

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

Case No: CC27/2018

In the matter between:

THE STATE

and

FADWAAN MURPHY First Accused

SHAFIEKA MURPHY Second Accused

DOMINIC DAVIDSON Third Accused

ULTERIOR TRADING SOLUTIONS CC Fourth Accused

**JUDGMENT DELIVERED ON 15 AUGUST 2022
RE SUBPOENAS DUCES TECUM ISSUED ON 7 APRIL 2021**

DAVIS AJ

INTRODUCTION

1. This judgment deals with an application to set aside two subpoenas *duces tecum* issued by two accused persons which require two employees of the National Prosecuting Authority (“**NPA**”) to produce documents held by the prosecution, and in one case also to testify on behalf of the accused at their criminal trial.

2. Mr Fadwaan Murphy and Ulterior Trading Solutions CC, a close corporation owned by him, are the first and sixth accused respectively in a long running part-heard criminal trial in which they are charged with various counts of dealing in drugs in contravention of the Drugs and Drug Trafficking Act 140 of 1992, as well as money laundering and racketeering charges in terms of the Prevention of Organized Crime Act 121 of 1998 ("**POCA**"). For the sake of brevity I shall refer to the first and sixth accused as "**the accused**" and to their legal representatives as "**the defence**".

3. The trial commenced in October 2018. During the course of the presentation of the State's case, the admission of evidence was challenged in no less than six trials within a trial. One involved the authenticity and legitimacy of a written statement taken from Ms Felica Wenn ("**Wenn**"), a former accused person who had faced similar charges and who had been called as a State witness in terms of s 204 of the Criminal Procedure Act 51 of 1977 ("**the Criminal Procedure Act**"). Wenn had apparently recanted in the witness box and departed from the contents of a written statement previously made by her in terms of s 204 of the Criminal Procedure Act.

4. As part of the docket, the State had furnished the defence with a copy of Wenn's written statement in terms of s 204 which, on the face of it, appeared to have been taken by the Investigating Officer, Captain Britz ("**Britz**"),¹ at Lentegeur on 27 October 2015 without any other persons being present. However it emerged

¹ Captain Britz held the rank of Warrant Officer at the time.

during the course of Wenn's evidence in chief that what appeared on the face of the written s 204 statement of Wenn was not accurate, and that Wenn's s 204 statements had in fact been taken by Britz in Cape Town at a meeting held at the offices of the Director of Public Prosecutions ("**DPP**") in the presence of two State Advocates.² Ms Heeramun, who appeared for the State in the trial, placed on record during the course of Wenn's evidence in chief that there were errors in the document, and that Britz would clarify matters when she testified.

5. The errors on the face of Wenn's s 204 statement spawned a persistent belief on the part of the defence that the reference to the statement having been taken in Lentegour, and the failure to note the presence of the two State Advocates who sat in on the consultations with Wenn, were a deliberate ploy designed to cover up the fact that the two State Advocates had participated in questioning Wenn in the absence of her legal representative and allegedly without the knowledge and consent of the legal representative. The defence went so far as to suggest that after the interview in Cape Town, Britz had "doctored" Wenn's s 204 statement by adding in details which did not emanate from Wenn, and had forged Wenn's signature on the s 204 statement.
6. After Wenn had been cross-examined by the defence, the State brought an application to have Wenn declared hostile. It was in this context that the validity and authenticity of her s 204 statement first came under the spotlight in a trial within a trial, which included the evidence of hand-writing experts.

² Ms Heeramun, who appeared for the State in the trial, was not one of the two State Advocates who met with Wenn on 27 October 2015.

7. I granted the application to declare Wenn hostile on the strength of her performance and demeanour in the witness box, and without making any determination regarding the authenticity or otherwise of the controversial s 204 statement.
8. The issue came to the fore again, however, and the nettle had to be grasped, when the State brought an application in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 to have Wenn's s 204 statement, which implicates the first accused, admitted as hearsay evidence. This required that I make a determination on whether or not Wenn had in fact made the written s 204 statement attributed to her, and whether or not her signature on the document was genuine. Pursuant to this application, and having regard to all the relevant evidence,³ I ruled that:

"... having considered all the evidence and the arguments, I am satisfied beyond a reasonable doubt as to the authenticity of the document. I am satisfied that the statement was freely and voluntarily made by Ms Wenn; I am satisfied as to the legitimacy of the statement, by which I mean that I'm satisfied that there was no violation of her constitutional rights or other police misconduct bringing about the statement... ."

9. I did not give detailed reasons for this particular ruling, which I shall refer to as "**the 204 ruling**" as it involves questions of credibility, in particular the credibility of Britz. It is, however, implicit in the 204 ruling that I accepted Britz's explanation

³ Including the evidence of handwriting experts.

for the errors on the face of Wenn's s 204 statement, and that Wenn's signature on the document was genuine, and, concomitantly, that I rejected Wenn's evidence that she had been improperly coerced into making the statement.

10. At the close of the State's case I heard an application for discharge in terms of s 174 of the CPA. On 19 November 2020 I gave judgment on the application, in which I discharged the fifth and seventh accused and dismissed certain of the charges against the remaining accused. The trial was due to resume on 13 April 2021.
11. On 7 April 2021, the accused caused subpoenas *duces tecum* to be issued and served on Ms Jolou Van der Merwe, a State Advocate and Ms Joslin Pienaar, Chief Clerk to the DPP, both being employees of the NPA. The subpoena served on Ms Van der Merwe required, in addition, that she attend at the criminal trial and testify on behalf of the accused. The avowed purpose of the subpoenas is to enable the defence to uncover evidence of malfeasance on the part of the State in procuring Wenn's s 204 statement, in order that the defence might challenge the s 204 ruling and persuade me to alter it.
12. The subpoenas *duces tecum* are wide ranging. They require Ms Van der Merwe and Ms Pienaar to produce, *inter alia*, "*copies of all emails, text messages, other digital communications ... internal office memo's and notes, file notes, entries in the diary section or elsewhere in the relevant police docket, and the like, of*

*communications exchanged between yourself and the following persons⁴ during the period 18 September 2015 to 31 December 2017” and which pertained to a list of topics which included *inter alia* the following:*

- 12.1. *“the decision to hold a meeting on 27 October 2015 at the DPP’s office, Cape Town, at which then accused persons Ms Felicia Wenn and Ms Zulayga Fortuin were to be interrogated;*
- 12.2. *the decisions to schedule the meeting and to proceed with it in the absence of the said accused person’s defence counsel;*
- 12.3. *the decision to prosecute Ms Wenn and Ms Fortuin, as communicated to the magistrate at Wynberg by the DPP per letter dated 22 January 2016;*
- 12.4. *the decision subsequently taken not to prosecute Ms Wenn and Ms Fortuin;*
- 12.5. *the delay between the two latter events;*
- 12.6. *the decision to utilize the s 204 statements of Ms Wenn and Ms Fortuin notwithstanding the falsity of the respective documents in which their ultimate statements were purportedly recorded;*

⁴ A list of persons is provided which includes Britz and various named employees of the NPA as well as two catch-all categories, namely “*any other professional member of the staff of the DPP (Western Cape)*” and “*any other member of the SAPS*”.

- 12.7. *the decision not to draw the said falsity to the attention of the defence prior to the trial, whether in the docket or via correspondence or otherwise;*
 - 12.8. *the decision not to draw the said falsity to the attention of the defence or the Court when Ms Fortuin's said statement was handed up to the Court;*
 - 12.9. *communications with Mr Desmond Jacobs [the 7th accused who was discharged at the close of the State's case] by Capt Britz and/or any professional member of staff of the DPP, at any time, whilst Mr Jacobs was under subpoena by the defence as a witness;*
 - 12.10. *the decision to join Mr Jacobs as an accused;*
 - 12.11. *communications with Mr Desmond Jacobs in the absence of his counsel between the date of his joinder as an accused and the date of his acquittal by the Court on 19 November 2020".*
13. The subpoenas also required copies of notes taken during the meeting of 27 October 2015, drafts of the statements made by Wenn and Fortuin and any audio recordings made of the meeting. In addition, Ms Van der Merwe was required to hand over:
- "the hard drive or SSD of your personal office computer – alternatively the means of accessing any of the data sought above and which may be stored on any external server such as Dropbox, Cloud Storage, or the like*

– *relevant to the period 18 September 2015 to 31 December 2017, provided that you are not required to produce same at Court unless directed by the learned presiding Judge to do so.*”

14. In response to the subpoenas, the DPP (Western Cape), together with Ms Van der Merwe and Ms Pienaar, who were cited as the second and third applicants, brought an application in terms of s 36(5) of the Superior Courts Act 10 of 2013 to have the subpoenas *duces tecum* set aside as an abuse of process and a violation of litigation privilege. For reasons which are not entirely clear to me, the DPP considered it undesirable that the application should be heard by me as part of the criminal trial, and chose rather to launch an application to be heard in civil court before another Judge of this division.
15. In the result, the criminal trial was delayed by over a year. Lengthy affidavits were prepared dealing with matters which were already on record in the criminal trial, and with which I was well versed. The matter ultimately came before Saldanha J on 2 June 2022, when the defence argued that the Judge presiding in the criminal trial was better placed to determine the application.
16. On 23 June 2022, Saldanha J gave a judgment in which he upheld the argument advanced by the defence that the challenge to the subpoenas could not be determined without reference to the evidence presented in the criminal trial, and that it was appropriate in all the circumstances that the matter be dealt with by the criminal trial court. He accordingly granted an order referring the application

to the criminal trial court for determination, and I heard argument on 29 July 2022.

17. Before me Mr Webster, who together with Mr Ebrahim appeared for the applicants,⁵ relied on two broad grounds for the setting aside of the subpoenas, namely that a) they constitute an abuse of process, and b) that policy considerations, including litigation privilege, militate against the granting of access to the documentation sought by the accused.
18. On behalf of the accused, Mr Van der Berg contended that the documents were sought for a legitimate purpose, namely to challenge the s 204 ruling which was interlocutory in nature and susceptible to reconsideration by the trial court. He further submitted that there was *prima facie* evidence of malfeasance on the part of the State, which defeats the litigation privilege relied on by the State.

THE LEGAL POSITION REGARDING ACCESS TO PROSECUTION DOCUMENTS

19. In *Shabalala & Others v Attorney General of Transvaal & Another* 1996 (1) SA 725 (CC) (“**Shabalala**”) the Constitutional Court did away with the “blanket” docket privilege in criminal cases which had hitherto applied to the contents of the police docket⁶ because it conflicts with the fair trial guarantee contained in the Bill of Rights.⁷

⁵ The DPP briefed separate counsel to deal with the subpoena application.

⁶ *R v Steyn* 1954 (1) SA 324 (A) 332

⁷ *Shabalala & others v Attorney General, Transvaal and another* 1996 (1) SA 725 (CC) para 72 A 1 -2.

20. The Constitutional Court in *Shabalala* authoritatively defined the ambit of the duty upon the prosecution to disclose documents to an accused person.⁸ It declared that ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or *prima facie* likely to be helpful to the defence) unless, in rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.⁹
21. The Constitutional Court further declared that ordinarily the right to a fair trial would include access to the statements of witnesses, whether or not the State intends to call such witnesses, and such of the contents of the police docket as is relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial.¹⁰
22. A police docket, which forms a prosecutor's brief, normally consists of three sections: section A, containing statements of witnesses, expert reports and documentary evidence; section B, containing internal reports and memoranda; and section C containing the investigation diary.¹¹ An accused person's ordinary entitlement to access to documents in the docket is not restricted to the contents

⁸ *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) ("**King**") para 54.

⁹ *S v Panayiotou (The Minister of Police the Intervening Party)* 2018 JDR 0660 (ECP) ("**Panayiotou**") para 19, referring to *Shabalala (supra)* para 72, A 3.

¹⁰ *Panayiotou (supra)* para 19, referring to *Shabalala (supra)* para 72, A 4.

¹¹ *King (supra)* para 1; *Shabalala (supra)* para 10.

of the A section of the docket, but extends to all documents which might be important for the accused properly to adduce and challenge evidence.¹²

23. Harms DP crisply summed up the position in our law as follows in *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) (“**King**”):

“In our law, following the English precedent, the general rule is that one is not entitled to see his adversary’s brief. This is referred to as litigation privilege, something different from attorney and client privilege. However, as the Constitutional Court has held in Shabalala, a ‘blanket’ docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of rights. Accordingly, litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the defence. This means that an accused is entitled to the content in the docket ‘relevant’ for the exercise or protection of that right. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be ‘important for an accused to properly ‘adduce and challenge evidence’ to ensure a fair trial. The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in attenuated form as a result of these limitations. Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or the defence.”¹³

24. Thus relevance to an accused’s defence is the touchstone for determining whether or not the State is obliged to hand over a particular document to the defence. It is only documents which are relevant to the conduct of the accused’s

¹² *Panayiotou (supra)* para 21, referring to *Shabalala (supra)* para 57 and *King (supra)* para 1.

¹³ *King (supra)* paras 1 and 2.

defence which are required to be disclosed to an accused. As pointed out by Harms DP in *King*, most of the material covered by litigation privilege in criminal cases would in any event not be discoverable because the material is not germane to the conduct of the trial in the sense of being relevant to the accused's right to make full answer and defence.¹⁴

THE LEGAL POSITION REGARDING SUBPOENAS

25. The default position is that a litigant is entitled to issue subpoenas to obtain production of any documents or oral testimony relevant to his or her case in the pursuit of truth unless the disclosure of the document is protected by law.¹⁵

26. In criminal proceedings this right is embodied in s 179(1)(a) of the Criminal Procedure Act, which provides that:

"The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose."

27. At common law every Superior Court enjoys inherent jurisdiction to protect itself and others against an abuse of its process. Where a Court is satisfied that a subpoena constitutes an abuse, it is entitled to set it aside.¹⁶ What constitutes an

¹⁴ *King (supra)* para 30.

¹⁵ *Beinash v Wixley* 1997 (3) SA 721 (SCA) ("**Beinash**") at 734 I; *Meyers v Marcus* 2004 (5) SA 315 (C) at para 30.

¹⁶ *Beinash* at 734 D – E.

abuse of the process of the Court is a matter which needs to be determined in the circumstances of each case.

28. In *Beinash v Wixely* 1997 (3) SA 721 (SCA) (“**Beinash**”) the Court stated that there can be no all-encompassing definition of the concept of ‘abuse of process’, but, generally speaking, “*an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective*”¹⁷ i.e., for an ulterior motive.
29. It bears emphasis, for purposes of this case, that while the issue of a subpoena for an ulterior motive will invariably amount to an abuse of process, the converse is not necessarily true. There may be instances where the issue of a subpoena, although it may subjectively be intended to facilitate the pursuit of truth, is nonetheless an abuse of process because it is manifestly unsustainable, for instance because the documents sought are plainly irrelevant or clearly protected by privilege, so that the subpoena may be regarded as vexatious.¹⁸
30. The common law jurisdiction of a Court to set aside a subpoena has received statutory recognition in s 36(5) of the Superior Courts Act 10 of 2013 (“**the Superior Courts Act**”), which provides that:

¹⁷ *Ibid.*

¹⁸ See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565 D; *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 275 B - C.

“36(5) When a subpoena is issued to procure the attendance of any person as a witness or to produce any book, paper or document in any proceedings, and it appears that-

- (a) he or she is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings; or
- (b) such book, paper or document could properly be produced by some other person; or
- (c) to compel him or her to attend would be an abuse of the process of

the court,

any judge of the court concerned may, notwithstanding anything contained in this section, after reasonable notice by the Registrar to the party who sued out the subpoena and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena.”

31. Although s 36(5) of the Superior Courts Act codifies many of the common law grounds on which Courts have in the past set aside subpoenas, I consider that, in the absence of any express indication of intent to alter the existing law,¹⁹ it does not operate as a *numerous clausus* of the grounds on which a court may set aside a subpoena, and a Court may still rely on the common law to set aside a subpoena as an abuse of process for reasons other than those contained in the section.

ABUSE OF PROCESS

¹⁹ *Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784 D – H; *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SA) para 16.

32. Mr Webster argued that the subpoenas are an abuse of process because:
- 32.1. they are framed in impermissibly wide terms;
 - 32.2. the documents sought are irrelevant;
 - 32.3. the timing of the subpoenas is indicative of an intention to delay the criminal trial;
 - 32.4. the resort to subpoenas is an abuse in circumstances where the accused have not applied for access to the B and C sections of the docket.
33. Although the question of onus was not raised, I shall assume, in favour of the accused, that where questions of fact are involved, the State bears the onus of proof beyond reasonable doubt.
34. Having regard to the onus, the argument based on delay may be disposed of without much ado. While it is correct that a considerable period of time passed between the s 174 judgment and the scheduled resumption of the trial, which arguably creates an impression that the defence waited until the last minute to issue the subpoenas, I do not consider that an intention to delay the trial can be inferred beyond reasonable doubt in all the circumstances. It cannot be ignored that the legion difficulties associated with the covid-19 pandemic have played havoc with the progress of the trial.

35. And it must also be said, in fairness, that if the DPP had not elected to bring an application in civil court to set aside the subpoenas, the subpoena issue could have been resolved in the criminal court in fairly short order without the significant delay which has occurred. To my mind there is no room for a finding, beyond a reasonable doubt, that the issue of the subpoenas was motivated by an intention to delay the progress of the criminal trial.
36. The complaints pertaining to lack of specificity and relevance of the documents sought and the misuse of the subpoena mechanism are inter-related. They all flow from a situation where, as Mr Van der Berg frankly conceded, the subpoenas could not be more specific because the defence did not know what they were looking for.
37. The avowed purpose of the subpoenas was to *investigate* and *uncover* evidence of alleged malfeasance on the part of the State in relation to the procuring of Wenn's and Fortuin's s 204 statements: this in circumstances where the defence's suspicions of malfeasance have already been ventilated in the context of the criminal trial and found to be without substance, and where the defence has put up no new evidence to demonstrate, *prima facie*, that its conspiracy theories are in fact well-founded.

Breadth and lack of specificity

38. It is trite that a subpoena must specify the documents required to be produced (see *Beinash v Wixley* 1997 (3) SA 721 (SCA) ("**Beinash**"). The common law in

this regard has been given statutory recognition in s 36(4) of the Superior Courts Act, which provides that:

“No person is obliged to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he or she actually has it in court.”

39. The subpoenas in this case are similar in many respects to the subpoena which was criticized and set aside as an abuse in *Beinash* for being overly wide and lacking in specificity (see *Beinash supra* at 735 C – G). The State is essentially called upon to produce all and any written communications between 18 September 2015 and 31 December 2017 relating to the meeting held at the offices of the DPP on 27 October 2015 when Wenn was interviewed, and various decisions assumed to have been made by the prosecution. But the net is cast wider than the meeting of 27 October 2015, as documents are also sought pertaining to Britz’s interactions with Mr Desmond Jacobs, the 7th accused who was acquitted and discharged, and the decision to join Mr Jacobs as an accused.
40. No justification is offered for the length of the period for which documents are requested when the relevant event took place on 27 October 2015. Nor is any attempt made to specify or limit the scope of the documents sought.
41. Moreover, many of the documents sought may not even exist. For example, the State is required to produce documents regarding *“the decision to utilize the s*

204 statement of Ms Wenn and Ms Fortuin notwithstanding the falsity of the respective documents in which their ultimate statements were purportedly recorded". The request assumes facts in issue which have not been established, namely that the s 204 statement was "false", that a decision was taken to utilize a "false" statement, and that such decision was recorded or communicated in writing.

42. To my mind it is improper to frame a subpoena in this way: the description of documents in a subpoena should be neutral and should not make reference to controversial theories and unproven allegations. I consider that the manner in which the subpoenas have been framed is oppressive and embarrassing for the recipients, who dispute the alleged "falsity" of Wenn's s 204 statement. The recipient of a subpoena should not be placed in a position where, by producing any document, he or she may be seen as impliedly admitting to any allegations contained in the subpoena.

43. As conceded by the defence, the subpoenas *duces tecum* necessarily lacked specificity because they were not aimed at a specific document known to exist, but to uncover suspected prosecutorial conduct based on pure speculation. In these circumstances it seems to me, not to put too fine a point on it, that the subpoenas amount to a fishing expedition par excellence. For this reason alone I consider that they are liable to be set aside as an abuse of process. In saying that, I accept that there was no ulterior motive on the part of the defence, but I

nonetheless regard the subpoenas as manifestly unsustainable and vexatious in the particular circumstances.

Relevance

44. The defence contends that the documents requested in the subpoenas are relevant inasmuch as they may afford evidence that Wenn's s 204 statement was unconstitutionally obtained. It is thought that the documents may afford evidence that Wenn was knowingly interviewed without her lawyer being present and without his knowledge and consent, and / or that Britz added to the contents of and forged Wenn's signature on her written s 204 statement. If it should ultimately be found that Wenn's s 204 statement was in fact unconstitutionally obtained, it would be open to the defence to argue that the statement should be excluded in terms of s 35(5) of the Constitution.
45. The State contends that it is difficult to see how documents pertaining to the logistical arrangements for interviewing Wenn may be relevant to the question of whether or not her s 204 statement was constitutionally obtained. According to the State, Wenn and Britz both testified regarding the manner in which the s 204 statement was obtained, and the matter falls to be decided on the basis of the probability and credibility of their respective versions.
46. As I have mentioned, it is implicit in the 204 ruling that I accepted the version of Britz and not that of Wenn, for reasons which have not yet been published. I

considered the evidence and accepted that there was no factual basis for the suspicion of misconduct harbored by the defence.

47. Now it is so that the s 204 ruling is interlocutory in character, and it is open to reconsideration at the end of the criminal trial. I appreciate that I am duty bound to keep an open mind and to reconsider the 204 ruling in the light of all the evidence adduced at that stage. The accused are perfectly entitled to adduce evidence aimed at challenging the 204 ruling and demonstrating why I should alter or reverse the 204 ruling.
48. *Non constat*, however, that they may be given *carte blanche* to trawl through the documents of the prosecution in a quest to find evidence of prosecutorial misconduct on the basis of mere speculation, and without putting up any new evidence which goes to show, *prima facie*, that there may be substance after all to the defence's suspicions. An example of such new evidence would be if the missing Wynberg Court legal aid file for Wenn were to be located and was found to contain no note of the fact that Britz had informed Wenn's lawyer that the State wished to consult with her with a view to calling her as a s 204 witness. And even if such new evidence were to emerge, I consider that the appropriate course of action for the defence would be to apply for access to the docket, rather than resorting to subpoenas duces tecum. I deal further with this aspect below.

49. One of the difficulties with the subpoenas is that the relevance of the documents sought – and hence the legitimacy of the subpoenas – is predicated on the validity of the suspicions of misconduct on the part of the State in procuring Wenn's and Fortuin's s 204 statements. The documents requested (to the extent that they exist) can have no possible relevance to the issues in the trial other than to demonstrate malfeasance, so if no malfeasance in fact occurred, the subpoenas can have no purpose.
50. As in the case of the lack of specificity, the hypothetical and speculative relevance of the documents sought points to the fact that the subpoenas are a fishing expedition: one which, I might add, has no prospect of success in my view. For if the employees of the NPA and Britz had indeed knowingly and deliberately questioned Wenn without the consent of her legal representatives and in violation of her constitutional rights, and had then conspired to cover up the unlawful interrogation in the manner suggested by the defence, I hardly think that they would have left a trail of written communications evidencing their nefarious actions.
51. A far more useful avenue of enquiry, I venture to suggest, would be to question Ms Van der Merwe, who was present at the meeting at the office of the DPP on 27 October 2015. One can reasonably expect that her answers will either bear out the theories advanced by the defence, or put an end to them once and for all.

52. I am not persuaded that there is any basis for believing that the documents requested in the subpoenas will in fact be relevant to the accused's defence in the criminal trial, and for this reason too the subpoenas *duces tecum* fall to be set aside.

Abuse of the subpoena mechanism: failure to first seek access to the docket

53. Mr Webster contended that the starting point for an accused to seek additional documents held by the State, over and above those portions of the docket provided to the accused in the ordinary course, is to seek access to the B and C sections of the docket. He submitted that it is an abuse of the subpoena mechanism to issue subpoenas *duces tecum* in respect of documents held by the prosecution without first asking for access to the full docket.
54. Mr Van der Berg conceded that no formal application had been made for access to the B and C sections of the docket, but he argued that access to the C section of the docket – the investigating diary – would be of no assistance to the defence as Britz had testified under cross-examination that she did not make entries in the investigating diary regarding the meeting on 27 October 2015. He further contended that, where malfeasance has been committed, those responsible would be astute not to include evidence thereof in the docket.
55. I cannot accept that the mere suspicion of prosecutorial misconduct and the spectre of concealment of documents entitles him or her to issue a subpoena

demanding access to all manner of prosecution documents in an effort to substantiate such suspicion. To accept such an entitlement would be to open the floodgates to a tsunami of subpoenas which would defeat the functioning of our criminal justice system. In my view, the remedy for an accused who has a well-founded suspicion that documentary evidence of prosecutorial misconduct exists, is to request access to the relevant document and, if necessary, to apply to Court for an order compelling the State to disclose the document.

56. Following the decision in *Tshabalala*, litigation privilege no longer applies to documents in the police docket which are incriminating, exculpatory or *prima facie* likely to be helpful to the defence. The entitlement is not restricted to statements of witnesses and exhibits, but extends to all documents that might be important for an accused properly to adduce and challenge evidence.²⁰ It follows, therefore, that the prosecution is under a duty to include in the docket and turn over to the accused any document which is exculpatory or *prima facie* likely to be helpful to the defence for purposes of adducing and challenging evidence. This is a serious ethical obligation, and it is not lightly to be inferred that the prosecution has been derelict in its duty in this regard.
57. If there were a document in the possession of the prosecution indicative of malfeasance in the gathering of evidence, it would indeed be relevant to the accused's right to challenge evidence, and the prosecution would be obliged to include the document in the docket.

²⁰ See NDPP v King 2010 (2) SACR 146 para [1].

58. To my mind, therefore, the first port of call for an accused who suspects malfeasance in the gathering of evidence is not to subpoena the production of prosecution documents wholesale, but rather to seek access to the full docket. If the accused considers that the docket is incomplete in that exculpatory or helpful documents are missing, the remedy would be for the accused to apply to Court for an order compelling the prosecution to turn over the documents thought to be missing. It would then be incumbent upon the accused to demonstrate a factual basis for the belief that the documents exist and have been concealed by the prosecution. The Court hearing such application would be in a position, if necessary, to take a “judicial peek” at the prosecution’s records in order to make a determination in this regard.
59. In this case the accused have not sought access formally to the B and C sections of the docket. A request was made during the course of the trial for the prosecution to bring these documents to court, but the defence did not pursue the matter – no doubt because it was considered that the exercise would be pointless. To my mind that was the wrong approach. I cannot see how the accused can complain that the docket is incomplete before they have had sight thereof.
60. In my judgment it amounts to an abuse of the subpoena mechanism to subpoena the production of documents held by the prosecution without first seeking access to the documents by way of the docket. I say that for the reason

that an accused can only issue subpoenas *duces tecum* to obtain relevant documents, i.e., documents relevant to the guilt of the accused or to his or her defence. But if a document is relevant in that sense, it falls to be included in the docket, and the way to procure access thereto is through an application for full access to the docket. If the document exists and has been left out of the docket, the remedy is to apply to Court to compel the State to include the document in the docket.

61. For these reasons I agree with Mr Webster's submission that the resort to subpoenas *duces tecum* instead of pursuing the remedy of access to the full docket amounted to an abuse of process which warrants the setting aside of the subpoenas *duces tecum*.

POLICY CONSIDERATIONS

62. In the light of the conclusion that the subpoenas *duces tecum* fall to be set aside as an abuse of process, it is not necessary for me to deal with the arguments advanced by Mr Webster on the grounds of public policy.
63. If I had to decide the point, however, I would be inclined to hold that the subpoenas *duces tecum* cannot be allowed to stand because of the broader implications for the administration of criminal-justice. In this regard Mr Webster submitted that it would be logistically impossible for the State to furnish each and every accused person with copies of a wide range of documents held in the

registry of the prosecution, and that any precedent which allowed such access would result in the criminal justice system being overwhelmed, with concomitant delays in the finalization of prosecutions. To quote Harms DP, it would “*grind an already overburdened criminal-justice system to a halt.*”²¹

THE REQUIREMENT THAT MS VAN DER MERWE TO ATTEND THE TRIAL AND TESTIFY ON BEHALF OF THE ACCUSED

64. In terms of s 192 of the Criminal Procedure Act, every person not expressly excluded by the Act from giving evidence is competent and compellable to give evidence in criminal proceedings.
65. The thrust of the application to set aside the subpoenas was aimed at the requirement to produce prosecution documents. No specific case was made out on the papers as to why Ms Van der Merwe should not be required to testify on behalf of the accused at the criminal trial. Before me Mr Webster fairly and properly conceded that Ms Van der Merwe is indeed a competent and compellable witness. Should she be called upon to testify, she will be entitled to object to answering questions which cross the boundaries of legal privilege.
66. As I have indicated, I consider that Ms Van der Merwe, who was present at the crucial meeting of 27 October 2015, is in a position to give evidence relevant to the accused’s complaints of prosecutorial misconduct. I see no reason to set aside the subpoena requiring her to testify at the trial, subject to her entitlement to invoke privilege where appropriate.

²¹ King at 156 a

CONCLUSION

67. In the result I make the following order:

- (a) The subpoena *duces tecum* issued by the first and sixth accused on 7 April 2022 in respect of Ms Joslin Pienaar is set aside.
- (b) The subpoena *duces tecum* issued by the first and sixth accused on 7 April 2022 in respect of Ms Jolou Van der Merwe is set aside.
- (c) The subpoena issued by the first and sixth accused on 7 April 2022 requiring Ms Jolou Van der Merwe to attend at court and testify on behalf of the first and sixth accused is confirmed, and Ms Van der Merwe is ordered to attend court on the resumption of the criminal trial.

D M DAVIS

Acting High Court Judge

15 August 2022

Appearances:

For 1st and 6th Accused: Adv J Van der Berg SC, instructed by Mr R Davies, Davies & Associates.

For the State: Adv C Webster SC, with Adv M Ebrahim, instructed by State Attorney L M Gava.