CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/03

SCHABIR SHAIK	Applicant
versus	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
LEONARD McCARTHY – THE INVESTIGATING DIRECTOR: DIRECTOR OF SPECIAL OPERATIONS	Third Respondent
WILLIAM JOHN DOWNER	Fourth Respondent
GERDA FERREIRA	Fifth Respondent

Heard on : 11 November 2003

Decided on : 2 December 2003

JUDGMENT

ACKERMANN J:

Introduction

[1] This is an application for leave to appeal[1] against the judgment and order of the High Court in Durban (the High Court) and concerns the constitutionality of certain provisions in section 28 of the National Prosecuting Authority Act[2] (the Act) that deal with examination under oath of certain persons.

[2] The applicant is Mr Schabir Shaik, a businessman and director of companies. First respondent is the Minister of Justice and Constitutional Development (the Minister). Second respondent is the National Director of Public Prosecutions (the NDPP). Third respondent is the Investigating Director: Director of Special Operations (DSO) appointed under the Act. Fourth Respondent is the Deputy Director of Public Prosecutions, Cape of Good Hope (the DDPP). Fifth Respondent is Ms Gerda Ferreira (Ms Ferreira), an advocate employed by and a member of the Directorate of Special Operations.

[3] Section 28 of the Act provides as follows:

> "**Inquiries by Investigating Director**.—(1) (a) If the *Investigating Director* has reason to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an *investigation* on the matter in question, whether or not it has been reported to him or her in terms of section 27.
> (b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a *specified offence* to the *Investigating Director*, the

[1] In terms of Constitutional Court Rule 18 read with section 167(6) of the Constitution.

[2] No 32 of 1998.

Investigating Director shall conduct an *investigation*, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the *Investigating Director*, at any time during the conducting of an *investigation* on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the *investigation* so as to include any offence, whether or not it is a *specified offence*, which he or she suspects to be connected with the subject of the *investigation*.

(d) If the *Investigating Director*, at any time during the conducting of an *investigation*, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the *Investigating Directorate* concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

(2) (a) The *Investigating Director* may, if he or she decides to conduct an *investigation*, at any time prior to or during the conducting of the *investigation* designate any person referred to in section 7 (4) (a) to conduct the *investigation*, or any part thereof, on his or her behalf and to report to him or her.

(b) A person so designated shall for the purpose of the *investigation* concerned have the same powers as those which the *Investigating Director* has in terms of this section and section 29 of *this Act*, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place *in camera*.

(4) The procedure to be followed in conducting an *investigation* shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the *Investigating Director* may deem fit.

(6) For the purposes of an *investigation*—

(a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the *investigation* or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director*, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director*, at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director*, to make copies thereof or to take extracts therefrom at any reasonable time.

(7) A summons referred to in subsection (6) shall—

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the *Investigating Director*;

(c) be signed by the *Investigating Director* or a person authorized by him or her; and

(d) be served in the prescribed manner.

(8) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10) (b) or (c), or in section 319 (3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(9) A person appearing before the *Investigating Director* by virtue of subsection (6)—

(a) may be assisted at his or her examination by an advocate or an attorney;

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who—

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;

(b) at his or her appearance before the *Investigating Director*—

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;

(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;

(c) having been sworn or having made an affirmation—

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence.

(11) . . . . .

(12) . . . . .

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the *Investigating Director* may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13)."

Factual background

[4] The matter came to engage the attention of the High Court under the following circumstances: After a preparatory investigation under subsection 28(13) of the Act had been conducted, the Investigating Director, on 24 August 2001, decided to institute an investigation under subsection 28(1) of the Act into the suspected commission of offences of fraud and corruption in contravention of the Corruption Act[3] in connection with the acquisition of armaments by the Department of Defence. On 30 August 2001 a search warrant was issued to search, amongst other premises,

[3] No 94 of 1992.

those of the applicant and of companies in which he had an interest. This search warrant was executed on 9 October 2001.

[5] On 16 November 2001 the applicant was arrested and charged with theft, alternatively various statutory offences. The trial was set down in the Regional Court for 27 May 2002. The DDPP had previously intimated to the applicant's legal representatives that further charges might be added to those already preferred against the applicant. The applicant's lawyers in turn advised the DDPP that they intended challenging the abovementioned search and seizure on constitutional grounds. This gave rise to doubts about the Regional Court's jurisdiction to hear such a challenge. These matters were argued on 27 May 2002, judgment was reserved and the case adjourned until 27 November 2002 to enable the State to add further charges. The applicant's legal representatives were advised by the DDPP that such further charges would in fact be the charges of fraud and corruption in connection with the acquisition of armaments referred to in paragraph 4 above.

[6] On 12 July 2002 a summons (the summons) was issued in terms of subsection 28(6) read with subsection 28(7) of the Act, calling on the applicant to appear at the offices of the DSO in Durban on 26 June 2002 to be questioned and to produce certain documents. The applicant duly appeared at the designated venue on the appointed day. Present were the DDPP and Ms Ferreira. The applicant was informed by Ms Ferreira that she was going to act as chairperson of the enquiry and that the DDPP would conduct the questioning. On being asked by the applicant's legal

representatives, the DDPP intimated that he was not going to question the applicant in regard to matters relating to the charges pending against him in the Regional Court, but that he intended doing so in relation to the charges of fraud and corruption in connection with the acquisition of armaments, which the DDPP had previously indicated might be added to the charges pending against the applicant in the Regional Court.

[7] The applicant's legal representatives objected to the enquiry and, after some discussion, it was agreed that the questioning would be adjourned to 24 July 2003 on condition that the applicant brought legal proceedings on or before 22 July 2003 to set aside the enquiry. The questioning was thereupon adjourned.

The High Court litigation

[8] In due course, on 15 September 2003 (by agreement with the DDPP), the applicant brought an application in the High Court in which he sought the following relief:

(a) an order setting aside the summons;

(b) "[a]lternatively in addition to [(a)]" an order declaring the provisions of subsection 28(6) of the Act to be unconstitutional and invalid;

(c) alternatively, an order declaring the procedure that the DDPP and Ms Ferreira intended adopting for the questioning of the applicant to be invalid and unlawful; and,

(d) an order directing the respondents to pay the costs jointly and severally.

[9] In the written notice given by the applicant pursuant to Uniform Rule 16A(1)[4] the constitutional issues involved in the application were stated to be:

> "1. Whether the Applicant's right to a fair trial is infringed by the summons served on the Applicant requiring that he be questioned in terms of Section 28(6) of [the Act] and to produce documents;
> 2. Whether section 28(6) of [the Act] is unconstitutional and invalid as a result of violating the rights entrenched in Sections 14 [privacy], 16 [freedom of expression], 33 [just administrative action], 34 [access to courts] and 35 [fair arrest, detention, trial] of the Final Constitution."

The constitutional issues were not significantly broadened by any factual or legal averment in the founding affidavits. Other than subsection 28(6), no other provision in the Act was attacked as being constitutionally invalid. The chief thrust of the applicant's attack, based on section 35 of the Constitution,[5] was that he was being compelled to assist in building a criminal case against himself. Under subsection 35(1)(a) of the Constitution an arrested person has the right "to remain silent"; under subsection 35(3)(h) an accused has the right "to be presumed innocent, to remain silent, and not to testify during the proceedings"; and under section 35(3)(j) an accused has the right "not to be compelled to give self-incriminating evidence."

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[4] Uniform Rule 16A(1) reads as follows:

> "(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
> (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
> (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
> (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days."

[5] Subsection 35(1) entrenches rights in respect of everyone who is arrested, subsection 35(2) in respect of everyone who is detained, and subsection 35(3) in respect of every accused person.

[10] In his founding affidavit, the applicant complained about the fact that the questioning was to be chaired by Ms Ferreira who, he contended, could not – as a member of the Directorate of Special Operations – exercise the necessary objectivity required of an independent arbiter. This complaint related to the administrative law attack founded on section 33(1) of the Constitution. The attack based on section 35 of the Constitution was limited to the compulsion to testify brought to bear on the applicant by, (so it was contended) section 28 (6) of the Act. To the extent that the State might have been obliged to justify, under subsection 36(1) of the Constitution, any infringement of the applicant's section 35 rights, it was – on the case brought by the applicant – obliged to show only that the *compulsion to testify* was, under the circumstances, justified.

[11] In the High Court the Minister did not oppose the application and intimated that he abided the decision of the Court. The High Court dismissed both the attack against the validity of the summons and the attack referred to in para 8(c) above, holding that –

> " . . . the proceedings at the inquiry are not of a judicial nature, nor do they constitute an administrative act. I agree with the submission by Mr. Moerane that the Applicant's demand for an independent arbiter at the inquiry is ill-founded."

[12] In regard to the attack against section 28(6) of the Act, the High Court found that, on a proper construction, the words "any person" as used in subsection 28(6)(a), did not include an accused person and that accordingly this subsection did not infringe the rights of an accused person under subsection 35(3) of the Constitution. It did find,

however, that the subsection infringed the right "to remain silent" under subsection 35(1)(a), but considered such limitation to be justified under section 36(1) of the Constitution on the authority of this Court's judgment in *Ferreira v Levin*.[6] Costs were awarded against the applicant, including the costs of two counsel.

The application to this Court

[13] The applicant obtained a positive certificate from the High Court under Constitutional Court Rule 18 on virtually all the matters raised in his application for a certificate. The only findings of the High Court's judgment challenged in the application are those holding that section 28(6) of the Act is constitutional and valid, and that the procedure for questioning under this subsection does not constitute administrative action and is accordingly not subject to the requirements of section 33(1) of the Constitution. During the course of argument in this Court, however, Mr Singh, who appeared for the applicant, indicated that he would not rely on this second ground and that he was confining his argument to the constitutionality of section 28(6) on the grounds of its incompatibility with section 35(3) of the Constitution.

[14] Events following the granting of a positive certificate by the High Court have complicated the issues. The application to this Court was served on the State Attorney on 22 August 2003 and filed with the Registrar on 26 August 2003. On 25 August 2003 the applicant was formally charged with offences of fraud and corruption under

[6] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).

the Corruption Act, being those very offences in respect whereof the summons was issued against the applicant and about which he was going to be questioned.

[15] The second to fifth respondents, in opposing the application in this Court, relied on these supervening events. In their response in terms of rule 18(9)(a), they stated that they were no longer entitled to question the applicant under subsection 28(6)(a). This is an implied acceptance of, and acquiescence in, the High Court's finding that section 28(6) does not apply to an accused person. They moreover stated that they had no intention of questioning the applicant under section 28(6) of the Act. They accordingly contended, that this issue was moot[7], in the sense that it no longer presented an existing or live controversy between the parties, and that the Court ought not to exercise its residual discretion to hear the matter.[8] In argument before the Court Mr Moerane, on behalf of the second to fifth respondents, abandoned this stance and requested the Court to decide on the constitutional validity of subsection 28(6) of the Act.

[16] This Court will only grant leave to appeal if it considers it to be in the interests of justice to do so. The prospects of success are important in deciding whether or not to grant leave to appeal, but they are not the only issue to be considered when the

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[7] Relying on *National Coalition for Gay and Lesbian Equality and Others v Min of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) fn 18. See also *JT Publishing (Pty) Ltd v Min of Safety & Security* 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC).

[8] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC) paras 9-11.

interests of justice are being weighed.[9] There are a number of factors that are relevant to this enquiry. They have to be assessed together.

[17] One of the factors relevant to the interests of justice is whether the dispute is a live one between the parties. In this case the High Court was undoubtedly correct in its conclusion that the words "any person" in subsection 28(6)(a) does not include an accused person charged with an offence that is the subject of a section 28 summons and investigation. Although the word "any" is, on the face of it a word of "wide and unqualified generality" it "may be restricted by the subject matter or the context."[10] Here context is all-important.[11] Giving an unlimited meaning to "any person" in the subsection would mean that, literally, any accused person could be summoned under 28(6) to answer questions in relation to his participation in the offences with which he has been charged. It could not have been the purpose of subsection 28(6) to cut across the well-established rules of criminal procedure and evidence established over centuries that have become part of our law.

[18] One need go no further than section 196(1)(a) of the Criminal Procedure Act[12] (the CPA) which establishes that an accused is a competent witness, but stipulates that "an accused shall not be called as a witness except on his own application." It is true

[9] *Fraser v Naude and Others* 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) para 7.

[10] *R v Hugo* 1926 AD 268 at 271, per Innes CJ.

[11] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC); 2002 (4) SA 768 (CC) para 63.

[12] Act 51 of 1977.

that this limitation, if applied literally, would apply only to the actual trial of the offence with which the accused is charged, but to construe "any person" in section 28(6)(a) as including such an accused, would constitute a flagrant circumvention of section 196(1)(a). Such a clash should be avoided by construing "any person" in section 28(6)(a) in a way most favourable to the accused,[13] and in a way that does not defeat the clear purpose of subsection 196(1)(a) of the CPA.[14] This is what the High Court did.

[19] The applicant can accordingly not be questioned under section 28 as long as he is being tried on charges covered by the section 28 summons. This summons has not, however, been withdrawn and if the criminal charges against the applicant were to be withdrawn, the applicant could still be questioned under the provisions of section 28. The expression of an intention on behalf of the second to fifth respondents not to do so, referred to above, does not amount to a formal undertaking to the Court that this will not occur. The possibility accordingly exists that the applicant could be examined. The issue between the parties which is not currently live, is not necessarily completely extinguished.

[20] It is not necessary, however, to reach a firm conclusion in this regard, because even if the issues were moot, this Court would still have to consider whether it ought

[13] See *R v Sachs* 1953 (1) SA 392 (A) 399-400 and *S v Baleka and Others* 1986 (1) SA 361 (T) at 392J-393F.

[14] A well-recognised rule of statutory construction was formulated as follows in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24:

> "[E]very part of a Statute should be so construed as to be consistent, so far as possible, with every part of that Statute, and with every other unrepealed Statute enacted by the same Legislature."

to exercise its residual discretion to hear the matter. This would itself involve an enquiry as to whether it would be in the interests of justice to do so, a prerequisite for which being that "any order which this Court may make will have some practical effect either on the parties or on others."[15] There could well be, indeed there are likely to be, other parties who find themselves in the same position as the applicant before being charged with the very offences forming the subject of the summons issued against him. This would therefore be a consideration in favour of granting leave.

[21] There are, however, considerations going the other way. The kernel of the applicant's attack throughout has been that the section 28 procedure empowers the prosecuting authority to require a suspect to answer questions without giving the suspect full immunity from the consequences of such answers. This attack has been based on section 35 of the Constitution and has been focussed exclusively on subsection 28(6) [16] of the Act. Subsection 28(6) is, however, the wrong provision to target. It does no more than describe the Investigating Director's powers and says nothing about the obligations of the examinee. It neither compels the examinee to heed the summons nor to answer any questions, nor does it stipulate what questions the examinee is obliged to answer, nor what use may be made of any answer, nor what the consequences might be if the examinee should fail or refuse to answer any question. The sting of the section – for purposes of the section 35 attack – is found in

[15] The *Langeberg* case above n 8 para 11.

[16] Quoted in para 3 above.

subsections 28(8) and (10).[17] The punishment for the offence created by subsection 28(10) is not prescribed in the Act and, accordingly, the general enabling provisions of section 276 of the CPA – that empowers, amongst other things, the imposition of imprisonment – apply.

[22] The compulsion to attend, to be sworn in or to make an affirmation, and to answer questions fully, are all stipulated in subsection (10). The extent of examinees' privilege to refuse to answer questions, and the manner and extent to which answers – that examinees are obliged to give – may subsequently be used against them, are detailed in subsection (8). Indeed, the constitutional attack in the High Court and this Court focussed on the alleged constitutional inadequacy of the direct use immunity[18] provided for in subsection (8)(b).

[23] Highlighting the fact that the wrong statutory provision has been attacked is not mere pedantry. It should not be thought that such an omission can always be cured, as between litigating parties, merely because the arguments addressed by them covered, albeit by implication, subsections 28(8) and (10). It is constitutionally a serious matter for any court to declare a statutory enactment of Parliament – or for that matter of any legislature – invalid, because it constitutes a serious invasion, albeit a constitutionally sanctioned one, by one arm of the state into the sphere of another. Moreover, an order by this Court that a statutory provision is constitutionally invalid,

[17] Quoted in para 3 above.

[18] As to which see *Ferriera v Levin* above n 6 paras 134, 152 and 153.

does not operate between the litigating parties only, but is generally binding on all persons and organs of state.

[24] The minds of litigants (and in particular practitioners) in the High Courts are focussed on the need for specificity by the provisions of Uniform Rule 16A(1).[19] The purpose of the rule is to bring the case 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 steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a Chapter 2 right and adduce evidence in support thereof.

[25] 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.

[26] Another consideration, adverse to the granting of leave, is the fact that the High Court in its judgment, and the parties in their arguments here and in the High Court, approached the issue of the constitutional invalidity of subsection 28(6) on the restricted basis that the summons in this case related to the suspected commission of offences of fraud and corruption in contravention of the Corruption Act. It was

[19] Above n 4.

common cause that such offences are extremely serious. The justification enquiry under section 36(1) of the Constitution, focussed exclusively on the state interest in prosecuting such serious crimes.

[27] This approach is incorrect. It is inconsistent with the principle of objective constitutional invalidity enunciated by this Court. Under the interim Constitution, the relevant part of this principle was formulated as follows in *Ferreira v Levin*:

> "[T]he enquiry is an objective one. A statute is either valid or "of no force and effect to the extent of its inconsistency". The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."[20]

This principle is equally applicable under the 1996 Constitution.

[28] Accordingly, when the state interest in conferring no more than a use immunity in subsection 28(8) is evaluated, regard must be had – not to the offences referred to in the summons – but to the whole range of offences in respect of which a summons could be issued under subsection 28(6). The "specified offence", referred to in

[20] Above n 6 para 26.

subsection 28(1), in respect whereof an investigation may be conducted and a person summoned under subsection 28(6), is defined in section 1 of the Act as meaning –

> "any matter which in the opinion of the *head of an Investigating Directorate* falls within the range of matters as contemplated in section 7(1)(a)*(aa)* or any proclamation issued in terms of section 7(1)*(a)(bb)* or (1A), and any reference to the commission of a specified offence has a corresponding meaning".

The matters contemplated in section 7(1)(a)(aa) are:

> "offences or any criminal or unlawful activities *committed in an organised fashion*". (Emphasis supplied).

The matters contemplated in section 7(1)(a)(bb) are:

> "such other offences or categories of offences as determined by the President by proclamation in the *Gazette*."

[29] Every possible offence is captured by the sweep of subparagraph (aa) of section 7(1)(a), provided only that it is committed "in an organised fashion". The ambit of subparagraph (bb) of section 7(1)(a) cannot be construed restrictively, so as to limit the offences or categories of offences that may be determined by the President, to offences committed "in an organised fashion". To do so would be to render subparagraph (bb) tautologous. It is clear that subparagraph (bb) enables the President to proclaim any offence as a "specified offence" for purposes of section 28, whether or not it is committed in an "organised fashion".

[30] By Proclamation No. R. 102, 1998 of 16 October 1998 offences were proclaimed which included "theft and any offence involving dishonesty" and any offence in contravention of "the Income Tax Act . . ."; "the Customs and Excise Act . . ."; "the Sea Fishery Act . . ."; and "the Drugs and Drug Trafficking Act . . ."; committed "in an organized fashion or which may endanger the safety or security of the public, *or* any conspiracy, incitement or attempt to commit any of the above-mentioned offences" (Emphasis supplied). The offences covered by section 7(1)(a)(aa) include the most trivial offence, provided it is committed in an organised fashion. This Proclamation includes an attempt to commit theft and any offence involving dishonesty, and it does so without expressly limiting it to attempts made in an organised fashion.

[31] By Proclamation No. R. 123, 1998 of 4 December 1998 (which did not purport to repeal the previous proclamation) the following further offences were added:

> "(a) . . .
>
> (i) . . .
>
> . . .
>
> (iv) corruption in terms of the Corruption Act . . .; or
>
> (b) any other –
>
> (i) economic common law offence; or
>
> (ii) economic offence in contravention of any statutory provision, which involves patrimonial prejudice or potential patrimonial prejudice to the State, any body corporate, trust, institution or person,
>
> which is of a serious or complicated nature."

The common law or statutory "economic" offences referred to need not be committed in an organised fashion, the only qualification is that such offence must be of a serious or complicated nature. No indication is given as to what is meant by "serious" or "complicated" or what criteria the Investigating Director is to use when, under subsection 28(1), such Director is to form a view that there is reason to suspect that a "specified offence" has been or is being committed.

[32] It is inadvisable to attempt any precise circumscription of the offences that may form the subject matter of a subsection 28(6) investigation. Suffice it to say that the offences could be far less serious or damaging to the state than offences referred to in the applicant's summons. Yet, it was on the basis of all such offences – that could be the subject of a section 28(6) summons – that the justification enquiry should have been done. The wide ambit of section 28(6) was not brought to the attention of the High Court nor appreciated by the litigants in this Court.

[33] The wrong provision in the Act has been targeted for constitutional attack. The potential ambit of section 28 has been misunderstood, with the attendant consequences referred to above. The dispute is not currently a live one between the parties. Under all these circumstances, it is not in the interests of justice to grant leave to appeal in which the thrust of the constitutional attack is not in substance against subsection 28(6) but against subsections 28(8) and (10).

[34] It is necessary, in the public interest, to comment on the way the attack was conducted in this Court. Both in the written and oral argument on the applicant's behalf, it was strenuously contended that the direct use immunity provided by section 28,[21] was constitutionally insufficient and therefore the compulsion to furnish incriminating answers invalid. In support of these contentions, heavy reliance was placed on dicta in a number of judgments of the Canadian Supreme Court.

[35] In *Ferreira v Levin* this Court considered, in the context of enquiries and the examination of persons under section 417 of the Companies Act 61 of 1973, the constitutional validity of subsection 417(2)(b) that provided the following:

> "Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him."[22]

The Court held the provision to be constitutionally invalid and one of the issues was the extent of its invalidity. This in turn revolved around the question as to what form of protection, against the use of such examinees' answers against themselves in a subsequent criminal trial, would be valid.

[36] There were three choices:

(a) Transactional immunity, that protected examinees from prosecution in respect of any offence disclosed in their answers;

[21] As already pointed out the compulsion to answer and the direct use immunity are features of subsection 28(8) and not subsection 28(6) of the Act.

[22] Above n 6 para 1.

(b) direct and derivative use immunity, that protected the examinees from their answers being used against them and also the exclusion from any subsequent prosecution of evidence derived by the prosecuting authorities from such answers; and,

(c) direct use immunity, that protected the examinees from their answers being used against them, and no more.

The Court opted for the last-mentioned. It came to the conclusion that, in the South African context, mere direct use immunity was sufficient, bearing in mind that the trial judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.[23]

[37] In coming to this conclusion, the Court paid close attention to comparable decisions in other jurisdictions, and in particular to the very Canadian authorities relied upon in this Court on the applicant's behalf. The conclusion reached in *Ferreira v Levin* on the use of derivative evidence, summarised above, was a broad and general one, and not confined to the statutory provision in question. Although attempts were made by the applicant in this Court to distinguish *Ferreira v Levin*, these were not convincing. If the applicant's contention was that the case had been wrongly decided, argument should have been addressed to convince this Court that it has the power to overrule itself and that it ought to do so. This was not done.

[23] Id. See, for example, paras 150-3.

A concern relating to section 28 of the Act

[38] There is a concern about the constitutional validity of subsections 28(6), (8) and (10) of the Act. It was not formally raised or dealt with in argument as a ground for attack under section 35 of the Constitution. While refraining from pronouncing on it, the Court cannot allow the concern to pass unmentioned. It relates to the fact that, under subsection 28(6)(b), the "Investigating Director or a person designated by him" questions the person summoned under oath or affirmation, without the necessity of any other person being present, let alone a person who is independent of the Directorate of Special Operations.

[39] This concern is not dispelled by an argument that the Investigating Director could, under the discretion conferred by subsection 28(4), make provision for the questioning to be presided over by an independent person. The point is that the Investigating Director is not obliged by any of the subsections to do so. This concern must moreover be viewed in the context of subsection (3), that makes it obligatory for all proceedings contemplated in subsections (6), (8) and (9) to take place in camera, and that, under subsection (5), these proceedings are to be recorded "in such manner" as the Investigating Director may deem fit. An Investigating Director could decide to keep a long-hand minute herself, or by the person designated to conduct the examination. Although the person summoned is, under subsection 28(9)(a), permitted to have legal representation, it cannot be assumed that a lawyer will be appointed. The section 28 procedure raises the spectre of the interrogator and interrogatee alone

in one room for days, the former asking the questions and making the record, the latter simply answering questions.

[40] The Act raises relatively novel problems about how to reconcile the need for effective control of organised crime with respect for the constitutional protection of a fair trial. More particularly it introduces elements of inquisitorial investigation into what has traditionally been an accusatorial system. The potential tensions involved need to be confronted with properly prepared papers and appropriately focused argument. It would not be in the interests of justice to touch on these matters in a tangential manner on the basis of the application as mounted in the present case.

The costs in the High Court and this Court

[41] The only remaining issue concerns the costs in the High Court that the applicant was ordered to pay. Even assuming, without deciding, that there may be circumstances when it is necessary for this Court to adjudicate on the merits of an appeal for the sole reason of considering an appeal against a costs order,[24] this is not such a case. The merits of the true issues cannot be considered because of the way the attack was launched by the applicant and it is not in the interest of justice, in the circumstances of this case, to grant leave to appeal solely against the costs order in the High Court. In dismissing the application for leave to appeal it is equitable to require all the parties to pay their own costs in this Court.

[24] See, for example, *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 863 and *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) para 18.

The order

[42] The following order is made:

1. The application for leave to appeal is dismissed;

2. All the parties are to pay their own costs in this application.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, and Yacoob J concur in the judgment of Ackermann J.

For the applicant:	N Singh SC and AA Gabriel instructed by Reeves Parsee Attorneys, Durban
For the second to fifth respondent:	MTK Moerane SC and RJ Salmon instructed by the State Attorney, KwaZulu - Natal