IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

SIGNATURE DATE: 7 March 2023

Case No. 19139/14

In the matter between:

MTN (PTY) LTD Applicant

and

ROBERT MMBULAHENI MADZONGA First Respondent

NOZUKO NXUSANI Second Respondent

NOZUKO NXUSANI INCORPORATED Third Respondent

Summary

Constitutional law – right against self-incrimination in section 35 (3) (j) of the Constitution, 1996 – a party to a civil action is entitled to refuse to discover material that may tend to incriminate them in parallel criminal proceedings arising from the same facts.

JUDGMENT

WILSON J:

1 The applicant, MTN, seeks to compel discovery of a range of documents relating to its action on a case of fraud against the respondents. The second and third respondents oppose the application. The second respondent, Ms. Nxusani, is an attorney. Ms. Nxusani is the sole director of her own firm, which is cited as the third respondent.

The fraud alleged and the disclosures sought

2 The first respondent, Mr. Madzonga, was an employee of MTN. In the main action, MTN alleges that Ms. Nxusani conspired with Mr. Madzonga to issue instructions for work that MTN did not need, and which was never performed, or which carried no value. Ms. Nxusani would then present invoices for the work that Mr. Madzonga accepted and on which he authorised payment. As a result of a series of these sham instructions, Ms. Nxusani's firm was paid over R12 million. MTN alleges that both Mr. Madzonga and Ms. Nxusani knew that the work remunerated was not done or was not needed, and that the need for the work was itself a contrivance designed to defraud MTN of the money paid over to Ms. Nxusani's firm.

3 MTN now seeks to compel discovery of the second and third respondents' financial records to assist it in proving its case. The scope of the disclosure MTN seeks is quite broad, but it is not necessary for me to deal with the nature of the documents sought in any detail. They are, in the main, the third respondent's accounts, ledgers, Value Added Tax returns and audited

financial statements covering the period during which MTN says that the fraud took place.

4 Ms. Nxusani resists the application on two bases. The first is that the documents sought are not relevant to the issues in the main action. That proposition need only be stated to be rejected. The documents are plainly relevant to MTN's case. In any event MTN need prove only that they might be relevant. MTN has clearly crossed that threshold.

5 The relevance of the documents MTN seeks is confirmed by the second basis on which Ms. Nxusani resists the application. Ms. Nxusani says that the documents may, if disclosed, tend to incriminate her and her firm in parallel criminal proceedings arising from the same facts underlying MTN's cause of action in this case. I was informed from the bar that Ms. Nxusani recently appeared in the criminal division of this court on those charges. Ms. Roestorf, who appeared for the second and third respondents before me, presented the attempt to compel discovery in these civil proceedings, which have been rumbling on since 2014, and have only recently been renewed by MTN, as an attempt to procure evidence for the State in the criminal proceedings.

6 I cannot say whether that is the motive force behind this application. But the fact that there are parallel criminal and civil proceedings being pursued simultaneously against Ms. Nxusani and her firm based on fundamentally the same accusation of fraud is critical to any evaluation of whether they have a right to withhold disclosure of potentially incriminating documents in the civil action. That is the question to which I now turn.

The privilege against self-incrimination in the context of civil proceedings to compel discovery

7 Counsel were unable to direct me to any domestic authority which finally decides the question of whether a party may resist a claim for discovery in civil proceedings by relying on the potentially incriminating nature of the documents sought to be disclosed.

8 In *Adams v Moffat Hutchins & Co* 1906 SC 343, it was said *obiter* that a party could "as of right" resist discovery of documents that are "criminatory or penal" (see page 346). That position was restated in *Mlama v Marine and Trade Insurance Company* 1978 (1) SA 401 (E) at page 402, and again in *Mazele v Minister of Law and Order* 1994 (3) 380 (E) at page 386. But it does not seem that these courts were concerned squarely with the question of whether the privilege against self-incrimination grounds a valid objection to discovery in civil proceedings.

9 When the pre-constitutional courts actually attended to the question of the extent of the privilege against self-incrimination, the approach appears to have been that the privilege attaches only to testimonial utterances. The distinction between testimonial utterances and evidence generated through other means has long been relied upon to suggest that there is in fact no privilege against self-incrimination where a party is sought to be compelled to co-operate in the production of real, as opposed to testimonial, evidence.

10 In *Ex Parte Minister of Justice: In re Matamba* 1941 AD 75, Watermeyer JA held that the taking of a palm print from an accused person does not compel that person to produce self-incriminating evidence because the accused

person concerned is “entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is being put upon an identification parade or when he is being made to show a scar in Court” (see pages 82 and 83).

11 I have some doubts about whether an accused person in this position is really as passive as Watermeyer JA suggested, but there is obviously a distinction to be drawn between an accused person being forced to make incriminating statements, and compelling an accused person to participate in the production or disclosure of other forms of potentially incriminating evidence. In *Levack v Regional Magistrate, Wynberg* [2003] 1 All SA 22 (SCA) (“*Levack*”), Cameron JA confirmed that the privilege against self-incrimination does not extend to the taking of “autoptic” evidence – that is “evidence derived from the accused’s own bodily features” (paragraphs 19 and 26).

12 The question before me, however, is how far, if at all, the privilege against self-incrimination extends beyond precluding compulsion of testimony, into the terrain of forcing an accused person to disclose, or help generate, documentary evidence that might incriminate them.

13 *Herbstein and van Winsen* are firmly of the view that a person who is ordered to produce documents is not thereby compelled to incriminate themselves. They support the position that “[a] party ordered to disclose documents is merely required to confirm that he or she has complied with the order in the sense that he or she has disclosed the existence of all

relevant documents in his or her possession and control. Such party is required to say nothing about the authenticity of the documents or their truth" (Adrian Zuckerman, quoted with approval in Herbstein and van Winsen *The Civil Practice of the High Courts of South Africa* (5 ed) vol 1 p 809).

14 It was this position – that the privilege against self-incrimination extends only to testimonial utterances and not to compelled documentary disclosure – that Mr. Martin, who appeared for MTN, pressed in moving for the relief MTN now seeks.

15 In the UK, however, the approach has been somewhat different. In *Rank Film Distributors*, Lord Fraser observed that, even if an undertaking were given, or a rule laid down, that incriminating material discovered in a civil action could only be used for the purposes of that action, the problem remains that "if the incriminating information given on discovery or in answer to interrogatories were disclosed subsequently in open court in the civil action, it might be heard and might then be used in a criminal prosecution against the defendant" (*Rank Film Distributors Limited v Video Information Centre* [1981] All ER 76 at 84). Substantially for that reason, the House of Lords held that the privilege against self-incrimination entitles a party to refuse to comply with an Anton Piller order. *Rank Film Distributors* was followed in *Dabelstein v Hildebrandt* 1996 (3) SA 42 (C), where Farlam J held that a party could refuse to point out and disclose documents under an Anton Piller order where there is "a real and appreciable risk of criminal proceedings being taken against" them (see page 66E-F).

16 An even more generous approach is suggested in *Erasmus*, where the authors state flatly that "[a] party is not obliged to discover a document which will tend to incriminate him or expose him to the risk of any kind of penalty or forfeiture" (Erasmus, *Superior Court Practice*, RS 16, 2021, D1-462A). Lord Fraser's observation in *Rank Film Distributions* appeared to be limited to situations in which it was at least possible that criminal proceedings might follow the civil action at issue. However, the authors of *Erasmus* state their position as if it were an absolute rule to be applied in any civil action, whether or not there are parallel or possible future criminal proceedings.

17 The position stated in Erasmus is said to be derived, in part, from section 14 of the Civil Proceedings and Evidence Act 25 of 1965 ("the CPEA"), which provides that "[a] witness may not refuse to answer a question relevant to the issue, the answering of which has no tendency to incriminate himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit". But it is clear from the text of the CPEA that the section 14 privilege extends only to a refusal to answer questions. The CPEA is not authority for the proposition that the privilege extends beyond testimonial utterances. It is in fact more consistent with the narrower construction of the privilege preferred in *Herbstein and van Winsen*.

Section 35 (3) (j) of the Constitution, 1996

18 As illuminating as these authorities are, the question before me must be decided, not on any common law or statutory test, but on an interpretation of

section 35 (3) (j) of the Constitution, 1996. In South Africa, the privilege against self-incrimination is not merely a common law principle. It is an entrenched constitutional right. Section 35 (3) (j) of the Constitution provides that "[E]very accused person has a right to a fair trial, which includes the right . . . not to be compelled to give self-incriminating evidence".

19 None of the positions stated in the authorities I have reviewed map neatly on to this text.

20 The first thing to note about section 35 (3) (j) is that it applies only to "accused persons". It was accepted before me that Ms. Nxusani and her firm are "accused persons" – their trial is pending – so I need not consider the difficult question of whether, as *Erasmus* appears to suggest, the right against self-incrimination applies even where a person who has not been "accused" of anything is called upon to discover in civil proceedings.

21 The second noteworthy feature of section 35 (3) (j) is that it excludes a compulsion "to give self-incriminating evidence". On the face of the text, "to give self-incriminating evidence" is not obviously restricted to a situation in which an accused person is forced into the witness box, or is compelled to answer interrogatories, which is the restriction argued for in *Herbstein and van Winsen*. Even though "giving evidence" is the shorthand often used to describe a witness getting into the box, the plain textual meaning of the words "give self-incriminating evidence" is co-terminus with the words "disclose incriminating material".

22 Whether section 35 (3) (j) extends further than testimonial utterances is an issue that must be resolved through interpretation. It is well-established that

rights in the Bill of Rights must be interpreted generously and purposively in their textual setting, and in the context created by the history of their denial to the vast majority of South Africans (see *S v Makwanyane* 1995 (3) SA 391 (CC), paragraph 9 and *Government of the Republic of South Africa* 2001 (1) SA 46 (CC), paragraphs 21 to 25).

23 I can find little warrant in these principles of interpretation to restrict the meaning of section 35 (3) (j) to testimonial utterances made by an accused person. As I have already pointed out, the text of the provision is not necessarily restricted to them. To narrow the application of 35 (3) (j) to testimonial utterances would be inconsistent with the generous construction I am enjoined to place on the provision. It would also undercut the purpose of the provision evaluated in historical context.

24 I need not rehearse here the long history of the abuse of police powers that marks our shameful past. Torture, extrajudicial executions, unjust detention, fabrication of evidence and compulsion of perjured testimony were critical means of enforcing Apartheid's perverse and evil superstructure. Although there is no suggestion of an abuse of police powers in this case, the only way to put that history of abuse behind us is to commit to a generous system of protections for all arrested and accused persons. The starting point must always be that an arrested or accused person is not required to assist in their own prosecution (see *S v Mathebula* 1997 SACR 10 (W) at page 19F-H). There may be exceptions to that starting position carved out by statute over time. It seems plain that the Supreme Court of Appeal held in *Levack* that statues that authorise the taking of autoptic evidence (for example

sections 36A to 37 of the Criminal Procedure Act 51 of 1977) constitute one such exception. Whatever the other exceptions are, they will always have to be reasonable, justifiable and consistent with the values to which the Constitution is meant to give effect (see section 36 of the Constitution). But exceptions they must remain.

25 There is presently no statutory limitation on the right against self-incrimination that applies in the context of civil discovery proceedings. Section 14 of the CPEA prevents a witness in a civil action from refusing to answer a question where the answer might expose them to civil liability, but it re-affirms the right not to be compelled to give self-incriminating evidence in the context of a civil trial. It has nothing to say about the discovery process.

26 In the absence of an express statutory limitation on the right against self-incrimination in this context, I do not think that I can allow MTN in this case to secure by means of civil discovery proceedings evidence that may clearly tend to incriminate the second and third respondents if it is produced in the criminal proceedings currently pending against them. That would be at odds with the fundaments of section 35. Whether or not MTN would ultimately pass any incriminating material on to the State in the pending prosecution is not the point. The mere fact that this is possible, and that there is no obvious legal impediment to the material being admitted in the criminal proceedings, is enough to uphold the second and third respondents' objection to disclosure on grounds of self-incrimination.

27 To be clear, I hold only that it is a valid objection to making discovery in civil proceedings that a party honestly believes the material sought to be discovered may incriminate them in parallel criminal proceedings arising from the same facts. I say nothing about whether the objection would still be good if there were no criminal proceedings pending, or if those proceedings have nothing to do with the civil action in which discovery is sought. Those cases await future determination. Nor does this judgment have anything to say about the application of the right against self-incrimination to disclosures that may have been, or may in future be, demanded of Ms. Nxusani by the Legal Practice Council in its disciplinary capacity.

28 It follows for all of these reasons that the second and third respondents' objection to discovering the documents the applicant seeks to compel must be upheld, and that the application to compel discovery must be dismissed.

29 Accordingly, the application is dismissed with costs.

S D J WILSON
Judge of the High Court

HEARD ON:	26 January 2023
DECIDED ON:	7 March 2023
For the Applicant:	HWS Martin Instructed by Knowles Hussain Lindsay
For the Second and Third Respondents:	AC Roestorf (Heads of argument drawn by J Peter SC) Instructed by Tomlinson Mnguni Attorneys