REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURT
DURBAN **CASE NO. 4293/07**

In the matter between

WYEBANK FUNERAL SERVICES CC	1st	Applicant
DHANAPALAN REDDY	2nd	Applicant
LOGANATHAN REDDY	3rd	Applicant
RAJAGOPAUL REDDY	4th	Applicant

and

THE MINISTER OF THE TRADE AND THE INDUSTRY	1st	Respondent
THE DIRECTOR OF THE PUBLIC PROSECUTIONS KZN	2nd	Respondent
INTERNATIONAL TRADE ADMINISTRATION COMMISSION	3rd	Respondent

JUDGMENT

Delivered on: 27 March 2009.

WALLIS J.

[1] This application arises out of the importation into South Africa of ten second-hand motor vehicles on various dates between 12 December 1996 and 30 August 1999. According to the charge sheet in a prosecution brought against the applicants in the Commercial Crime Court in Durban the vehicles were imported on the basis that they were infant hearses. Import permits were granted by the Department of Trade and Industry permitting such importation subject to the condition that the hearses could only be used for the purpose they were designed for and would not be converted or dismantled for the purpose of any other function nor offered, advertised, lent, hired, leased, pledged, given away,

exchanged, sold or otherwise disposed of within a period of two years from the date of entry into South Africa. The essential case advanced by the prosecuting authorities appears to be that eight of the hearses had undergone a minor modification to make them functional for the purpose of carrying an infant's coffin and could easily be restored to their ordinary purpose as limousine motor vehicles designed for the conveyance of passengers. It is alleged that three of the vehicles were in fact leased to third parties for the purpose of being used for the conveyance of passengers for reward.

[2] The charge sheet against the accused contains twenty-four charges. Counts 1 to 10 allege that the motor vehicles were unlawfully imported into South Africa in contravention of the provisions of section 6(1)(b) of the International Trade Act 71 of 2002, read with paragraphs 1(a) and (b) of Government Notice No.25873 published in Government Gazette No.7861 on 2 January 2004, as amended, in that it is said that they were imported "without the requisite import permit". A reference to the preamble to the charge sheet reveals that the prosecution's allegation is not that no permits were obtained. It is that the permits that were obtained in respect of the importation of these vehicles were invalid because they had been secured in consequence of misrepresentations made on behalf of the applicants by a Mr Bijnath, who acted as the clearing agent on their behalf. Although not expressly couched in the alternative to counts 1 to 10, counts 15 to 24 charge the accused with the crime of fraud on the basis of the misrepresentations said to have been made to procure the issue of import permits in respect of the vehicles. It is difficult to see how these can be anything other than alternative to counts 1 to 10 as otherwise there would be an improper splitting or duplication of charges. Sandwiched between these counts are four counts alleging that four of the imported vehicles were either disposed of or used for purposes other than those permitted under the import permits. These charges presuppose the validity of the permits.

[3] It will immediately be apparent from the dates upon which the motor vehicles were allegedly imported into South Africa that there is a difficulty with these charges insofar as they are based upon the provisions of the International Trade Act 71 of 2002, as read with Government Notice 25873, published on 2 January

2004, in that neither the Act nor the Notice existed at the time the motor vehicles were imported into this country. This difficulty is addressed in the founding affidavit where it is said that the importation of the vehicles and the issue of the permits governing that importation took place in terms of the provisions of the Import and Export Control Act 45 of 1963 and Government Notice R2582 published in the Government Gazette No.4299 dated 23 December 1988. It is further said that the provisions of the earlier Act are broadly similar to those of the 2002 Act as were the terms of the relevant Notice. On that basis it is alleged that the applicants have been advised that the prosecution would ordinarily be entitled to amend the references to the relevant legislation during the course of the trial, provided no prejudice is occasioned to the applicants. Apparently the prosecutor has intimated that she will apply for an amendment. However, no such application for such amendment has as yet been made and until such an application is made it is difficult to make any assessment of whether the applicants will be prejudiced thereby.

[4] Apart from drawing attention in the affidavit to certain other technical problems with the charge sheet, all that I am told about the criminal proceedings is that the charges were put to the applicants on 30 January 2007 and they pleaded not guilty. Thereafter an application was brought for a stay of the prosecution to enable the applicants to bring proceedings in the High Court :

> "… to challenge the constitutional validity of the legislation relevant to the charges on which convictions are or may be sought."

That application was granted by the magistrate and these proceedings are the result. In them the applicants seek an order declaring that "section 2(b) and/or section 4(1)(a) of the Import and Export Control Act 45 of 1963" alternatively "section 6(1)(b) and/or section 54(1)(a) of the International Trade Administration Act 71 of 2002" are inconsistent with the Constitution, invalid and of no force and effect.

[5] It was expressly stated in the founding affidavit that the constitutional attack is primarily directed at the provisions of the 1963 Act and that the attack on the 2002 statute is conditional on the court finding that the statutory offences

provided for in the 2002 Act are retrospective. However, in the heads of argument delivered on behalf of the applicants it was said :

> "It may well be that the attack on the 1963 Act in the application was misdirected.
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> (a) It is hard to see how a prosecutor could amend the charge so as to frame it under a repealed Act;
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> (b) Since all regulations (including prohibitions thereunder) previously made are expressly re-affirmed under the new Act, the proper focus may be the impugned sections of the 2002 Act only."

[6] It is unclear from whence this uncertainty sprang. At the time of the commission of the alleged offences it was the 1963 Act and the Government Notice issued under that Act that regulated the importation of second-hand goods into South Africa. Accordingly it was only under that statute, as read with that Notice, that the accused could have been guilty of criminal conduct in relation to the importation of these vehicles. The subsequent repeal of the 1963 Act is not relevant to that issue as, unless the contrary intention appears from the repealing statute, in terms of section 12(2)(d) of the Interpretation Act 33 of 1957 the repeal of a law does not :

> "affect any penalty, forfeiture of punishment incurred in respect of any offence committed against any law so repealed."

Thus the repeal of a statute imposing criminal liability would not ordinarily have the result of discharging that criminal liability. Nor will any prosecution need to place reliance on subsequent legislation. The reason, as explained by Steyn JA in *R v Mazibuko*[1], is that liability for the penalty arises when the offence is committed, not at the later stage when the accused is tried and convicted. The effect of section 12(2)(d) is to keep alive the penal provisions of the repealed Act.[2] When this was debated with Mr Pillay SC, who appeared on behalf of the applicants he accepted that this is correct and accordingly that the constitutional challenge lies where it did in the initial formulation in the Notice of Motion.

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1 1958 (4) SA 353 (A) at 357 E-H.

2 *S v Mpetha* 1985 (3) 702 (A) at 708 H; *S v Sithole* 1988 (4) SA 177 (T) at 181 C-D. The result in M*petha's* case would now be different by virtue of the provisions of section 35(3)(n) of the Constitution.

[7] The effect of this is that applicants' constitutional attack is addressed to a statutory provision under which they are not at present charged and which has been repealed. Whether and when the prosecutor will seek to charge them under the legislation applicable at the time these alleged offences were committed is a matter of speculation. Whether such an application will succeed is likewise a matter of speculation. As matters stand at present the position is that in respect of the statutory charges facing the applicants as currently formulated, being counts 1 to 14, they have been charged under a statute that was not applicable at the time the offences were allegedly committed. That question could have been dealt with at the outset of the criminal proceedings by way of an objection to those charges in terms of section 85(1)(c) of the Criminal Procedure Act, 51 of 1977. Alternatively, the appellants might, for tactical reasons, bearing in mind that much the same evidential ground would be traversed on counts 15 to 24, where they are charged with the common law crime of fraud, have kept their powder dry until the close of the State case and then sought their discharge on the statutory counts. In that event, absent a successful application to amend the charges, their acquittal on these counts would seem to follow as a matter of course.

[8] The situation described in the previous paragraph lends a somewhat surreal air to the present proceedings. That is compounded by the way in which the constitutional challenge is formulated. Section 2(1) of the Import and Export Control Act 45 of 1963 provides that :

> "The Minister may, whenever he deems it necessary or expedient in the public interest, by notice in the *Gazette* prescribe that no goods of a specified class or kind or no goods other than goods of a specified class or kind :
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> (a) shall be imported into the Republic; or
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> (b) shall be imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by him or by a person authorised by him …"

Section 4(a) of the Act makes it an offence for any person to import any goods in contravention of the provisions of any notice issued under section 2. The criminal proceedings confronting the applicants arise because the Minister exercised the powers given by section 2(1) to prohibit the importation of second-

hand or used goods into South Africa except in terms of an import permit.[3] However, the constitutional attack set out in the application papers is not against the Minister's power to issue notices regulating the importation of goods into South Africa. Nor is it against the provision that renders it criminal conduct to import goods into South Africa contrary to any notice regulating the importation of those goods. Both of those must therefore be taken to be constitutionally valid for present purposes.

[9] The basis of the attack appears from paragraphs 33 and 34 of the founding affidavit. In paragraph 33 attention is drawn to the provisions of section 90 of the Criminal Procedure Act[4] which read as follows :

> "In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."

The applicants then formulate their complaint by drawing attention to the words in section 2(1)(b) of the 1963 Act :

> "… except under the authority of and in accordance with the conditions stated in a permit …"

They then say that these words fall within the ambit of section 90 of the CPA and accordingly claim that they are burdened with an onus to prove that the second-hand hearses imported into South Africa were imported under the authority of and in accordance with the conditions stated in import permits. It follows, so they contend, that if they are unable to discharge that onus the legislation permits of the possibility that they may be convicted even though there may be a reasonable doubt whether the hearses were imported unlawfully. That would infringe their fair trial rights under the Constitution[5] and in particular the right to be presumed innocent in terms of section 35(3)(h) of the Constitution.

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[3] The import control regime thereby established has been continued under the provisions of section 6(1) of the International Trade Administration Act 71 of 2002 and, in terms of section 54(1)(a) of that Act, it remains a criminal offence to import goods contrary to the provisions of a notice. The established prohibition on the importation of used or second-hand goods remains in place.

[4] Act 51 of 1977 (the "CPA").

[5] Constitution of the Republic of South Africa, 1996. See Act 5 of 2005.

[10] There is of course a respectable body of precedent in which the Constitutional Court has struck down reverse onus provisions.[6] However, before the question of constitutionality can be addressed it is necessary to identify correctly the statutory provision that is said to give rise to the situation where an accused person may be faced with a reverse onus which, if not discharged, may result in their being convicted notwithstanding there being a reasonable doubt at to their guilt of the offence in question. In a number of cases the Constitutional Court has stressed the importance of an applicant seeking an order of constitutional invalidity to identify accurately the statutory provision to which they have an objection.[7] In my view the proper target for the applicants' constitutional attack is not the provisions of the Import and Export Contract Act to which it refers in the notice of motion, but section 90 of the CPA. That conclusion seems to me to follow necessarily from a consideration of the provisions of section 2(1), which are quoted in paragraph [9], *supra*. It is not section 2(1) that creates the problem but the application of section 90 of the CPA in relation to the exercise by the Minister of the powers afforded by section 2(1) that potentially creates a reverse onus. This follows from a proper analysis of the effect of section 2(1).

[11] Where the Minister exercised powers given by section 2(1)(a) of the 1963 Act the effect was to impose a blanket prohibition on the importation into South Africa of the class or kind of goods specified in the notice. Where the Minister exercised the powers given by section 2(1)(b), there was no outright prohibition on the importation of goods of the specified class or kind. Instead the prohibition was qualified by the fact that a person wishing to import goods of that class or kind could apply for and obtain an import permit that would entitle them to do so. Importation of such goods under the authority of a permit was perfectly lawful whilst importation without a permit was a criminal offence.

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6 *S v Zuma and Others* 1995(2) SA 642 (CC); *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC); *S v Coetzee and Others* 1997 (3) SA 527 (CC) and *Scagell and Others v Attorney-General, Western Cape and Others* 1997 (2) 368 (CC).

7 *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC) at paras [21] to [25]; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at para [40]; *Crown Restaurant cc v Gold Reef City Theme Park (Pty)Ltd* 2007 (5) BCLR 453 (CC) at para [6], p456 A-B.

[12] That approach to the construction of section 2(1)(b) is consistent with the approach that our courts have always followed in regard to the interpretation of statutory provisions containing a proviso. That was spelt out in the following passage from the judgment of Botha JA in *Mphosi v Central Board for Co-operative Insurance Ltd*[8] :

> "This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law*, 7th ed., at p.218 :
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> > 'The effect of an excepting or qualifying proviso according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment where it can fairly and properly be construed without attributing to it that effect.'
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> In *R v Dibdin* 1910 P.57, Lord FLETCHER MOULTEN at p.125, in the Court of Appeal, said :
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> > 'The fallacy of the proposed method of interpretation (ie to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The courts … have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those, which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso.'"

[13] When the correct principles are applied the situation is that any criminal offence arising from the publication of a notice in terms of section 2(1)(b) of the 1963 Act can only be the offence constituted by a person importing goods of the specified class or kind into South Africa without being in possession of an import permit. A person who has an import permit is entitled to import the goods referred to in that permit into South Africa and such importation is lawful. It is not correct to say that the importation is unlawful but that the import permit operates as a bar to a successful prosecution. It is simply that importation under and in terms of an import permit is perfectly lawful. It is only importation without a permit that is unlawful.

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[8] 1974 (4) SA 633 (A) at 645 C-F.

[14] On that approach any prosecution under section 4(1)(a) of the 1963 Act, arising from the importation of goods of a class or kind specified in a notice issued under section 2(1)(b) could only succeed if the person importing the goods did not have an import permit in relation to those goods. On ordinary principles therefore it would be for the State to prove, beyond reasonable doubt, that, at the time of importation, the accused did not have a permit entitling them to import those goods into South Africa. Failure to lead evidence that no such permit had been issued would result in the accused's discharge at the close of the State case. The accused would not even be put on his or her defence and would not be required to give any evidence.

[15] The analysis set out above accords with basic principle and with the analysis by Innes CJ in *Dada Gia v Rex*[9] of the necessary allegations to be contained in a proper charge or indictment. The conclusion that the prosecution would have to prove that the case fell outside the exception or proviso was, however, altered by the provisions of section 127(2)(b) of the Criminal Procedure Act No.31 of 1917, which is in all essential respects identical to section 90 of the CPA. As explained by de Villiers CJ in *R v Zondagh*[10] it was enacted with the clear purpose of simplifying the task of the prosecution in proving statutory offences couched in general language, but subject to exceptions of qualifications. From an early stage it was recognised that the effect of this was to alter the burden of proof in such cases.[11]

[16] Section 127(2)(b) of the Criminal Procedure Act, 1917, was succeeded by section 315(2)(b) of the Criminal Procedure Act, 56 of 1955 and by section 90 of the CPA. These provisions have frequently been considered by our courts. As a general proposition, where conduct has been prohibited by statute unless the conduct is performed by someone in possession of a permit or licence or being registered to undertake that type of activity, the courts have held that it is sufficient for the

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9 1906 TS 23. The Court there left on one side where the burden of proof would lie.

10 1931 AD 8 at 12-14. The section had its origin in English law from whence it was imported into our law.

11 See the passage from the judgment by Bovill CJ in *Rex v Harvey(Cox C.C. XI* 662) quoted in R v Zondagh, *supra,* at p.15.

prosecution to prove that the accused undertook the activities in question, leaving it to the accused to prove possession of the requisite licence or permit or the fact of registration.[12] The section has been said to be a troublesome one[13] because of the difficulty of distinguishing those cases where the negative element of the statutory description is a fundamental part of the offence, so that the burden of proof remains on the prosecution, and those where it constitutes an exception to the offence, or where the burden of proof rests on the accused. The difficulty is apparent from the manner in which Schreiner JA formulated the issue in *R v Kula and Others*[14], a case involving the provisions of section 10(1) of the Natives (Urban Areas) Consolidation Act 25 of 1945[15] :

> "Does sec 10(1) make it an offence for any native to whom certain negative conditions apply to remain in an urban area for more than 72 hours, or does it make an offence for any native so to remain in the area unless he falls within one or other of certain excepted classes?"

The artificiality of this mode of analysis is highlighted in that case by van den Heever JA in saying the following[16] :

> "The statutory enactment creating an offence must necessarily contain a command which all persons or certain persons must obey or be liable to punishment. The offence is that which the Legislature creates, not another notional one. One cannot elicit the scope and incidence of the command – both as to facts and persons – without considering all its terms and modalities. Once its scope and incidence has been ascertained both as to persons and facts, we have established its field of operation. To postulate 'the offence' as something divorced from its actual definition is an unreal proceeding. If an area is defined in terms of what would otherwise have been a circle but by deduction of a certain segment, it seems to me notionally impossible to refer to the segment as either an additional element of or an exception to the area defined.
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> The difficulty is that the Legislature has, in words which are deceptively simple at first blush, provided extremely elastic criteria which are purely relative. In most statutory provisions creating offences it will be necessary – save perhaps in regard to the simplest matters – to describe and define the scope of the prohibition by excepting, exempting, excluding, excusing or qualifying the persons of incidence or the *corpus delicti,* the facts. Enlarge the segment to which I have referred and it

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12 *R v Tshatsi* 1926 TPD 100 (Registration as a medical practitioner); *R v Zondagh, supra* (Purchase of rough or uncut diamonds without a licence); *R v von Wielligh and Another* 1959 (4) SA 352 (C) (Sale of liquor to a person not a licensee or in possession of a permit).

13 *R v Beebee* 1944 AD 333 at 335-6.

14 1954 (1) SA 157 (A) at 159 E-F.

15 Happily a relic of our past

16 At 162 G-163B

> becomes difficult to say which is the notional circle, used as a term of reference and which the segment."

Accordingly the learned judge held that the concepts embodied in the predecessor to section 90 represent concepts *ejusdem generis* and that the question is resolved as a matter of interpretation of the particular statutory enactment and depends upon whether the legislature intended the portion of the enactment in question to fall within the scope of the predecessor to section 90 in any criminal prosecution.

[17] It is apparent from the aforegoing that the applicants' true complaint, from a constitutional perspective, lies with the provisions of section 90 of the CPA and not with the impugned provisions of the Import and Export Control Act 45 of 1093. In the absence of section 90[17] it would be perfectly clear that the onus of proof would rest upon the prosecution in counts 1 to 10 of the charges they face, to prove that they imported these second-hand hearses without being in possession of a valid import permit. It is only in consequence of the potential application of section 90 that there can be any question of the prosecution being in any respect relieved of the burden of proving their guilt beyond a reasonable doubt. That being so the position is that the constitutional attack in the present case is misdirected. Whilst presented as an attack on the constitutionality of the relevant provisions of the 1963 Act it is in fact an attack on the constitutionality of section 90 of the CPA.

[18] In ordinary litigation that conclusion would ordinarily be fatal to the case. However, there is a passage in the judgment of Ackermann J in *Shaik v Minister of Justice and Constitutional Development, supra*[18] which appears to cast some doubt on whether that is necessarily so in constitutional litigation. What the learned Justice said was the following :

> "It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. **This is not an inflexible approach. The circumstances of a particular case might dictate otherwise.** It is, however, an important consideration in deciding where the interests of justice lie." (My emphasis.)

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17 Or any peculiar rules taken over from the English law.

18 Para [25].

The difficulty lies with the statement that the rigorous approach of requiring a proper identification of the statutory provisions attacked on the grounds of constitutional invalidity is not inflexible. With respect, that leaves little guidance to courts of first instance as to the circumstances in which they should demand rigour in pleading a case from litigants and when they should be more lenient. In *Sheik's* case, as well as in *Phillips v National Director of Public Prosecutions, supra,* the Constitutional Court did not find it necessary to deal with that as they could dispose of the matters on the grounds that it was not in the interests of justice to grant leave to appeal, which is the context in which this remark was made. However, the requirement relating to the interests of justice is peculiar to the exercise by the Constitutional Court of its appellate jurisdiction and can have no direct bearing on a decision at first instance whether a litigant should be non-suited for expressing their constitutional attack as being on statutory provision A, when it emerges that their true target is another statutory provision B,. If there is a measure of flexibility in this regard it is unclear on what basis a first instance court is to recognise when it should be flexible and when not.

[19] The difficulty in this regard is compounded by the fact that there are cases in which the Constitutional Court has heard and determined constitutional issues that have never before been raised or even disavowed in the prior proceedings in the lower courts.[19] However far more often it has declined to deal with constitutional matters sought to be raised as novel points before it.[20] In cases where the Constitutional Court has been minded to entertain such arguments the facts have been clear and the argument one purely of law as in *Carmichele* or procedural directions have been given to enable the issue to be properly ventilated, as in *Prince.* That accords with the approach that our courts have traditionally taken to allowing new points to be raised on appeal. The entitlement

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19 Thus in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) reliance had not been place on the Constitution prior to the hearing in that Court and this occasioned considerable concern. See paras [41], [50] to [60] and [78] to [83]. In *Prince v President, cape Law Society and others* 2001 (2) SA 388 (CC) the constitutional issue was argued but without having been properly raised or canvassed in the evidence and the Court exceptionally permitted further evidence to be placed before it. In general however its approach has been that it is undesirable to allow matters to be raised unless they are properly canvassed in the evidence and the argument

20 C*armichele, supra*, paras [50] to [53]; *Shaik v Minister of Justice and Constitutional Development and Others,supra*; *Phillips and Others v National Director of Public Prosecutions, supra.* I leave aside cases where direct access has been sought and granted as they stand on a different footing.

to do so is limited unless the court of appeal is satisfied that the issues have been fully canvassed in the court *a quo* and that no prejudice will accrue to the other party by having to deal with the new point.[21] A new legal point that is clearly available on the papers as they stand can always be raised but the court must be satisfied that there is no factual material necessary for its consideration that might have been placed before it had the point been properly articulated from the outset. I think the same principles can apply in relation to constitutional litigation, with certain additional qualifications. Firstly such litigation may involve a broader range of persons than the parties cited in the proceedings, especially where it is alleged that a statutory provision is unconstitutional, and the court must be satisfied that all interested parties have been afforded the opportunity to appear and respond to the point. Secondly the importance of the constitutional point that has emerged may be relevant to whether the court should permit it to be raised. In that latter regard there may be a pressing need for a particular point to be determined notwithstanding the fact that it has not been properly raised and the court must then put in place appropriate procedural steps to prevent prejudice to the other parties, actual or potential. Conversely there may be no pressing need for the point to be determined and it may be preferable for it to await a consideration in due course when it can be raised and determined in the usual course.[22] Thirdly the court should consider whether it is in the overall interests of justice to permit the point to be raised and dealt with. Lastly a court of first instance enjoys greater latitude than an appellate court to ensure procedural fairness when new issues arise.

[20] There are two points in favour of addressing the issue of the constitutionality of section 90 of the CPA. The first is that, whilst the applicants identified the provisions of the Import and Export Control Act 45 of 1963 as their targets in their prayer for relief in the Notice of Motion, their case as advanced in the

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21 *Herbstein and van Winsen's The Civil Practice of the Supreme Court of South Africa* (4th Ed) 912-4 and the authorities there cited.

22 As occurred recently in relation to the points raised in *The APartyand another v Minster of Home Affairs and others; Moloko and others v Minister of Home Affairs and others* [2009] 4 ZASCC where the Court in a judgment of Ngcobo J refused to grant direct access to the claimants in relation to various constitutional points arising under the Electoral Act,73 of 1998. Whilst the decision related to a question of direct access to the Constitutional Court the principles relating to the proper time to determine a constitutional issue have frequently been stated in such cases.

affidavit clearly refers to section 90 of the CPA and their complaint is that they are faced in the criminal proceedings with a reverse onus. It cannot therefore be said that the attack on section 90 is entirely novel. It is some degree foreshadowed by the founding affidavit. The second factor in favour of dealing with section 90 is that the issues surrounding it were pertinently dealt with by the Constitutional Court in *S v Coetzee and Others.*[23] In that case Langa J (as he then was) said[24] :

> "The provision imposes an *onus* on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same fact an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached."

Kentridge AJ, in his partial dissent in that case, said that this meant *a fortiori* that section 90 of the CPA infringed the presumption of innocence in section 35 of the Constitution. As Langa J's judgment attracted the concurrence of four of his colleagues[25] one might have thought that the fate of section 90 is relatively clear-cut and that it the time is right for the constitutional *coup de grace* to be administered..

[21] Despite these factors, however, I do not think that it would be appropriate for this court to deal with section 90. Firstly, whilst the judgment of Langa J in *S v Coetzee and Others* certainly points towards the conclusion that section 90 may not withstand constitutional scrutiny, it must be borne in mind that the Court had expressly refrained in the past from determining that every presumption or every provision reversing the onus of proof is *per se* invalid.[26] Secondly, it is not entirely clear to me, that a provision such as section 90, that imposes on an accused person the obligation to prove the existence of a licence or permit or registration to undertake a particular activity is, if a limitation on the presumption

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23 1997 (3) 527 (CC).

24 Para [38].

25 The concurring judgment of Sachs J in para [227] that tipped the balance in favour of the decision by Langa J, endorses the analysis and comments in the four dissenting judgments, which gives rise to some difficulty in ascertaining the *ratio decidendi* of the court.

26 *S v Zuma, supra,* at paras [41] and [42].

of innocence, not one that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors set out in section 36(1) of the Constitution. In the papers before me there is, not surprisingly, no attempt to justify any limitation embodied in section 90 of the CPA. As Mr Mtshaulana SC, who appeared for the 1st and 3rd respondents, pointed out section 90 is within the remit of the National Director of Public Prosecutions as the prosecuting authority in South Africa and the Minister of Justice, neither of whom are participating in this litigation. I agree with him that it would not be safe to address section 90 in their absence. That brings me to the third point which is that it does not appear from the papers that the applicants have complied with the provisions of Rule 16A(1)(a) and, even had they done so, it is clear that the focus of any notice under that Rule would have been on the provisions of the Import and Export Control Act 45 of 1963 and not section 90 of the CPA. As pointed out in *Shaik's* case[27] the purpose of that Rule is to bring to the attention of persons who may be affected by or have a legitimate interest in the case the particularity of the constitutional challenge in order that they may take appropriate steps to protect their interests. This is particularly so in relation to the question of limitation. Lastly there can be no prejudice to the applicants in the point being dealt with at a later stage, if it arises at all.

[22] Weighing up these factors it seems to me on balance that, whatever discretion I may enjoy to entertain submissions about the constitutional invalidity of section 90 of the CPA should not be exercised in favour of the applicants. In my view it is desirable that if and when section 90 is to be subjected to constitutional scrutiny that should occur in a completed criminal case where the application of the section has proved fundamental to the question of the guilt or innocence of the accused. It should also occur in proceedings where the Minister of Justice and the National Director of Public Prosecutions have made a full contribution as to the effect of the section in practice and the circumstances in which it is invoked by the prosecuting authorities as well as any disadvantages that may flow from it being held to be invalid. Even if the section does not survive such scrutiny and cannot be read down or justified in terms of section 36(1) of the Constitution the close examination of the relevant issues that would occur in that situation would

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27 Para [24]

determine whether any declaration of invalidity should be suspended in terms of section of 172(1)(b)(ii) of the Constitution and would also inform any decision to enact legislation to replace section 90.

[23] In my view therefore the application must fail on the simple ground that the applicants' constitutional complaint relates to section 90 of the CPA and not to the statutory provisions that they have attacked. To the extent that I have a discretion to permit them to alter the target of their attack, that is not a discretion that should be exercised in their favour. However, even if the application is not doomed on this ground it is clear that it must in any event fail on another ground to which it is closely akin, namely that the constitutional issue, however formulated, is not yet ripe for determination.

[24] In *S v Mhlungu and Others*[28] Kentridge AJ said :

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

Similarly in *Zantsi v Council of State, Ciskei and Others*[29] Chaskalson P quoted with approval a statement by an American judge :

"(N) … anticipate a question of constitutional law in advance of the necessity of deciding

> "(N)ever … anticipate a question of constitutional law in advance of the necessity of deciding it; … never … formulate a rule of constitution law broader than is required by the precise facts to which it is to be applied."

Although these statements were made in the context of the provisions of section 102(8) of the Interim Constitution, they are expressly directed at the principle that constitutional questions should be determined only as a last resort.[30] Returning to *Zantsi's* case Chaskalson P went on to say that :

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28 1995 (3) SA 867 (CC) at para [159].
29 1995 (4) SA 615 (CC) at para [2].
30 *S v Bequinot* 1997(2) SA 887 (CC) at p.894, footnote 15.

> "It will only be in the interests of justice for a constitutional issue to be decided first, where there are compelling reasons that this should be done."

The justification for this rule is that it allows the law to develop incrementally and it is a rule that should ordinarily be adhered to by all South African courts.[31]

[25] The only reason advanced in argument by Mr Pillay SC on behalf of the applicants for considering and determining the constitutional question at this stage was that it would enable the applicants to consider their position and to determine whether, for any reasons, including commercial and reputational reasons, it would be desirable for them to enter into a plea bargain or even to plead guilty. Whilst it is still possible I suppose that a decision on the constitutional issue might provide some assistance to the applicants and their legal advisers in determining what approach they should take to this prosecution I do not see why such uncertainty as attaches to the issue should be dispelled by this Court in advance of their taking whatever decisions fall to be taken in this regard. That approach comes precious close to asking the court to give legal advice so that parties may order their future affairs, something against which the court has always set its face. If there are difficulties confronting the applicants and their legal advisers in taking a decision as to their future course of conduct in the criminal proceedings that is because, as Kriegler J has pointed out,[32] defending a criminal charge can present a minefield of hard choices. I see no reason why the applicants should, in making whatever choices face them in their criminal trial, be entitled to a judicial decision on the application of section 90 of the CPA in order to guide their decision-making. No doubt their advisers can indicate to them what risk there is of that section being invoked in these proceedings and its consequences if invoked.

[26] What is more, it is unclear in any event that the State will seek to place any reliance on section 90 of the CPA in pursuing this prosecution. In the general preamble to the charge sheet it is specifically alleged that import permits were applied for and granted in respect of the importation of the hearses to which the charges relate. In

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31 *Zantsi* at paras [4] and [5].

32 *S v Dlamini: S v Dladla and Others; S v Joubert; S v Schietakat* 1999 (4) SA 623 (CC) at para [94].

paragraph 8 of the general preamble it is said that the Department of Trade and Industry would not have authorised and issued those permits but for certain misrepresentations having been made to the relevant official regarding the description of the vehicles. It is accordingly alleged that the permits were invalid and "as a direct consequence thereof, the second-hand Limousines were imported without valid permits". It follows that the debate in the criminal proceedings will revolve around the validity of the permits and whether their issue was procured by way of misrepresentations. It is apparent that the State will seek to prove those misrepresentations beyond reasonable doubt inasmuch as they are the misrepresentations upon which counts 15 to 24 are based.

[27] There is therefore no question of section 90 being applied in relation to the question of the issue of permits. It is the State's case that the permits were issued and it is apparent that this is not challenged by the appellants. It is also the State's case that the permits were issued in consequence of fraudulent misrepresentations made on behalf of the appellants. This is clearly a matter which the State will have to prove beyond reasonable doubt. Whether in consequence of any such fraudulent misrepresentations the permits are void and that it can therefore be said that the vehicles were imported without valid permits, is a question of law.

[28] It appears to me therefore that each of the elements necessary for a successful prosecution of the appellants on these counts would in any event, *ex facie* the contents of the charge sheet, either be common cause between the parties or have to be proved by the prosecution beyond reasonable doubt. I am unable to discern where it can be said that section 90 would have any application in this case. At most it might be invoked if the State were unable to satisfy the court beyond reasonable doubt that the representations on which it relies were made or that they were fraudulent, but nevertheless sought a conviction on counts 1 to 10 on the basis that the appellants had not proved that they were in possession of valid permits. That is, however, a very remote possibility.

[29] A similar situation confronted Howard JP when he was asked to refer a matter to the Constitutional Court in *Schinkel v Minister of Justice and Another.*[33] That also

[33] 1996 (6) BCLR 872 (N).

concerned a presumption and a challenge to its constitutional validity because it created a reverse onus. Howard JP held that as it could not be said that it would be necessary for the State to rely on the presumption it would not be appropriate to refer the matter to the Constitutional Court. He pointed out that the trial could be over in a day or two and if the accused was convicted, without reliance on the presumptions, or acquitted the constitutional issue would never arise. Accordingly he refused to grant the reference and the Constitutional Court has subsequently said that his decision illustrates how, in practice, deferring the determination of constitutional issues until they prove decisive promotes the interests of justice.[34]

[30] Cumulatively, the position in this case is the following. The applicants have been charged with statutory criminal offences on the basis of an incorrect statute and as matters stand at present will be entitled to their acquittal. It is impossible to say whether any application by the prosecution to amend the charge sheet to cite the correct statute will succeed. Whatever happens in that regard the charges relating to the common law crime of fraud will remain and the evidence in respect of those charges appears to traverse much the same ground as the evidence on the principal statutory charges, because both are dependent upon the permits having been secured by the misrepresentations of Mr Bijnath. (Counts 11 to 14 are not significant for this purpose). On the basis of the facts set out in the general preamble to the charge sheet section 90 of the CPA could only become of application in somewhat unusual circumstances and it is probable that the case will be disposed of without any need to have resort thereto. In any event it would be open to the prosecution not to rely on that section. The constitutional attack that has been mounted in the application papers is directed at the wrong sections and, insofar as there is a basis for attacking section 90 of the CPA, it would be inappropriate on these papers to deal with that question. All of these factors point inexorably to the conclusion that the constitutional issue raised by the applicants, however formulated, is not ripe for determination at this stage.

[31] There is one last point in this regard. It is that, in consequence of the suspension of the criminal proceedings whilst this application has been brought before the High Court, the criminal trial has been delayed for over two years. It appears to have

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[34] *S v Bequinot, supra,* p.895, footnote 18

become relatively routine in certain criminal cases for the proceedings to be delayed, whilst a range of preliminary issues, primarily constitutional, but sometimes having their source elsewhere, are determined, very often not by the court seized of the criminal proceedings. In a recent judgment where the Constitutional Court was confronted with such preliminary litigation, it expressed the view that in principle the interruption or suspension of criminal proceedings in order to ventilate preliminary issues that could as well be dealt with in the course of the criminal trial is undesirable and should not ordinarily be permitted.[35] I can only echo that sentiment. Delay already appears to be endemic in the conduct of criminal cases before our courts. Those delays make a mockery of the constitutional guarantee in section 35(3)(d) that an accused person has the right to have his or her trial begin and conclude without unreasonable delay. In my opinion the court should not facilitate delay in proceeding with a criminal trial by entertaining applications of the present type, with all their potential for further delay whilst appeals are pursued or matters taken to the Constitutional Court, save in exceptional circumstances where it is clearly in the interests of justice to deal with the question raised as a separate and preliminary issue. In general the provisions of the CPA are such as to provide ample opportunity for an accused person to raise constitutional and other points at an appropriate stage of the proceedings and the right of appeal will always enable a person to vindicate their constitutional rights if they are convicted.

[32] For those reasons I conclude that the constitutional point that the applicants seek to raise in these proceedings, however it is defined, is raised at a premature and inappropriate stage. That issue is not yet ripe for hearing and may never arise in the criminal proceedings before the Commercial Crime Court. The matter should be restored to the roll of that Court as soon as possible and disposed of. Once a decision has been reached by that Court on the applicants' guilt or innocence the question whether any constitutional issue is raised by those proceedings will have crystallised and can be dealt with in an appeal from the decision of the magistrate.

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[35] *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para [65]. The case of *National Director of Public Prosecutions v Moodley and others* [2009]2 All SA 561 (SCA) is illustrative of the type of delay to which I refer arising from the taking of preliminary points in criminal cases. The case was delayed from 2004 to 2009 on the preliminary issue when the accused had not yet even been formally charged.

[33] It follows that the application must fail. On the question of costs Mr Pillay SC urged upon me that the usual rule in constitutional matter is that each party should bear its own costs because the threat of an adverse award of costs would otherwise operate to deter people from raising legitimate constitutional issues. Mr Mtshaulana SC, whilst accepting this principle in certain cases, particularly where it involved poor persons and people seeking to vindicate fundamental rights, contended that in the present case these considerations are not applicable. The applicants have simply brought proceedings seeking to obtain legal relief that they view as beneficial to them in defending themselves against criminal charges and they should bear the consequences, insofar as costs are concerned, of their lack of success in those proceedings. In my view that submission is correct. Whilst Mr Mtshaulana did, with some diffidence, ask for the costs of two counsel and both the applicants and the first and third respondents had taken the precaution of briefing two counsel, I do not regard the issues in this case as sufficiently complex or the volume of material that needed to be considered so great, as to justify the employment of two counsel.

[34] In the result the application is dismissed with costs.

DATE OF HEARING	20 MARCH 2009
DATE OF JUDGMENT	27 MARCH 2009
APPLICANTS' COUNSEL	MR L. PILLAY SC with him Mr D.D. Naidoo

APPLICANTS' ATTORNEYS	SEGIE MOODLEY & ASSOC.
FIRST AND THIRD RESPONDENTS' COUNSEL	MR P.M. MTSHAULANA SC with him Mr M.S. Mangolele with him Mr M.S. Mangolele
FIRST AND THIRD RESPONDENTS' ATTORNEYS	STATE ATTORNEY KWAZULU-NATAL

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