject. This was how the Supreme Court of Appeal approached it. If the letter of request were granted on the wrong legal basis, and it yielded evidence that might be employed at the trial, did this not implicate the fair trial right of a subject who would become an accused person, at least as a threatened violation as envisaged in section 38?<sup>107</sup> This question became particularly pressing in light of the fact that the judicial imprimatur of the letter of request made it impossible at the trial to argue that the evidence had been obtained unlawfully. As had been pointed out by Ngcobo J in his minority judgment in *Zuma*,

“Once the Supreme Court of Appeal had pronounced upon the validity of the warrants, it was no longer open to the applicants to challenge the validity of the warrants on the same grounds that were rejected by the Supreme Court of Appeal. To do so would amount to an impermissible collateral challenge to the decision of the Supreme Court of Appeal.”<sup>108</sup>

The Supreme Court of Appeal’s answer to the fair trial complaint in *Thint Holdings* echoed the “preliminary litigation” approach of the Constitutional Court in *Zuma* and its sanguinity about preservation orders:

“Their right to be tried fairly, if they are tried at all, is unaffected by the issue of the letter of request, and will remain unaffected even if the request is acceded to. It is no doubt so, as submitted on their behalf, that the evidence that is sought to be obtained by the letter of request might result in or contribute to their conviction, but it will do so only if it is admitted at a trial, and their right to object to the admission of the evidence, on any ground that might properly be available to them, remains intact.”<sup>109</sup>

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<sup>106</sup> Par. [47].

<sup>107</sup> See the discussion on the implication of fair trial rights of violations occurring before the trial, and the problem of identifying the perspective of the person affected, for the purposes of considering whether an ‘arrested’, ‘detained’ or ‘accused’ person’s rights are at issue, in Frank Snyckers & Jolandi le Roux “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in Chaskalson et al *Constitutional Law of South Africa* [2<sup>nd</sup> Edition, Original Service], §51.1 (a)(iv) and §51.2.

<sup>108</sup> *Zuma* par. [245].

<sup>109</sup> *Thint Holdings* SCA par. [2].

The appellants argued in the Constitutional Court that the last proposition ignored the fact that the lawfulness of the issuing of the letter of request could not be challenged at trial for as long as the High Court order stood. The Court mentioned this argument,<sup>110</sup> but sidestepped it completely. It reiterated the proposition that the appellants would have the fullest opportunity at the trial to challenge the admissibility of the evidence yielded by the letter of request, and that the trial court “will surely ensure that the fair trial rights of the applicants are protected”.<sup>111</sup> It then referred to the fact that it had upheld the lawfulness of the letters of request, and that it remained open to the appellants to raise any unlawfulness in the execution of the letter of request at the trial.<sup>112</sup> This was the basis for agreeing with the Supreme Court of Appeal that “at this stage, the applicants’ right to a fair trial is not implicated”.<sup>113</sup>

The objection to ignoring the problem of collateral challenge is also the reason why the Supreme Court of Appeal’s approach to standing ought not to have been accepted. The “judicial imprimatur”<sup>114</sup> entailed by the letter of request rendered the lawfulness of the appearance of the evidence in South Africa immune from challenge at trial – *bene captus bene detentus*. Neither section 5(2)(b) of the Act nor section 35(5) of the Constitution<sup>115</sup> could come to the rescue of the appellants at trial if their complaint was that the evidence sought to be used to convict them had been obtained unlawfully.

This interplay between the “preliminary proceedings” and the criminal trial was at the very heart of the textual argument about which section of the Act was applicable to the letter of request. If the letter of request were to be issued by the trial court, none of the problems entailed by the collateral challenge issue would arise.

The history of the matter is illuminating in this regard.<sup>116</sup> The South African Directorate of Special Operations had been conducting an investigation into alleged corruption, implicating the appellants, surrounding The Arms Deal. This resulted in a search and seizure operation in Mauritius, authorised by a Mauritian court. This yielded documents. The South African prosecuting authorities made copies of the

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<sup>110</sup> *Thint Holdings* par. [56].

<sup>111</sup> Par. [58].

<sup>112</sup> Par. [59].

<sup>113</sup> Par. [55]. The Court held “As we have already found, at this stage, the applicants’ right to a fair trial is not implicated”. It is not at all clear where such a finding occurred “already” earlier in the judgment. The only potential candidate appears to be the implication in par. [45] that the admissibility of documents obtained under the letter of request would be regulated by section 5(2) of the Act, where one of that factors to be taken into account was the prejudice the admission of the evidence might entail.

<sup>114</sup> *Thint Holdings SCA* par. [2].

<sup>115</sup> The provisions the Court considered adequate to protect the appellants’ fair trial rights – par. [58].

<sup>116</sup> The history set out here paraphrases that related in the Constitutional Court judgment.

documents and the Mauritian authorities retained the originals. These were the documents at issue in this matter. Proceedings were then brought in Mauritius to restrict the use of the original documents on the basis that the fruits of the search extended beyond the authority of the order. These proceedings resulted in a settlement to the effect that the documents would not be given to anybody without an order by a Mauritian court. After Mr Shaik's conviction, the South African prosecuting authorities decided to prosecute Mr Zuma and the Thint companies. A trial date was obtained. The first application for a letter of request was then brought. This was brought in terms of section 2(1) of the Act, which deals with the situation when the need arises to examine a person who is in a foreign state in criminal proceedings, but it appears that his attendance in South Africa to testify would for some reason be difficult to obtain, in which case a letter of request may be issued to obtain "such evidence as is stated in the letter of request for use at such proceedings".<sup>117</sup>

The state wanted the originals held by the Mauritians to be produced as evidence, given the intimation that the appellants would challenge the use of the copies. The application was brought before the trial began, and the High Court declined to grant the order, holding that a letter issued in terms of section 2(1) could be issued only by the court presiding over the trial. The application was accordingly referred to the trial court. The proceedings in the trial court were subsequently struck from the roll, before the application could be heard there. So the authorities brought another application, this time under section 2(2), which allowed a letter of request for "information...for use in an investigation related to an alleged offence" to be issued by a judge in chambers.<sup>118</sup> This was the application the subject-matter of the appeal.

The argument was that section 2(2) did not apply to the production of evidence as did section 2(1), and that section 2(2) dealt with a situation where the trial had not yet commenced, and was still in the investigation stage.

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<sup>117</sup> "If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at the proceedings."

<sup>118</sup> "A judge in chambers or a magistrate may on application made to him or her issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence if he or she is satisfied –

- (a) that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed ;
- (b) that an investigation in respect thereof is being conducted; and
- (c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State."

This argument appeared to have much force. Section 2(1) creates a species of evidence on commission, and is specifically linked to certain rights of participation in the process of the taking of the evidence in the foreign state on the part of the accused, such as appearing at “the examination” and issuing interrogatories, which are not applicable to “information” gathered in terms of section 2(2).<sup>119</sup> The only entity entitled to appear at “the examination” and issue interrogatories with respect to a letter of request for “information” issued in terms of section 2(2) is the person in charge of the investigation.<sup>120</sup> Section 2(1) has as a jurisdictional fact for the request of the “evidence” it contemplates the necessity of examining a person in the proceedings, and refers to evidence “for use at such proceedings”. Section 2(2) does not contemplate the need for a witness to testify at proceedings, and refers to information “for use in an investigation”. Section 4(1), which requires a request for an accurate record of the examination, applies to “the court or presiding officer issuing the letter of request”, which echoes the entity issuing a section 2(1) letter for evidence, not a section 2(2) letter for information. “Evidence” is defined in section 1 as including all books, documents or objects “produced by a witness”. The one concededly weighty anomaly in this apparently undeniably correct interpretation is that section 5, which deals with the admissibility of “evidence” acquired on the strength of a letter of request, distinguishes between cases where evidence has been obtained before proceedings have been instituted and cases where evidence has been obtained after proceedings have been instituted. In the case of the former, section 5(2) decrees factors to apply for admitting the evidence similar to those relating to the statutory admission of hearsay.<sup>121</sup> If a section 2(1) request is the only way in which evidence for use at such proceedings (as opposed to information for use in the investigation) can be obtained, and such a request must be issued by the judge or court presiding at such proceedings, then it is difficult to conceive of a case where evidence would be obtained before proceedings have been instituted. The Supreme Court of Appeal invoked section 5(2) in aid of its construction which allowed “information” under section 2(2) to include “evidence”.<sup>122</sup> The Constitutional Court certainly assumed that section 5(2), which dealt with the admissibility of evidence obtained before proceedings were instituted, was intended to govern evidence obtained as “information” under section 2(2).<sup>123</sup> This concededly grave anomaly, however, should not outweigh or undo the clear divide established in the Act between the production of evidence for the purposes of the trial, in which process the accused participates, and the production of information for use in the investigation, in which process the accused has no rights of participation, and a request for which may be issued ex parte in chambers.

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<sup>119</sup> Section 3(1).

<sup>120</sup> Section 3(2).

<sup>121</sup> Under Act 45 of 1988.

<sup>122</sup> SCA par. [14].

<sup>123</sup> Par. [45].

The Court did not consider the distinction in the Act between evidence and information to be material. This distinction artificially segmented the criminal process between the investigation and the prosecution stage. Furthermore, evidence such as originals of documents the contents of which were known also constituted “information”.<sup>124</sup> Once the proceedings had been struck, there were no longer any proceedings for section 2(1) to apply,<sup>125</sup> and the only avenue for obtaining the documents that remained was section 2(2).

What was disconcerting about the treatment of the issue in both the Supreme Court of Appeal and the Constitutional Court was the absence of any thorough consideration of this statutory scheme, in particular the fact that an accused enjoyed important fair trial rights under section 4 when section 2(1) was being invoked but not when section 2(2) was being invoked. One cannot even glean from the report what counsel for Mr Zuma was referring to when he complained that, in proceeding under section 2(2), the NDPP had “unlawfully circumvented the participative process envisaged in s 2(1) of the Act, which he would otherwise have been obliged to pursue in order to obtain the evidence he sought from Mauritius”.<sup>126</sup> The critical relationship between section 2(1) and section 3(1), a relationship that stood in sharp juxtaposition with that between section 2(2) and section 3(2), did not feature anywhere in the judgment.

The impatience of the Court with “preliminary litigation” entails a focus on the discretion in section 35(5) as the panacea for dealing with any threats to the fairness of criminal proceedings. In *Thint Holdings* this impatience arguably steered the Court away from pausing more heavily at the preliminary stage to consider directly the question to what extent the fact that the opportunity to challenge the coercive act at its root was lost before the trial commenced had negative implications for the fairness of the trial. The attenuated fair trial that the accused might have enjoyed with respect to the impugned evidence, had there been an insistence that such evidence be obtained in terms of section 2(1) of the Act, if at all, was permitted to be circumvented entirely by recourse to section 2(2). This dimension was not addressed directly, save for a cryptic reference to an argument about having been deprived of the benefit of a ‘participative process’, without any analysis of this argument. What might have been a discussion of how best to protect the extent to which the Act created fair trial safeguards became rather a discussion of the absence of any real distinction between evidence and information, and between investigation and prosecution.

## Shaik

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<sup>124</sup> Pars. [37] to [39].

<sup>125</sup> Par. [41].

<sup>126</sup> Par. [54]. Footnote 53 refers merely to the text of section 2(1), quoted in footnote number 1.

Forfeiture of property as a coda to a criminal conviction potentially involves a deeply troubling phenomenon. An accused is found guilty and convicted. The court then passes sentence. In the process of passing sentence, it attempts as comprehensively as possible to define the appropriate penal and deterrent response the law demands. The sentence is as good as the extent to which it approximates this ideal of a perfect balance of all factors. Having performed this function as conscientiously as possible, the court then proceeds to consider an appropriate forfeiture or confiscation order. The troubling phenomenon arises to the extent that this second exercise repeats the penal or deterring function of the sentence. By definition, to the extent that the sentence was complete, appropriate and sufficient, augmenting it heaps something inappropriately excessive upon the appropriate sentence.

Hence, whenever forfeiture is at issue, particularly when it follows upon a properly imposed sentence, it is critical to examine the extent to which one is dealing with something that is penal in nature, or something that, although it may seem penal, or have penal effects, must properly and legitimately be regarded as non-penal and as appropriately addressing non-penal interests and purposes.

The main reason for being concerned with the extent to which one is dealing with a penal phenomenon would be concern with the extent to which the fair trial protections that govern the exercise of criminal penal powers may be circumvented. Fair trial protections tend overwhelmingly to protect, not so much against dubious convictions, as against the punishments that flow from dubious convictions, as “doubt about guilt is immediately translatable into doubt about the justice of punishment”.<sup>127</sup>

In *Shaik*, what was at issue was a confiscation order imposed after sentence in terms of Chapter 5 of the Prevention of Organised Crime Act 121 of 1998 (“POCA”). This kind of order must be contrasted with a civil forfeiture of the proceeds of crime under Chapter 6 of POCA, where a criminal conviction is not relevant to the order, or the forfeiture of an “instrumentality of the offence” under that Chapter. As the Court pointed out,<sup>128</sup> these latter kinds of orders were considered in the decisions in *Prophet*<sup>129</sup> and *Mohunram*.<sup>130</sup> *Shaik* was the first case where a confiscation order following upon conviction came before the Court.<sup>131</sup>

The extent to which the order should be regarded as penal was, or should have been, central to the jurisprudential questions raised by the case. This was because of the double counting of the benefit that appeared to be involved in the determination of the extent of the order, and possible justifications for such double counting. The potential objection that such double-counting was penal could be met if the

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<sup>127</sup> AAS Zuckerman *The Principles of Criminal Evidence* (1989), 129.

<sup>128</sup> *Shaik* par. [16].

<sup>129</sup> *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC).

<sup>130</sup> *Mohunram & Another v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC).

<sup>131</sup> *Shaik* par. [50].

phenomenon of confiscation were acknowledged as being penal, and if this were constitutionally permissible. The State argued that punishment was one of the purposes of Chapter 5.<sup>132</sup> The Court more or less disagreed. For a unanimous Court, O’Regan ADCJ held:

“Upon a proper construction of the Act, I am not persuaded that a primary purpose of Ch 5 is the punishment of offenders. Its primary purpose seems rather to be to ensure that criminals cannot enjoy the fruits of their crimes. It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive.”<sup>133</sup>

In the analysis of the appropriateness of the order at issue, this question of the extent to which there was a penal purpose or a penal effect played no further part. English case law that was unperturbed by the penal effect of certain confiscation orders,<sup>134</sup> or acknowledged the purposes of confiscation orders to include “to punish offenders”,<sup>135</sup> and Strasbourg law to the effect that Article 6 of the European Convention on Human Rights (the fair trial right) did not apply to such procedures,<sup>136</sup> were left sidelined as unhelpful for a consideration of the South African legislation and constitutional issues, because of differing texts.<sup>137</sup>

What remained was a general invocation of the seriousness of the crime of corruption and its close links to the sphere of organised crime as the basis for declining to interfere on appeal with what was interpreted as being a confiscation of the full benefit received for the crime in question as the “appropriate” confiscation order in terms of POCA.<sup>138</sup>

It was not clear exactly what the Court was saying about the penal dimension, and what part, if any, what it was saying played in its reasoning. To the extent that the legitimate purpose of confiscation orders under Chapter 5 was to give effect to the principle enunciated in the ninth clause of the preamble and quoted by the Court as operative, namely to “ensure that no person can benefit from his or her wrongdoing”,<sup>139</sup> an interpretation of the benefit being confiscated would seek to avoid extending the confiscation beyond the actual extent of the enrichment of the wrongdoer, and would be alive to

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<sup>132</sup> Par. [53].

<sup>133</sup> Par. [57].

<sup>134</sup> *R v Smith (David)* [2002] 1 WLR 54; [2002] 1 All ER 366 (HL), par. 23, cited in *Shaik*, par. [55].

<sup>135</sup> *R v Rezvi* [2003] 1 AC 1099 (HL); [2002] 1 All ER 801 (HL).

<sup>136</sup> *Phillips v United Kingdom* [2001] Crim. L.R. 817 (ECHR).

<sup>137</sup> Pars. [56] and [61].

<sup>138</sup> Pars. [64] to [82].

<sup>139</sup> Par. [51].

the necessarily penal consequences of any such extension. To the extent that the exercise was penal, and part of the sentencing function of the court, two consequences would follow: (1) double counting would not be anathema, and (2) an assessment would be required of the extent to which fair trial rights might be circumvented or undermined in the sentencing exercise under the guise of a separate civil process.

The State was alive to the first consequence, and relied on authority accepting the purpose as at least partly penal, to deal with the complaint of double counting. The second consequence was lamentably absent from the consideration, save for reference to the finding of the European Court of Human Rights in *Phillips*<sup>140</sup> to the effect that the presumption of innocence captured in section 6(2) of the European Convention of Human Rights did not apply to the confiscation proceedings, and the expression of a disinclination to consider this jurisprudence as helpful, referred to above.

It may be noted that the basis for the finding in *Phillips* was that confiscation proceedings formed an integral part of the sentencing process, and that the sentencing process itself did not trigger Article 6 fair trial rights. In our constitutional jurisprudence, however, it has been authoritatively determined that section 35 fair trial rights apply also to the sentencing stage of the criminal process.<sup>141</sup> The *Shaik* Court recognised the very close connection between the sentencing exercise and the confiscation exercise in Chapter 5, in its approach to the proper test on appeal:

“In my view, given the close connection between the criminal conviction and the confiscation order, it is apt that the discretion conferred upon the sentencing court by s 18 be considered for the purposes of appellate jurisdiction in the same light as the imposition of sentence.”<sup>142</sup>

Furthermore, in the context of Chapter 6 forfeiture orders, the Constitutional Court has itself recognised the dangerous potential for forfeiture orders to intrude upon the penal function of the sentencing process, and illegitimately to amount to double punishment. The majority in *Mohunram*, in regarding the forfeiture of gambling premises as an “instrumentality of the offence” as disproportionate, based its finding squarely on a repudiation of a penal approach to forfeiture:

“Civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections, particularly those against arbitrary and excessive punishment and against arbitrary deprivation of property”<sup>143</sup>

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<sup>140</sup> *Phillips v United Kingdom* [2001] Crim. L.R. 817 (ECHR).

<sup>141</sup> *S v Dzukuda & Others; S v Tshilo* 2000 (4) SA 1078 (CC), pars. [12], [20], [25] and [40]; *Sibiya & Others v Director of Public Prosecutions, Johannesburg & Others* 2005 (5) SA 315 (CC), par. [35].

<sup>142</sup> Par. [67].

<sup>143</sup> *Mohunram & Another v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), par. [120].

...

“In *Mohamed*<sup>144</sup> this Court with reference to various international instruments, made the point that it is now widely accepted in the international community that the purpose of civil forfeiture is to remove the incentive for crime, not to punish the offender.”<sup>145</sup>

...

“What legitimate purpose other than additional punishment will the forfeiture serve?”<sup>146</sup>

Van Heerden AJ, for the minority in *Mohunram*, said the following:

“There is no justification for resorting to the remedy of civil forfeiture under POCA as a substitute for the effective and resolute enforcement of ordinary criminal remedies”.<sup>147</sup>

Van Heerden AJ also quoted the following from the Supreme Court of Appeal in *Van Staden*<sup>148</sup> with approval:

“To avoid an order for forfeiture in such cases being arbitrary, and not unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function.”<sup>149</sup>

Whether and to what extent forfeitures operate with penal effect entails direct consequences for the implication of fair trial rights such as the right not to be tried (and hence punished) twice for the same offence, entrenched in section 35(3)(m).<sup>150</sup> We have seen that our Constitutional Court has accepted

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<sup>144</sup> *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC).

<sup>145</sup> *Mohunram* par. [133].

<sup>146</sup> *Mohunram* par. [135].

<sup>147</sup> *Mohunram* par. [72].

<sup>148</sup> *National Director of Public Prosecutions v Van Staden & Others* 2007 (1) SACR 338 (SCA), par. [8].

<sup>149</sup> *Mohunram* par. [73].

<sup>150</sup> See in this regard Frank Snyckers and Yolandi le Roux “Criminal Procedure” in Chaskalson et al *Constitutional Law of South Africa* [2<sup>nd</sup> Edition, Original Service], §51.5(n). The extent to which such forfeitures are penal, and accordingly implicate double jeopardy, has been a hotly contested issue in the United States: see, for example *Austin v United States* 509 US 602 (1993) and *United States v Ursery* 116 SCt 2135 (1996).

that fair trial rights are implicated at the sentencing stage, and has repudiated the legitimacy of a purely penal element in forfeiture cases. One would therefore have expected the Court in *Shaik* to have approached the question whether double counting was at issue, and if so, whether it ought to be countenanced, on a principled basis, informing its exercise of statutory construction by the extent to which the outcome was justifiable when informed by pure enrichment considerations, or was instead informed by penal concerns. Had it found the penal element necessarily implicated, it could still have regarded this as justifiable, but then only, it would seem, as a result of a limitations analysis under section 36. It declined, however, to approach the matter in this way.

The double counting issue arose in the following way. Companies of which Mr Shaik was the principal concluded a transaction, or negotiations towards a transaction, with companies that appeared set to profit as beneficiaries from The Arms Deal. These latter companies at some point threatened to cut Mr Shaik's companies out of the transaction. Mr Shaik procured the intervention of Mr Zuma by the payment of a bribe to ensure that this did not happen. Mr Zuma's intervention caused Mr Shaik's companies once again to be included in the transaction. At issue was the value of the shareholding held by Mr Shaik's companies (directly and indirectly) in the beneficiary entity (ADS). This shareholding interest, valued at over R21m, had been purchased for R7,464,000. The purchase price had been funded by an interest-bearing loan. The loan was paid by means of dividends declared by ADS in favour of Mr Shaik's shareholding company. Some R12,8m in dividends had been declared. All of this was used by Mr Shaik's company to pay off the loan to pay for the shares in ADS. The sentencing court had considered the full value of the shares as well as the full value of the dividends received as "benefits" received by Mr Shaik's companies (and Mr Shaik to the extent of his interest in those companies) as proceeds of the crime. The complaint was that the addition of the dividend amount to the shareholding amount amounted to unjustifiable double counting, and that the "benefit" had to be calculated with reference to the "nett" benefit, not the "gross" benefit.<sup>151</sup>

The maximum confiscation order authorised by the statute was the sum of all benefits "retained or derived" by the relevant defendant in connection with the unlawful activity.<sup>152</sup> Whether "benefit" or "proceeds" had to be regarded as "retained or derived" by considering them gross or nett was a question the Court appeared to beg in its consideration of the interpretation of the broad definitions employed in POCA.<sup>153</sup> Similarly, in considering whether the doubling was disturbingly disproportionate, the Court asked itself whether it should interfere with a finding that "all" of the benefits received be ordered confiscated – once again begging the question how one defined the benefits received or derived.<sup>154</sup>

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<sup>151</sup> Par. [32].

<sup>152</sup> Section 19(1), read with section 18(2) of POCA – see pars. [27] and [28].

<sup>153</sup> See par. [60].

<sup>154</sup> See pars. [80] to [82].

It would seem clear that, if one adopted an enrichment approach to the question, there could be little justification for the doubling. If one regarded the doubling as penal, and rightly so, as the State urged, the doubling would have made more sense. It is ironic that the term “confiscation order” is singularly inapposite as a description of an order sounding in money when it extends beyond the retained proceeds of crime. The Court considered that

“the mechanism of a civil judgment sounding in money may well have been selected by the legislature to avoid the difficulty of tracing particular assets which may have been the proceeds of crime and so to facilitate the recovery of the value of the proceeds.”<sup>155</sup>

This may be so. But there is a world of difference between a mechanism designed to address the metamorphosis of the benefits of crime into divergent proceeds making them difficult to trace, on the one hand, and a mechanism that is oblivious to the extent of enrichment, on the other.

The *Smith* decision in the House of Lords<sup>156</sup> upon which the State most heavily relied was remarkable for the degree to which it adopted an undeniably penal approach to this issue. A smuggler of cigarettes was apprehended and his boat confiscated. This smuggler then funded the acquisition by S of a boat to be used for smuggling purposes. S attempted to evade customs duty of some £130,000 by smuggling a huge consignment of cigarettes in his newly acquired boat. It did not work; he got caught. The boat and the cigarettes were confiscated by customs. S remained liable to pay the customs duty on the confiscated cigarettes. The confiscation order encompassed both the value of the boat and that of the customs duty that S attempted to evade (although the amount ordered was limited to the realisable assets of S, considerably less than the aggregate in question). The Court of Appeal held that, as the cigarettes had been confiscated, S had not had any benefit of evading the customs duty at all. The House of Lords had little difficulty in regarding the “evaded” customs duty as a benefit that S had in fact derived from the crime (despite his remaining at all times liable for the customs duty!)

Although the Court in *Shaik* declined to employ *Smith* as precedent, it made the valid point that such case law was “instructive at least to the extent that it [made] plain that the legislation here under consideration [had] a counterpart in another open democracy”.<sup>157</sup> It may well also have found comfort in the fact that it was difficult to conceive of a more draconian and more penal implementation of the assessment of the “benefit derived” from crime than that employed by the House of Lords in *Smith*. But even the *Smith* principle, that the subsequent fate of a benefit received from crime (i.e. its destruction or loss) did not render it immune from forming the basis for a confiscation order in the same amount,<sup>158</sup> was distinguishable in the instant case.

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<sup>155</sup> Par. [24].

<sup>156</sup> *R v Smith (David)* [2002] 1 WLR 54; [2002] 1 All ER 366 (HL).

<sup>157</sup> Par. [56].

<sup>158</sup> See the passage quoted in par. [55].

In the instant case, the question was what amount Mr Shaik's companies could be said to have received as a benefit in connection with the crime. They received the opportunity to purchase the shareholding at a considerable discount (on the assumption that they added no value at all to the transaction apart from the procurement of the bribes making it more likely that ADS would benefit from The Arms Deal).<sup>159</sup> They also paid nothing themselves for the funds employed as the purchase price, as these were funded entirely through the dividends received out of the very shareholding in question. But at no stage did they, in any meaningful sense, "receive or derive" the benefit of the dividends in addition to the value of the shareholding. Their receipt of the shareholding was always entirely dependent upon their employment of the dividends for the purposes of purchasing the shares. They could never, even if they had not been caught, had the benefit of both. In this regard, their position differed from that of a criminal who had the benefit of his crime, but then lost it later. One may postulate analogous scenarios – assume money to be received as proceeds of crime passed in and out of various accounts in various guises, even several times through the same account, in order to effect a complicated payment mechanism. Would it not be arbitrary and purely penal to regard every movement of the same amount into the same account in such a "pass the parcel" scheme as an aggregation augmenting the amount of the money in question? What if a valuable item were carried, now by A, then by B, then by A again, then by B again, ultimately to end up in the hands of A as the proceeds of crime – would it not be absurdly penal to count the number of times each "received" the item from the other and to multiply the value of the item by this number as the "benefit" retained or derived by each? Unfortunately, *Shaik* does not provide a clear answer to this question. To the extent that it suggests one, it simultaneously suggests such an aggregation might well occur, and offers no comfort that fair trial rights may be employed to counter any obviously penal element entailed by such multiplication.

## **Zealand**

Z was charged with rape, murder and assault in 1997. His case was postponed on a few occasions, until he escaped. At large, he allegedly committed another murder. For this, he was tried, convicted and sentenced. As a result, he found himself in maximum security in St Alban's prison. However, his conviction and sentence were set aside on appeal on 23 August 1999. The court registrar failed to inform the prison of this. Z remained in maximum security when dragged in and out of court in relation

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<sup>159</sup> For a South African citizen, one of the most disturbing elements in the judgment was the identification of the value that Mr Shaik's involvement was seen as entailing for the beneficiary. The Court referred to the explanation offered in the evidence before the High Court in the following way in footnote 31:

"As the High Court noted:

'Mr Moynot, with charming Gallic candour, said that it was standard practice in the armaments industry to cultivate the services of such people, although the rumours or information they provided always needed careful assessment for their reliability. Moreover, he said, notwithstanding the existence of apparently impartial institutions like tender boards, the ultimate choice in competitions of this sort was always made at a political level.'

to the first (1997) charge. Had the prison been made aware of his successful appeal in relation to the second case, he would have been moved to medium security to await trial on the first charge. The first charge was withdrawn on 1 July 2004. Z remained in prison for six more months, until December 2004, when he was released. On the rare occasions that we do manage to catch and convict them, it seems, we just cannot let them go.

Z instituted an action in delict for unlawful detention. It was common cause that his detention between July and December 2004 had been unlawful. The question for separate determination that went on appeal to the Supreme Court of Appeal and then to the Constitutional Court was whether for any period between 23 August 1999 and 30 June 2004 he had been unlawfully detained, and if so, for which period.

Between 23 August 1999, when the appeal against the conviction and sentence in the second case was successful, and 11 October 2001, Z had been remanded in custody on several occasions. Because of the ignorance of success of his appeal on the part of the courts remanding him in custody, he was remanded to maximum security, instead of to medium security. On 11 October 2001, he was ordered to be released on warning. This was, however, not carried out. Subsequently, on 29 October 2001, and until his release, he was again remanded in custody, to maximum security.

The majority of the Supreme Court of Appeal held the detention between 23 August 1999 and 1 July 2004 to have been lawful, but that after 11 October 2001 to have been unlawful.<sup>160</sup>

For the majority of the Supreme Court of Appeal, the error ignoring the status of the prisoner between 23 August 1999 and 11 October 2001 did not affect the lawfulness of his detention, whereas the error ignoring the order for the release of the prisoner after 11 October 2001 did affect the lawfulness of his detention. The reason for the former proposition was the following:

“A decision by a court to remand an accused person in custody results in lawful detention of that person. Such a decision needs to be set aside before lawful detention in terms thereof ceases.”<sup>161</sup>

The reason why the former proposition did not make the latter proposition untenable was not stated. The remand in custody on 29 October 2001, which followed upon the release on warning, did not lawfully cancel the release on warning; it appeared oblivious to such release.<sup>162</sup> That might well have been so. But it was by no means clear why a court dealing with a delictual action was bound to recognise the court orders based on error up to 11 October 2001, but could ignore those based on error

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<sup>160</sup> *Minister of Justice and Constitutional Development & Another v Zealand* 2007 (2) SACR 401 (SCA), pars. [17] to [22].

<sup>161</sup> *Zealand* SCA par. [17].

<sup>162</sup> SCA pars. [13] to [15]. The state unsuccessfully argued that the release on warning had been, and must be regarded as having been, a mistake.

thereafter. The doctrine of collateral challenge appeared at least arguably equally applicable to both situations.<sup>163</sup>

For the majority of the Supreme Court of Appeal, the difference between medium and maximum security, whether as to conditions of detention or as to location of detention, could not transform a lawful court-ordered detention into an unlawful detention for the purposes of determining the question reserved for separate determination. This was not to say that Z did not enjoy some remedy for having been thus detained; it simply was not correct to say he had been unlawfully detained during this period.<sup>164</sup> The minority avoided the problem entailed by the reserved question essentially by redefining the question reserved for determination as a function of interpreting the real cause of action in delict:

“The illegality in his continuing confinement as a sentenced prisoner is undoubted. It follows that an action must lie against those who caused him to be subjected to that treatment. This is precisely the basis of his claim. It is not a claim for unlawful imprisonment, or deprivation of all liberty, within the context of the *action iniuriarum*. One is not concerned with the validity of the remand orders and one is not concerned with whether the respondent should have awaited trial in the regional-court case in custody, on bail or on warning. That question might arise were the claim to be amended. What is alleged, and is apparent from the agreed facts, is that negligence on the part of the Registrar of the High Court resulted in certain injurious consequences amounting, in sum, to his continued wrongful detention as a sentenced prisoner.”<sup>165</sup>

How did the Constitutional Court deal with the problem of collateral challenge and the fact that there had at no stage been any challenge to the court orders remanding Z in custody? It ignored the problem.

The decision of the Court is important for the jurisprudence of section 12. It established, with reference to a set of facts amenable to classroom dissection, that violating one’s right not to be deprived of freedom might be a matter of degree, or, put differently, that adding an unjustifiable burden upon liberty to what would otherwise be a lawful burden was itself a violation of section 12, despite the fact that one was not dealing with a situation where any degree of deprivation of liberty would be a violation.

In the process of establishing this important principle, however, the Court failed to address the problem of collateral challenge. It mentioned the argument, that the lawfulness of the detention of Z was founded in a series of court orders, three times.<sup>166</sup> It dealt with the argument, however, merely by

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<sup>163</sup> See the comprehensive treatment of the topic in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) and *V & A Waterfront Properties (Pty) Ltd & Another v Helicopter & Marine Services (Pty) Ltd & Others* 2006 (1) SA 252 (SCA), in particular at par. [10].

<sup>164</sup> SCA par. [19].

<sup>165</sup> SCA par. [28], Ponnar JA (Howie P concurring).

<sup>166</sup> Par. [20]; par. [35]; par. [42].

invoking the defects in the court orders with respect to the extent to which these failed to respect the right enshrined in section 12.<sup>167</sup> In this way, the Court did not distinguish the question of the correctness of the court orders from the very different institutional question of the appropriate manner, procedure and forum of taking issue with such correctness. This meant that potentially important questions such as why Z had failed to challenge any of his remands, when he first became aware of the success of his appeal or the fact of his release on warning, and so on, would be left unaddressed while the court orders issued in the context of the criminal trial were ultimately overturned in an appeal relating to the framing of a cause of action in delict.

There can be little question that *Zealand* can fairly be hailed as a victory for rights vindication. But the victory did seem to come at the cost of doctrinal rigour, and perhaps of institutional integrity in the relationship between orders made by criminal trial courts, and orders made by other courts in other processes taking issue with what happened as a result of the orders of the criminal trial courts.

As discussed above, Ngcobo J for the minority of the Court was alive to the collateral challenge question in *Zuma*, where he regarded the problem as *prima facie* creating an absolute obstacle. In *Thint Holdings* and in *Zealand* the Court seemed quite critically to gloss over the problem.

When the Court assumes jurisdiction in circumstances where it is arguably straddling the *Boesak* divide, one may fairly say it is important that it be clear on such foundational questions of institutional comity and jurisdiction as are entailed by the doctrine of collateral challenge. Its treatment of such questions in the sphere of the criminal process in the year under review raised more questions than were answered.

## Conclusion

The cases under review all in one way or another manifested an aversion for “Justice in theory” in favour of “Justice in fact”.<sup>168</sup> The jurist would find, in each of the cases under review, one or other opportunity to address and decide a matter on some or other doctrinal basis avoided or declined. The result, apart from the missed opportunity to discuss doctrinal issues, is an attenuation of the extent to which the judgments lay down rules and principles for the textbook and guiding lights for the trial or appellate lawyer.<sup>169</sup> An aversion to doctrine may occasionally redound to the benefit of the accused person, as it

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<sup>167</sup> Pars. [43] to [45].

<sup>168</sup> See the discussion of the State argument in *Zuma* par. [62].

<sup>169</sup> It is also the case that, when one needs to find the principle by the exercise of some degree of technical sophistication that is fundamentally contentious, the opportunity has also been missed to speak plainly to the citizenry when rules are being made. As Tshepo Madlingozi put it in the last issue of this journal:

“Thinly reasoned’ judgments that require the reader to enter into a highly sophisticated and technical reconstruction of a judgment — some would say a *sangoma*-like exercise — do not advance

did when the *Zealand* Court declined to confront the doctrine of collateral challenge directly, in a way that, if it had, would have had uncomfortable implications for the violation of rights the Court was anxious to see adequately addressed. But, by and large, such an aversion in the criminal process is no friend of the accused. In the criminal justice system, the call of the general tends to be rung with the bells of liberty. The call of the particular tends to sound in the clang of the prison gate.

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the cause of ensuring that ordinary people are part of the ‘principled’  
— or at least transparent — constitutional dialogue to which the Court  
is ostensibly committed.”

(“The Constitutional Court, court watchers and the commons: a reply to Professor Michelman on constitutional dialogue, “interpretive charity” and the citizenry as *sangomas*’, 2008 CCR 63, at 69).