

CONSTITUTIONAL COURT OF SOUTH AFRICA

[2008] ZACC 14
Case CCT 90/07

THINT HOLDINGS (SOUTHERN AFRICA) (PTY) LTD First Applicant

THINT (PTY) LTD Second Applicant

versus

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Case CCT 92/07

JACOB GEDLEYIHLEKISA ZUMA Applicant

versus

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Heard on : 11-13 March 2008

Decided on : 31 July 2008

JUDGMENT

THE COURT:

Introduction

[1] These two cases concern the lawfulness of a letter of request issued in terms of section 2(2) of the International Co-operation in Criminal Matters Act 75 of 1996 (the

Act)¹ by Levinsohn DJP of the Durban High Court. The letter of request requested the Attorney-General of Mauritius to transmit to the South African National Director of Public Prosecutions (NDPP) 14 original documents in the possession of the Mauritian authorities, together with statements as to their authenticity. It is the decision to issue the letter of request that is the subject matter of this judgment.

[2] The two applications before this Court were heard together. They are for leave to appeal against the decision of the Supreme Court of Appeal handed down on 8 November 2007.² The Supreme Court of Appeal unanimously dismissed the applicants' appeal against the High Court³ decision of 2 April 2007.

The parties

[3] In the one application the first applicant is Thint Holdings (Southern Africa) (Pty) Ltd, a company incorporated in South Africa and carrying on business in Pretoria. The second applicant is Thint (Pty) Ltd, an incorporated company carrying on business at the same address. Both companies are subsidiaries of Thales

¹ Section 2(2) provides:

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

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

² *Zuma and Others v National Director of Public Prosecutions* [2007] ZASCA 135; [2008] 1 All SA 234 (SCA). The matter has not yet been reported in the South African Law Reports.

³ *National Director of Public Prosecutions v Zuma and Others* DCLD 13569/2006, 2 April 2007, unreported. This matter was heard before Levinsohn DJP.

International Africa Ltd (formerly Thompson CSF-Africa Ltd) and together they will be referred to as the Thint companies. In the second application the applicant is Mr Jacob Gedleyihlekisa Zuma (Mr Zuma). A reference in this judgment to “the applicants” shall refer to the applicants in both matters, unless the context indicates otherwise. The respondent in both applications is the National Director of Public Prosecutions.

Background

[4] On 5 October 2001, an order was made by the Mauritian Supreme Court authorising the search of the premises of Thales International Africa Ltd (Thales) and of Mr Alain Thétard (Mr Thétard), who was at all relevant times a director of both Thint companies and Thales. The order also authorised the seizure of certain specified documents to be found on the premises.

[5] The order was obtained by the Directorate of Special Operations (DSO), a unit within the office of the National Prosecuting Authority. The request formed part of an investigation conducted by the DSO into alleged corruption concerning the so-called “arms deal” in which the applicants are implicated.⁴ Advocate Downer SC, a representative of the NDPP, was present at the search of the premises. While the

⁴ In November 2000, the DSO tasked Ms Gerda Ferreira with determining whether there existed reasonable grounds upon which an investigation could be conducted pertaining to corruption and/or fraud in relation to the arms deal. In August 2001, her mandate was extended to the level of conducting a full investigation into suspected commission of fraud and corruption in relation to the said arms deal. In September 2001, Ms Ferreira caused a request to be transmitted to the Ministry of Justice of Mauritius for an application for “a *commission rogatoire* and search and seizure”. The Mauritian authorities had some difficulty with instituting a *commission rogatoire* as the persons from whom the documents were to be seized were not witnesses but rather suspects in an investigation. After negotiating with the Mauritian authorities, it was decided that only a search and seizure order would be sought and the *commission rogatoire* was abandoned.

original documents were retained by the Independent Commission Against Corruption in Mauritius, Advocate Downer returned to South Africa with copies of the documents.

[6] One week after the search and seizure, Thales and Mr Thétard launched proceedings in the Mauritian Supreme Court for an order restricting the use of the original documents contained on diskette and in the possession of the Independent Commission against Corruption. Thales and Mr Thétard contended that the information contained on the seized diskettes was not limited to information pertinent to the letter of request and the order of the Mauritian Supreme Court. Therefore, they averred that material belonging to both Thales and Mr Thétard was indiscriminately seized. The application by Thales and Mr Thétard was set down for hearing on 26 October 2001. After several postponements it was eventually heard on 27 March 2003. On that day, the parties reached an agreement. Amongst other assurances given, the Independent Commission Against Corruption undertook not to communicate any of the documents to any person or authority unless it was authorised to do so by an order of a Mauritian court.

[7] After the conviction of Mr Schabir Shaik (Mr Shaik) in 2005,⁵ the National Prosecuting Authority decided to charge Mr Zuma and the Thint companies with certain offences including corruption. Their trial was set down for hearing on 31 July 2006.

⁵ Mr Shaik's final appeal was dismissed by this Court in *Shaik and Others v S* [2007] ZACC 19; 2007 (12) BCLR 1360 (CC); 2008 (1) SACR 1 (CC).

[8] The NDPP sought to obtain the original documents in case the applicants objected to the admissibility of the copies. It was for that reason that the NDPP applied to the Durban High Court (the High Court) for the issue of a letter of request.⁶ The letter of request requested the Mauritian authorities to furnish the original documents obtained during the search of October 2001, as well as proof of their authenticity. This application was made in terms of section 2(1) of the Act.⁷

[9] On 22 March 2006 the High Court declined to issue the letter of request, on the ground that section 2(1) conferred authority to issue a letter of request only upon the court seized with the relevant criminal proceedings. Given that criminal proceedings had already been instituted, the High Court referred the application for the letter of request to the trial court.⁸ However, on 20 September 2006, the trial court per Msimang J refused the state's application for a postponement and struck the criminal proceedings from the roll.

[10] On 12 December 2006, the NDPP brought a new application for the issue of a letter of request, this time under section 2(2) of the Act. Whereas under section 2(1) a letter of request may be issued by the court during criminal proceedings, section 2(2)

⁶ *S v Zuma and Others* 2006 (2) SACR 69 (D). This matter was heard before Combrinck J.

⁷ Section 2(1) provides:

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

⁸ Above n 6 at para 9.

may be utilised as soon as an investigation is underway.⁹ Although the Act permits an application under section 2(2) to be brought *ex parte*, the NDPP nevertheless served notice of the application on the applicants, in accordance with an earlier agreement to do so. The application was heard before Levinsohn DJP on 22 and 23 March 2007.

High Court

[11] Before Levinsohn DJP, the NDPP argued that, once the Court was satisfied that the application met all three jurisdictional requirements set out in section 2(2), the Court should issue the letter of request.

[12] The applicants opposed, insisting that the applicable provision was section 2(1) and not section 2(2). They contended that even if the criminal proceedings had been struck from the roll, those proceedings were still pending and thus section 2(2) was inapplicable. Levinsohn DJP rejected this argument. He found that once a case is struck from the roll prior to the plea, criminal proceedings are terminated.¹⁰

[13] Levinsohn DJP further concluded that the jurisdictional requirements of section 2(2) of the Act had been satisfied. In the result, he issued the letter of request on 2 April 2007. It requested the Attorney-General of Mauritius to transmit to South Africa the original 14 documents in the possession of the Independent Commission Against Corruption and to obtain and transmit statements from the relevant authorities

⁹ See above n 1.

¹⁰ Above n 3 at 20-1.

as to their authenticity. It is Levinsohn DJP's decision to issue the letter of request in terms of section 2(2) that is the subject of this appeal.

Supreme Court of Appeal

[14] The applicants appealed against the decision of the High Court. Dismissing the appeal, the Supreme Court of Appeal, per Nugent JA, held that the applicants had no standing to appeal against the decision to issue the letter of request.¹¹ Furthermore, the Court concluded that even if they did have standing, the applicants would have failed on the merits of the case as the jurisdictional requirements of section 2(2) had clearly been met.¹²

Constitutional Court

[15] In this Court, Mr Zuma alleged that the issue of the letter of request resulted in an infringement of his right to dignity under section 10 of the Constitution.¹³ He submitted that the contents of the letter of request, together with the fact that it was issued by a judge, would incline any reader to conclude that he is guilty of corruption.¹⁴

¹¹ Above n 2 at paras 19-20.

¹² Id at para 14.

¹³ Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

¹⁴ The letter of request issued by Levinsohn DJP included an affidavit by the Head of the DSO, setting out the background facts and basis for seeking the letter of request, as well as statements to the effect that Mr Zuma was suspected of having committed the crime of corruption.

[16] Mr Zuma also alleged the infringement of his right to a fair trial under section 35(3).¹⁵ This argument is similar to the Thint companies' contention that by denying them standing to challenge the validity of the letter of request, the decision of the Supreme Court of Appeal infringed their constitutional rights and reflected a failure to apply the provisions of section 39(2) of the Constitution.¹⁶ Mr Zuma further alleged that the ruling by the Supreme Court of Appeal infringed his right of access to courts under section 34.¹⁷

[17] The applicants also alleged non-compliance with the principle of legality in the issuing of the letter of request. They averred that a letter of request cannot be lawfully issued unless the jurisdictional facts set out in section 2(2) are present and that these jurisdictional facts were not present in this case. Specifically, they argued that the requirement set out in subsection 2(2)(c) was not established in this case. That subsection requires an applicant seeking a letter of request to satisfy the judicial officer that it is "necessary in the interests of justice" that a letter of request be issued. In papers lodged before this Court, the two Thint companies also raised the concern that the National Prosecuting Authority had acted beyond its powers under section 179 of the Constitution,¹⁸ but they abandoned this submission during oral argument.

¹⁵ Section 35(3) of the Constitution protects the fair trial rights of accused persons.

¹⁶ Section 39 of the Constitution relates to the interpretation of the Bill of Rights. Section 39(2) provides:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

¹⁷ Section 34 of the Constitution provides that everyone has the right to have their disputes decided in a fair public hearing before a court or another independent and impartial tribunal or forum.

¹⁸ Section 179 of the Constitution sets out the powers and functions of the National Prosecuting Authority.

Interlocutory applications

[18] The NDPP filed his answers to the applications for leave to appeal two days out of time. In his application for condonation, he argued that it was impossible to answer all four of the applications in this matter within the 10 days permitted by the Rules of this Court, given the sheer volume of work involved and the limited availability of counsel. Furthermore, the NDPP filed a supplementary answer to place on record that Mr Zuma and the Thint companies had been re-charged at the end of last year. He applied for leave to do so. The applicants do not oppose the applications.

[19] In light of the fact that there is neither opposition to the applications nor any prejudice to the applicants, the applications are granted.

Application for leave to appeal

[20] This Court only has jurisdiction to hear a matter if it is a constitutional matter¹⁹ or an issue connected with a decision on a constitutional matter.²⁰ That however is not decisive.²¹ In addition it must be shown that it is in the interests of justice that the application be granted.²²

¹⁹ *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30.

²⁰ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC); 2001 (1) SACR 1 (CC) at para 11.

²¹ *Shaik and Others v S* above n 5 at para 15; *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; and *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29.

²² See in this regard *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19 (*Radio Pretoria*); and *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC) at para 24.

[21] The applicants raised several issues. They contested the legality of the exercise of public power by Levinsohn DJP. In addition, they alleged that their fair trial rights under section 35(3) of the Constitution²³ had been infringed. Finally, Mr Zuma asserted that his right to dignity under section 10²⁴ and his right of access to courts under section 34 had been violated.²⁵

[22] Whether it is in the interests of justice for leave to appeal to be granted is based on a careful weighing-up of all relevant factors,²⁶ including the interests of the public. This is the first time that the Court has been asked to consider section 2(2) of the Act and the applicants have raised constitutional issues in this regard. It is therefore in the interests of justice that leave to appeal be granted.

[23] We deal first with whether the letter of request was lawfully issued under section 2(2) of the Act. The second question to be determined is whether the issuing of the letter of request infringed the enumerated rights as claimed by the applicants.

Lawfulness of the letter of request

[24] The NDPP's first attempt to obtain a letter of request was made in an application to the High Court before Combrinck J, after the NDPP charged the applicants. On 22 March 2006, Combrinck J found that section 2(1) was only

²³ Above n 15.

²⁴ Above n 13.

²⁵ Above n 17.

²⁶ Above n 22.

applicable when a court was already seized with criminal proceedings and that, as he was not seized with the criminal proceedings, he could not grant the application. He therefore referred the matter to the trial court.²⁷ The criminal proceedings were thereafter struck from the roll by the trial court because the NDPP was not ready to proceed. After that, but before the reinstatement of the criminal proceedings, the NDPP made this second attempt to obtain the letter of request, this time invoking section 2(2) of the Act.

[25] In the Supreme Court of Appeal Nugent JA, when confirming the order of the High Court, held that “proceedings” in section 2(1) means “the trial of a person on a criminal charge”²⁸ which commences when an accused is called upon to plead. He held that section 2(2) “allows for assistance to be sought in the course of a criminal investigation that precedes a prosecution”.²⁹ The applicants, on the other hand, contend that substantively they were in the position of accused persons at all material times and that section 2(2) should have no application as the state never, in fact, withdrew the charges against them, although the criminal case was struck from the roll. Consequently, they aver, the state was not in a position to seek a letter of request at all until it had re-charged the applicants and the trial was about to commence when it could have proceeded under section 2(1).

²⁷ Above n 6.

²⁸ Above n 2 at para 10.

²⁹ Id.

[26] Under section 2(1), the letter of request is issued once it appears to the presiding officer during criminal proceedings that it is necessary in the interests of justice because a person who can give evidence cannot do so without undue expense, delay or inconvenience.³⁰ The meaning of the section is clear: the letter of request is issued in court and not by a judge in chambers or a magistrate. The application is therefore made to the court by the investigator during, and not outside of, the criminal proceedings.

[27] Section 2(2), however, requires a letter of request to be issued on application by an investigator outside of court proceedings. An application is made before a judge in chambers or a magistrate, thereby permitting a request to be made even before commencement of criminal proceedings and during investigations.

[28] In terms of that section, the investigator must on reasonable grounds satisfy the judge or the magistrate that:

- (a) the information sought relates to an alleged offence reasonably believed to have been committed in South Africa; alternatively, that the information is necessary to determine whether an offence has been committed;
- (b) an investigation in respect of the alleged offence is being conducted;

³⁰ Above n 7.

- (c) for the purposes of the investigation it is necessary in the interests of justice that the information be obtained; and
- (d) the information sought is in the possession of a person or authority in a foreign state.

[29] For a letter of request to be granted, it is required that the judge or magistrate be satisfied that each of the jurisdictional requirements under section 2(2) has been met.³¹ Save for the question as to whether or not the information sought is necessary in the interests of justice, which under subsection 2(2)(c) is determined in the discretion of the judicial officer of the court, all the jurisdictional requirements are facts which must be proved.

[30] Whether the information sought is necessary in the interests of justice will derive from the circumstances of each case. A determination of the interests of justice must take into account and balance the relevant rights, duties and interests involved.³² As the applicants' claim makes clear, individuals who may be affected by the issue of letters of request possess constitutional rights which must be respected. On the other hand, the public has an interest in the effective prosecution of crime and the state thus bears a duty to take all reasonable and lawful steps to obtain information necessary for the effective prosecution of crime.³³ What is necessary in the interests of justice must

³¹ Above n 1.

³² See *Radio Pretoria* above n 22.

³³ See inter alia sections 179 and 205 of the Constitution. Section 179 provides in relevant part:

be determined in the exercise of the court’s discretion taking into account the surrounding facts and circumstances of the case.³⁴

The interpretation of section 2(2)

[31] The legal questions concerning the proper interpretation of section 2(2) of the Act that must be decided in this case are twofold: (a) may the state use section 2(2) to procure original documents of which it already has copies; and (b) does the fact that the applicants had been previously charged, though that case had been struck from the roll, prevent the state from using section 2(2) in the circumstances of this case?

Use of section 2(2) to obtain originals when copies are already held

[32] In this case, the letter of request asked for the original documents, copies of which were already in the possession of the NDPP. It also requested affidavits from relevant officials in Mauritius for the purpose of confirming the authenticity of those documents in the event of them being tendered as evidence in future proceedings. The NDPP thus sought to obtain the documents to ensure that there could be no dispute as to their admissibility during the trial. As correctly pointed out by the Supreme Court of Appeal,³⁵ the applicants had already indicated that they would oppose any attempt on the part of the NDPP to tender copies as evidence of their content.

“2. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

.....

4. National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.”

³⁴ See *Radio Pretoria* above n 22.

³⁵ Above n 2 at para 11.

[33] The applicants argued that section 2(2) may not be invoked for purposes of obtaining evidence but merely to obtain information for the purposes of an investigation. The applicants also argue that since section 2(1) refers to “evidence” and section 2(2) makes reference to “information”, the words must have distinct and different meanings. “Information”, they contend, refers to unknown knowledge which in this case would be the contents of the seized documents. However, since the NDPP already had copies of the seized documents, he will not obtain any new “information” from the originals. The Thint companies submitted that the NDPP therefore sought to obtain “evidence”, which is different from “information” to be sought under section 2(2) and is therefore not covered by section 2(2). For that reason also, the letter of request is unlawful. Counsel for Mr Zuma largely echoed this argument.

[34] The NDPP’s response was that “evidence” and “information” may be different, but evidence is a category of information. A criminal investigator is therefore entitled to seek information that is known where it would be useful in proving the commission of a crime. Whether the purpose is to discover new facts or to prepare for a criminal trial with known facts, he argued, is neither here nor there.

[35] The Supreme Court of Appeal found that, for purposes of this case, there was no absolute distinction between these two concepts: an “investigation” includes the determination of whether an offence has been committed *and* the gathering of

evidence to prove its commission.³⁶ Information therefore extends to known facts in documentary form that might provide evidence of the commission of the offence and its meaning is not restricted to knowledge that is not yet known.

[36] In considering the applicants' arguments, it should be borne in mind that the state is entitled to tender evidence that seeks to strengthen its case at the criminal trial. Indeed, the state is under an obligation to prosecute crime as effectively as it lawfully can.³⁷ In our constitutional democracy, the courts must ensure, in the interests of justice, that fairness prevails and litigants are not oppressed or evidence suppressed. The courts must also ensure that a litigant's right to a fair trial under section 35 of the Constitution is protected.

[37] In order to determine the area of application of section 2(2), it is necessary to understand how crime is investigated. It is important to note that the process of investigation is not divided into two mutually exclusive processes: the first process being to determine whether a crime has been committed; and the second process being to gather evidence to prosecute the crime. These two processes happen simultaneously and both fall within the scope of "investigation". To understand "investigation" as referring only to the former process and not the latter would be to adopt a meaning of section 2(2) incompatible with the manner in which criminal investigations are undertaken. In our view, a more functional and appropriate

³⁶ Above n 2 at paras 13-4.

³⁷ Above n 33.

understanding of section 2(2) would recognise that the two processes are inevitably intertwined and that “investigation” in section 2(2) should be read accordingly.

[38] Furthermore, information is not restricted to new and/or unknown knowledge. It extends to any knowledge, known or unknown. Indeed, as the applicants argue, the NDPP has had the information contained in the 14 documents available to him since 10 October 2001, in the form of copies. He therefore did not seek new knowledge. What he sought was to obtain the original documents to counter, as he contended, the risk of the applicants’ objection to the use of the copies.

[39] The NDPP employed these investigative and information-gathering exercises with a view to building a case against the applicants for a future trial. That is a legitimate and lawful strategy to adopt. To distinguish between information and evidence as the applicants did is therefore to draw a false distinction. In our view, therefore, the applicants’ argument that the purpose for which the original documents were sought in this case falls outside the scope of section 2(2) must be rejected.

Was section 2(2) available in this case despite the fact that the applicants had previously been charged?

[40] The second argument raised by the applicants was that, because they had previously been charged, section 2(2) could not be employed by the NDPP. As described above, section 2(2) was invoked after the criminal case had been struck from the roll on 20 September 2006, and before the applicants were re-indicted.

Counsel for Mr Zuma argued that criminal proceedings began once the NDPP started its initial prosecution and that the NDPP should not be allowed to use section 2(2) because the criminal proceedings were struck from the roll as a result of the NDPP's state of unreadiness. They argued that the NDPP should not be permitted to prosper from its own mistakes.

[41] There are two obstacles in the way of this argument. First, once a case is struck from the roll, the case terminates and is no longer pending. There is no guarantee that the criminal proceedings will be reinstated. Removal of a matter from the roll is therefore abortive of the currency of the trial proceedings. Should the trial ever be re-enrolled, it would start anew.

[42] As soon as the criminal matter had been struck from the roll by Msimang J, therefore, the criminal proceedings were terminated and the proceedings were no longer pending. At the time, Mr Zuma had not yet pleaded to the charge. Even if there might have been an intention on the part of the NDPP at that stage to reinstitute proceedings, there was no guarantee that he would actually do so. But it would not matter even if the probabilities were that he would do so.

[43] In relation to the question as to whether or not section 2(2) is applicable in these circumstances, it is of no particular significance whether the NDPP was responsible for the matter being struck from the roll. That the criminal case was no longer on the roll and no criminal proceedings were pending is an objective fact. It cannot be said

therefore that once the matter had been struck from the roll, the proceedings were still pending.

[44] Secondly, the effect of this argument is that until the trial resumed, the NDPP would not have been entitled to use either section 2(1) or section 2(2). This would be an untenable result. It is in the interests of a speedy and fair trial that the state should prepare its case as fully as possible before proceeding to court. A speedy and fair trial is not only a constitutional obligation placed on the state, it is also a right of the applicants themselves and in the interests of justice. If the interpretation of section 2(2) suggested by the applicants were to stand, it would frustrate the very objectives of a speedy trial.

[45] Finally, we should add that the admissibility of any documents obtained under section 2(2) at the criminal trial falls to be determined in the light of section 5(2) of the Act. That section regulates the approach the court must take in relation to admissibility. One of the factors to be taken into account is any prejudice to any party which the admission of such evidence might entail.³⁸

³⁸ Section 5(2) of the Act provides:

“Evidence obtained by a letter of request prior to proceedings being instituted shall be admitted as evidence at any subsequent proceedings and shall form part of the record of such proceedings if—

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or
- (b) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) any prejudice to any party which in the opinion of the court should be taken into account; and
 - (v) any other factor which in the opinion of the court should be taken into account,

[46] The applicants' arguments that it was not appropriate for the NDPP to use section 2(2) in the circumstances of this case must therefore fail. We conclude that the letter of request was lawfully issued.

Standing

[47] The Supreme Court of Appeal concluded that the applicants did not have standing to challenge the issue of the letter of request.³⁹ It concluded that the process of obtaining information is a preliminary process that does not affect the rights of the applicant.⁴⁰ In our view, this is a matter that does not need to be decided in this case and we accordingly refrain from doing so. We should note, however, that our Constitution has adopted a broad approach to questions of standing.⁴¹ We wish to make it clear that we are not persuaded that the approach of the Supreme Court of Appeal is necessarily correct given our constitutional approach to standing and we leave this question open for consideration in another case.

is of the opinion that such evidence should be admitted in the interests of justice.”

³⁹ Above n 2 at para 20.

⁴⁰ *Id* at para 2.

⁴¹ Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

See also in this regard *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 164-7.

The right to dignity

[48] Counsel submitted that the issuing of the letter of request directly and detrimentally affects Mr Zuma's right to dignity under section 10.⁴² In that regard, reference is made to the impact of the letter of request on the political office held by Mr Zuma⁴³ as follows:

“We submit that a [letter of request] issued by a Judge of the High Court carries with it the respect engendered by the endorsement of that Judge that the interests of justice compel the [letter of request] and that the very act of issuing the [letter of request] itself will incline any reader thereof to the view that there is reason to believe that the person referred to in the [letter of request] (*in casu* the applicant) has in fact made himself guilty of corruption. In the circumstances, we submit that the [letter of request] which has been transmitted to law enforcement officials in a foreign state (Mauritius), directly and detrimentally affects the applicant's dignity. We have alluded to the positions held by the applicant to illustrate the obvious impact thereof on the applicant's reputation and dignity.”

[49] At a broad level, this issue reflects the tension between Mr Zuma's claims to the right to dignity and the duty of the NDPP in his constitutionally-mandated role and function to prosecute crime.⁴⁴ The state has a constitutional obligation to protect society against serious crimes, such as corruption and fraud.

⁴² Above n 13.

⁴³ At the time the letter of request was issued, Mr Zuma was the Deputy President of the African National Congress.

⁴⁴ Above [30].

[50] Dignity is indeed an important right and value in our Constitution.⁴⁵ Like any other right in the Bill of Rights, it may be limited subject to section 36 of the Constitution. The right to dignity however, does not necessarily extend to the right not to be named as a suspect, once there is a reasonable suspicion that a crime has been committed.

[51] There is currently no jurisprudence on the conflict between the right to dignity and the state's duty to fulfil its mandate in terms of sections 179 and 205 of the Constitution.⁴⁶ But there is much on the issue of the conflict between the rights to free expression and to dignity.⁴⁷ However, that jurisprudence is of no use to Mr Zuma. One of the primary defences against defamation, viewed as an injury to one's dignity, is the defence of truth.⁴⁸ That Mr Zuma is suspected of alleged corruption is the truth; it does not signify his guilt. His right to be presumed innocent under section 35(3)(h) remains untrammelled. What the NDPP has done is therefore no more than to communicate the objective fact that Mr Zuma is a suspect in a criminal matter. By analogy, this defence of truth could in principle apply and protect the NDPP from any interference in his constitutionally-mandated function.⁴⁹ As O'Regan J held in *Khumalo v Holomisa*, "no person can argue a legitimate constitutional interest in

⁴⁵ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); 1995 (2) SACR 1 (CC) at paras 144 and 328-9.

⁴⁶ See above [30].

⁴⁷ For a summary of developments in this area, see Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta, Cape Town 2005) at 383-92.

⁴⁸ See Neethling et al *Law of Delict* 5 ed (LexisNexis Butterworths, Durban 2006) at 313. The defence includes an element of public interest, but that is not at issue in this case.

⁴⁹ See above [30].

maintaining a reputation based on a false foundation.”⁵⁰ Similarly, there is no right not to be named as a suspect in a criminal matter.

[52] Counsel for Mr Zuma also alluded to his high political profile as relevant to the explanation of his claim. It suffices to point out that where our jurisprudence touches on the status of political information, it tends towards permitting greater dissemination rather than the restriction of it.⁵¹ This is clearly in recognition of the vital role that the free flow of information plays in maintaining an open democracy, thereby enhancing public trust, confidence and legitimacy in its institutions.

[53] Mr Zuma’s right to dignity under section 10 of the Constitution has accordingly not been infringed.

The right to a fair trial

[54] The submission on behalf of Mr Zuma was that, notwithstanding that the criminal proceedings were struck from the roll by Msimang J on 20 September 2006, Mr Zuma should be regarded as having been an accused person at all material times. This, he contended, is due to the fact that there was no doubt that he would be charged again in future. Despite that, and during the period between the order issued by Msimang J and his re-indictment on 28 December 2007, the NDPP approached the

⁵⁰ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 35.

⁵¹ *Id* at paras 18 and 22; see also *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at para 116; 2004 (11) BCLR 1182 (SCA) at para 117.

High Court for the issue of the letter of request in terms of section 2(2) of the Act.⁵² In doing so, counsel for Mr Zuma argued, the NDPP unlawfully circumvented the participative process envisaged in section 2(1) of the Act,⁵³ which he would otherwise have been obliged to pursue in order to obtain the evidence he sought from Mauritius. Therefore, counsel for Mr Zuma averred that a number of fair trial rights in section 35(3) of the Constitution have been infringed.⁵⁴

[55] We have held that the letter of request was lawfully issued under section 2(2) of the Act.⁵⁵ In the circumstances of this case, the applicable provision of the Act was section 2(2) and not section 2(1). The applicants' assertion that the NDPP subverted or circumvented their rights to a fair trial by invoking section 2(2) therefore has no substance. As we have already found, at this stage, the applicants' right to a fair trial is not implicated.

[56] Although Nugent JA held that the letter of request was not dispositive of the rights of the applicants and that they would have the opportunity to challenge the

⁵² For the text of section 2(2) see above n 1.

⁵³ For the text of section 2(1) see above n 7.

⁵⁴ See Section 35(3) of the Constitution above n 15. The applicants point specifically to the rights of the accused:

- “(b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
-
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner . . . ;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence”.

⁵⁵ Above at [31] – [46].

admissibility of the evidence obtained on the authority of the letter of request,⁵⁶ the applicants insisted that this opportunity will not arise. The Thint companies submitted that if the High Court order were to stand, they would legally be precluded from questioning the lawfulness of the letter of request at a future trial.

[57] Counsel for Mr Zuma submitted that although the right to cross-examine is a fundamental right, under section 2(2) a person who is subsequently accused has no right to challenge and adduce evidence by means of cross-examination of a witness from abroad. An accused, he contended, can only challenge under section 5(2) of the Act the admissibility of evidence already taken.⁵⁷

[58] The fact that copies of the documents sought had been successfully tendered as evidence in the trial of Mr Shaik does not necessarily mean that in this case the same result will follow. The trial court will still need to determine their relevance, admissibility and cogency. It is then and there that the applicants will have the full opportunity to engage with the prosecution and challenge the admissibility of the evidence. Of particular importance, as we have already pointed out, is that under section 5(2)(b) of the Act⁵⁸ and in terms of the Constitution, in particular subsections 35(3) and 35(5),⁵⁹ the trial court will surely ensure that the fair trial rights of the applicants are protected.

⁵⁶ Above n 2 at paras 2 and 15.

⁵⁷ Above n 39.

⁵⁸ *Id.*

⁵⁹ See section 35(3) of the Constitution above n 15. Section 35(5) of the Constitution governs the admission of unconstitutionally-obtained evidence.

[59] We have held that the letter of request, which is an executive tool to facilitate investigation for purposes of criminal proceedings, was lawfully issued and obtained. If in the process of executing the letter of request the applicants' rights had indeed been infringed, it would be the infringement of the rights and not the issuing of the letter of request which would have been challengeable.

The right of access to courts

[60] Mr Zuma also claimed that his right of access to courts under section 34 of the Constitution had been infringed.⁶⁰ The argument was as follows: He has raised legal challenges to the issuing of the LoR. As a result, this matter is a “dispute that can be resolved by application of law”.⁶¹ Thus, he has a right to have this dispute decided by a court, which in turn requires that he must be granted standing.

[61] The NDPP did not contest that Mr Zuma possesses a right to a hearing in a court of law, but submitted that that right would not be infringed if Mr Zuma was required to wait to raise his claims to exercise that right at the eventual trial. The trial court and not this Court is therefore the proper forum. Reserving the exercise of his right to make his claims does not result in infringement or threat of infringement of his rights.

⁶⁰ Section 34 provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁶¹ Id.

[62] Elsewhere in this judgment,⁶² we have articulated the nature of Mr Zuma’s rights to be exercised before the trial court. Those comments apply here with equal force. It follows that Mr Zuma’s right under section 34 of the Constitution has not been infringed, and for that reason cannot serve to grant him standing. However, even if there was to be no further trial or hearing, it is doubtful that section 34 would serve the purpose that Mr Zuma would have it serve. The right of access to courts exists to ensure that litigants who have suffered violation of their rights are not barred by procedural, legal or other obstacles from obtaining just and equitable relief from the courts.⁶³ It is not intended to grant standing to a person even after that person has received a full and proper hearing in a court of law, simply because such person alleges a violation of his or her rights. Such an interpretation of section 34 would essentially nullify the rules of standing in our law. It would create endless difficulties for the administration of justice. Inevitably, section 34 is of no aid to Mr Zuma at this time and in this Court.

“Clean hands”

[63] Counsel for Mr Zuma argued that since the Mauritian Supreme Court had precluded the removal of the documents, the state acted unlawfully and as a result, the NDPP approaches this Court with “unclean hands”, and should not be heard.

⁶² See above [58].

⁶³ See section 172 of the Constitution.

[64] The NDPP argued that this issue was not centrally addressed by the Supreme Court of Appeal, and for that reason the applicant should not be allowed to raise it on appeal.

[65] At this stage, it suffices to point out that this argument gives rise to the question of the admissibility of evidence. That question being a matter for the discretion of the trial court makes the question intrinsically one to be dealt with by that court.⁶⁴ On that basis we leave the question of “unclean hands” open.

Conclusion

[66] We have held that none of the rights claimed by the applicants has been infringed by the issuing of the letter of request. In the result, the appeal must be dismissed.

Costs

[67] The applicants and the respondent all sought an order for costs in the event of success in these proceedings. In this Court, the general rule is that a party which has raised a substantial constitutional issue should not be ordered to pay the costs of the successful party,⁶⁵ so as not to discourage litigants from approaching the Court on

⁶⁴ See above [58].

⁶⁵ *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 47; and *Sanderson v Attorney General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 12 BCLR 1675 (CC) at paras 43-4.

matters of constitutional importance. However, this rule serves as a guideline to the exercise of the Court's discretion and is not inflexible.⁶⁶

[68] In this case, it was pointed out to the applicants in the Supreme Court of Appeal that their complaints in relation to the infringement of their rights were prematurely raised and should only be made at the criminal trial. It also became clear during the present hearing that if the applicants lose, they would still be entitled to object to the admissibility of the documents forming the subject matter of these proceedings. The main issue in this case was thus the narrow one of the lawfulness of the letter of request. Despite what was said in the Supreme Court of Appeal, the applicants persisted in raising the same complaints and put the respondent to the expense of defending the appeal. In the circumstances, the general rule ought not to apply. Costs should therefore follow the result.

Order

[69] The following order applies to *Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd versus the National Director of Public Prosecutions* (CCT 90/07):

1. The respondent's application for condonation for the late filing of his response to the applicants' application for leave to appeal is granted.
2. The respondent's application to file a supplementary answer is granted.
3. The application for leave to appeal is granted.

⁶⁶ *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at paras 31 and 33.

4. The appeal is dismissed.
5. The applicants are ordered to pay the costs, including costs of the employment of two counsel.

[70] The following order applies to *Jacob Gedleyihlekisa Zuma versus the National Director of Public Prosecutions* (CCT 92/07):

1. The respondent's application for condonation for the late filing of his response to the applicants' application for leave to appeal is granted.
2. The respondent's application to file a supplementary answer is granted.
3. The application for leave to appeal is granted.
4. The appeal is dismissed.
5. The applicant is ordered to pay the costs, including costs of the employment of two counsel.

Langa CJ, O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, Skweyiya J, Van der Westhuizen J, and Yacoob J.

For the Applicants in CCT 90/07:

Advocate P Hodes SC, Advocate A Katz and Advocate M Collins instructed by Shamin Rampersad & Associates.

For the Applicants in CCT 92/07:

Advocate KJ Kemp SC, Advocate MDC Smithers and Advocate TS Khuzwayo instructed by Lourens, De Lange & Minnie.

For the Respondents in CCT 90/07 and CCT 92/07:

Advocate W Trengrove SC and Advocate AM Breitenbach instructed by the State Attorney.