IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case No: 45/2021

In the matter between:

NTHIMOTSE MOKHESI	**Applicant 1/Accused 1**
PHEANE EDWIN SODI	**Applicant 2/ Accused 3**
BLACKHEAD CONSULTING (PTY) LTD	**Applicant 2/ Accused 4**
THABANE WISEMAN ZULU	**Applicant 3/ Accused 11**
ELIAS SEKGOBELA MAGASHULE	**Applicant 4/ Accused 13**

and

THE STATE	**Respondent**

In re:

THE STATE

versus

NTHIMOTSE MOKHESI	**Accused 1**
MAHLOMOLA JOHN MATLAKALA	**Accused 2**

PHEANE EDWIN SODI	**Accused 3**
BLACKHEAD CONSULTING (PTY) LTD As represented by accused 3	**Accused 4**
DIAMOND HILL TRADING 71 (PTY) LTD As represented by Lindikhaya Mpambani	**Accused 5**
605 CONSULTING SOLUTIONS (PTY) LTD as represented by Michele Antia Mpambani	**Accused 6**
SELLO JOSEPH RADEBE	**Accused 7**
MASTERTRADE 232 (PTY) LTD	**Accused 8**
ABEL KHOTSO MANYEKI	**Accused 9**
ORI GROUP (PTY) LTD as represented by accused 9	**Accused 10**
THABANE WISEMAN ZULU	**Accused 11**
SARAH MATAWANE MLAMLELI	**Accused 12**
ELIAS SEKGOBELA MAGASHULE	**Accused 13**
NOZIPHO BELINA MOLIKOE	**Accused 14**
THABISO MAKEPE	**Accused 15**
ALBERTUS VENTER	**Accused 16**

JUDGMENT

CORAM: NAIDOO, J

HEARD ON: 21 & 22 FEBRUARY 2022

DELIVERED ON: 28 MARCH 2022

[1] These are civil proceedings arising from the criminal prosecution of the sixteen (16) accused cited herein. The accused are charged, separately in some of charges and jointly in respect of other charges, with seventy four counts, which include fraud, corruption, money laundering and various other statutory contraventions. Central to many of the charges appears to be a contract awarded by the Free State Department of Human Settlements (FSDHS) to accused 3,4 and 5, for the assessment and audit of homes with asbestos roofing, referred to as the Asbestos Project in the papers. The trail of payments made in connection with or from the proceeds of the Asbestos Project was the subject of investigations which led to the accused being charged. The evidence led at the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and chaired by Deputy Chief Justice Raymond Zondo, is also a feature of the applications currently before me. For convenience, I shall follow the reference used by the parties in the papers and refer to the Commission as the State Capture Commission (SCC) or the Zondo Commission.

[2] Four separate applications served before me, having been brought by accused 1, Nthimotse Mokhesi (Mokhesi), accused 3 and 4, Pheagane Edwin Sodi (Sodi) and Blackhead Consulting (Pty) Ltd (Blackhead) in one application, the latter being represented by Sodi, accused 11, Thabane Wiseman Zulu (Zulu) and the fourth application by accused 13, Elias Sekgobela Magashule (Magashule). Mokhesi was represented by Adv C Meiring, Sodi, Blackhead and Magashule were represented by Adv LM Hodes SC, with Adv (Ms) T Govender and Zulu was represented by Adv SS Maakane SC, with Adv AN Tshabalala. The respondent (the state) was represented by Adv N Cassim SC, with Adv (Ms) S Freese and Adv (Ms) T Ngubeni.

[3] I mention that there have been a few appearances in court by the accused persons for the purpose of pre-trial hearings. The indictment was served on the defence teams together with other documentation over the months preceding these applications, to enable the accused to prepare for trial. A trial date has yet to be set. Although the relief prayed for in each of the current applications is similar, in that they each seek, inter alia, the setting aside or quashing of charges, stay of prosecution or being excused from prosecution, there are certain differences in the grounds upon which such relief is claimed. It would, therefore, be prudent to deal with each application separately. I propose to summarise the case of each accused and the relief sought, and thereafter deal with the evaluation of all the applications. All the applications are premised on the allegation that the fair trial rights of the accused, in terms of section 35(3) of the Constitution have

been infringed, while three of the applicants allege that this infringement arises as a result of the charges in this matter being based on evidence they have given to and at the State Capture Commission.

[4] The purposes for and establishment of the SCC have been extensively set out in the papers and it unnecessary to repeat it here. I shall confine myself to the issues (relating to the SCC) raised in the applications before me, as far as that may be necessary. Mokhesi, Sodi and Zulu relied on and claimed the privilege afforded to them in terms of Regulation 8(2) of the Regulations relating to the SCC, alleging that the state is not entitled to use against them the evidence emanating from the SCC, as it is not permitted by Regulation 8(2). For completeness, I refer to the provisions of Regulation 8(1) and 8(2) as they were in February 2018 and thereafter the amendment to Regulation 8(2):

"(1) No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947

(2) No evidence regarding questions and answers contemplated in subregulation (1), and no evidence regarding any fact or information that comes to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act 1947 (Act No. 8 of 1947), or regulation 12".

[5] Regulation 8(2) was amended by a Proclamation dated 23 March 2018 to read as follows:

"A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any

criminal proceedings brought against that person instituted in any court, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947)"

[6] I turn now to deal with the individual applications.

MOKHESI

Mokhesi is the suspended head of the Free State Department of Human Settlements**.** I pause to mention that his application as well as his Heads of Argument in this matter were both filed out of the time frames prescribed in the Rules of Court and the Practice Directives of this Division. He subsequently sought condonation for both and, as the respondent and other parties were not opposed to same, condonation was accordingly granted for such late filing. Mokhesi seeks relief in the following terms:

"1. Declaring that the indictment, insofar as Accused 1 is concerned, is premised on evidence obtained from the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("State Capture Commission")

2. Declaring that the State's reliance on Accused 1's testimony and evidence from the State Capture Commission renders any trial against the applicant unfair and in breach of his fundamental right to a fair trial as envisaged by section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996, as amended ("the Constitution");

3 Declaring that Accused 1 is excused from prosecution in terms of Regulation 8(1) of the State Capture Regulations;

4. In the alternative, the evidence given on behalf of Accused 1 at the State Capture Commission infringes his right to a fair trial as provided for in terms of section 35 of the Constitution and may not be relied upon in any trial against Accused 1;

5. Further/and alternative relief;

6. Costs of the application, including the costs of two counsel".

[7] One of Mokhesi's primary complaints is that the charges against him have their roots in the evidence of one Mr Mxolisi Dukoana (Dukoana) who made two appearances at the SCC and testified, on his second appearance, about the Asbestos Project, referring to it as the "Asbestos Heist". Mokhesi's contention is that Dukoana's evidence has very little to do with him, yet the police investigation concerning him (Mokhesi) stems from Dukoana's evidence. Mokhesi was interviewed by investigators from the SCC and in consequence of such interviews, he alleges that he furnished two affidavits to the SCC. In addition, he testified on two occasions at the SCC, 28 August 2020 and 28 September 2020. Two days after his second appearance at the SCC, he was arrested in terms of a Warrant of Arrest, dated 4 September 2020

[8] Mokhesi's contention is that the entire indictment is premised on the evidence emanating from the SCC, which is in contravention of Regulation 8(2) as the latter provides that self-incriminating statements or evidence given by a person before the SCC is not admissible as evidence against that person in criminal proceedings brought against him/her. Therefore, his right to a fair trial, as

enshrined in section 35(3) of the Constitution, has been infringed, with the consequence that he has been "irreparably prejudiced" in respect of the criminal proceedings against him. He contends that the state delayed charging him formally until after he testified at the SCC, in order that it could use his testimony to bolster its case against him. Therefore, all the evidence obtained against him via the SCC is inadmissible. He contends that, as a result, he is excused from prosecution in terms of Regulation 8(1) of the SCC Regulations and in terms of section 35 of the Constitution, and is entitled to the relief he seeks.

[9] In its Answering Affidavit, deposed to by the then Acting Director of Public Prosecutions (DPP), Free State, the respondent outlined the material facts leading to the criminal charges being brought against Mokhesi, and did the same in the other three applications as well. The state alleges that the FSDHS approached its counterpart in Gauteng to participate in an asbestos eradication project that the latter had already embarked upon. The Gauteng Department of Human Settlements (GDHS), although having approved the FSDHS's request on 4 August 2014, pointed out that its contract was due to terminate on 31 August 2014, and suggested that FSDHS follow a competitive procurement process, rather than a participation process. Notwithstanding this, and without following an open and transparent procurement process, FSDHS appointed Sodi, Blackhead and the fifth respondent, collectively known as the Blackhead Consulting JV (the JV), to undertake the Asbestos Project. Such appointment was based on an unsolicited bid, which was contrary to the procurement prescripts applicable to FSDHS.

[10] The respondent further highlighted the lack of compliance with Treasury Regulations, the knowledge that the project could never have been completed by 31 August 2014, that the party to whom FSDHS awarded to contract, namely Blackhead Consulting JV, was not a party to the GDHS project, and that a large portion of the contract price was paid to the JV. The contract price was Two Hundred and Fifty Five Million Rand (R255 million), of which Two Hundred and Thirty Million Rand (R230 million) was paid to the JV, which did not undertake the work itself but subcontracted it to the eighth respondent, who in turn subcontracted it to the tenth respondent. The work was ultimately not completed by any party.

[11] The respondent decried Mokhesi's application as "legally inept and ill-conceived" as he seeks declaratory relief in respect of the indictment and evidence to be led, without having been confronted with any evidence by the respondent. It is argued that Mokhesi has not set out any legal basis for the relief he seeks but relies on conjecture and supposition. The respondent objects to what it claims is Mokhesi's attempt to obtain a preview of the *viva voce* evidence of the state, to which he is not entitled, even as part of his entitlement to a fair trial. It claims, in addition, that he has not shown that he provided to the SCC, either by way of his affidavits or his evidence at the inquiry, any self-incriminatory statements or evidence, which the respondent is precluded from using against him.

[12] The respondent set out in great detail the manner in which it went about securing evidence against Mokhesi. For reasons that will become apparent later in this judgment, I refrain from repeating all

those details here. The respondent contends that, based on the investigation undertaken by the team of investigators, the evidence in its possession discloses a *prima facie* case against Mokhesi, and the other accused persons in this matter, and that each of them is aware of this, having been given access to the docket, from which it is evident that they have a case to answer.

[13] I point out that in outlining the legal position in the Heads Argument filed on behalf of Mokhesi, reliance was placed on Regulation 8(2) prior to its amendment in March 2018. This is clearly incorrect as Regulation 8(2) in its amended form applies to Mokhesi. Therefore, only self-incriminating statements or evidence may not be used in criminal proceedings against the person making such statements. Despite this being pointed out during the respondent's oral address, Mr Meiring chose not to reply to this and the various other points raised by the respondent, to demonstrate its contention that the orders sought by Mokhesi are legally inept, impermissible and irregular.

SODI AND BLACKHEAD

[14] Sodi (accused 3) is a businessman and a director of Blackhead (accused 4). The latter is represented by Sodi in the criminal matter. In this application, they seek orders in the following terms:

> "1. Declaring that the indictment, insofar as accused 3 and 4 are concerned, is premised on evidence obtained from the Judicial Commission of Enquiry into allegations of State Capture, Corruption

and Fraud in the Public Sector, including Organs of State (*"State Capture Commission"*);

2. Declaring that the State's reliance on Accused 3's testimony and evidence from the State Capture Commission renders any trial against these applicants unfair and in breach of their fundamental right to a fair trial as envisaged by section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996, as amended (*"the Constitution"*);

3. Declaring that Accused 3 and 4 are excused from prosecution in terms of Regulation 8(1) of the State Capture Regulations;

4. In the alternative, the evidence given on behalf of Accused 3 and 4 at the State Capture Commission infringes their fair trial rights as provided for in terms of section 35 of the Constitution and may not be relied upon in any trial against Accused 3 and 4;

5. Costs of the application."

[15] As Mokhesi did, so did these accused set out a detailed history of how the SCC came into being. It is not necessary to repeat that here. Sodi and Blackhead also complain that the criminal prosecution against them has its genesis in the evidence delivered by Mr Mxolisi Dukoana at the SCC, particularly at his second appearance before the SCC, when he testified about the "Asbestos Heist". Although Blackhead Consulting JV and Mr Mpambani are mentioned several times in Mr Dukoane's testimony, Sodi claims that Dukoane's testimony has very little to do with them. Sodi asserts that although he testified on three occasions at the SCC, his legal representative expressly reserved his rights in terms of section 35 of the Constitution. He complains that he was arrested

on 30 September 2020, a day after his third appearance at the SCC, in terms of a warrant of arrest that appears to have been authorised on 4 September 2020, and asserts that the timing of his arrest by the police, immediately after he testified at the SCC indicates how important his testimony is to the police investigation.

[16] Sodi attached copies of the statements and affidavits provided to the SCC in which various details were furnished in response to queries raised by the SCC's investigators. Transcripts of the oral evidence he delivered at the SCC on 7 August 2020, 19 August 2020 and 29 September 2020 were also attached to the papers. In setting out the legal issues in this matter, Sodi alleges that the entire indictment against him and Blackhead is premised on evidence emanating from the SCC. This is in conflict with Regulation 8(2), (which I set out earlier in this judgment), in terms of which self-incriminating statements or answers may not be used against the person making such a statement, in criminal proceedings that are instituted against such a person. Notably, while certain provisions of Regulation 8(2) are underlined for emphasis, the words *"self-incriminating answer"* are not. I will deal further with this later. He also alleges that his right to a fair trial as entrenched in section 35(3) of the Constitution have been violated as a result of the grounds for and manner in which the charges against him and Blackhead have been brought.

[17] I pause to mention that Mokhesi's application is almost identical to that of Sodi and Blackhead. The respondent's response to Sodi's Founding Affidavit, in its Answering Affidavit, is similarly the same as its answer in the Mokhesi application. It sets out the background

to this matter in similar terms as I have indicated in paragraphs [9] to [12] above. In dealing with the relief sought by Sodi and Blackhead, the respondent asserts that the declaratory relief is incompetent and "nonsensical", they seek a determination in respect of the very charges they face, that these emanate from evidence given at the SCC. There is in any event nothing remiss, the respondent argues, about a criminal prosecution ensuing from evidence given at the enquiry, as this is one of the purposes of such a Commission of Enquiry. Regulation (8)(1) and 8(2) do not come to the assistance of the accused because Regulation 8(2) specifically prohibits the use of self-incriminatory statements in criminal proceedings, and does not provide a blanket prohibition against all evidence given at the inquiry.

[18] As with Mokhesi, the respondent sets out in great detail the manner in which evidence against Sodi and Blackhead was uncovered, in order to demonstrate that the state's case is not based on the evidence emanating from the SCC. I will not deal with such evidence at this stage for reasons that will become apparent later. The respondent asserts that Sodi and Blackhead are improperly attempting to obtain a preview of the *viva voce* evidence that the state will lead at the trial. Not even their fair trial rights in terms of the Constitution allows them this. Should they wish to challenge or object to any evidence on the basis that it is inadmissible, the proper forum to do so is before the trial court, whose discretion will be unduly hamstrung by the declaratory relief sought by these accused.

[19] Both parties filed extensive Heads of Argument and presented lengthy oral arguments. The arguments on behalf of Sodi and Blackhead repeated the submissions made in their papers, reiterating that the criminal prosecution arises from the evidence delivered at the SCC, and that the state is prohibited from using such evidence against Sodi and Blackhead. I pause to mention that the submissions on behalf of these accused consistently and continuously emphasise that statements given at the SCC are not admissible in criminal proceedings, and gloss over the qualification that such statements must be self-incriminatory. I will deal further with this later.

[20] The respondent, in its response, raises this point that the statements must be self-incriminating in order to be excluded in criminal proceedings. Mr Cassim also asserted that there was nothing self-incriminating in Sodi's evidence, nor did he point out which parts of his evidence were self-incriminatory. His evidence was to the effect that he did nothing wrong. In any event, Mr Cassim submitted that it is the trial court to whom the objection that evidence is self- incriminatory must be addressed, and the trial court will decide whether it is or not. This court cannot be asked to do so.

ZULU

[21] Thabani Wiseman Zulu was at the times relevant to the charges in this matter the Director General of the National Department of Human Settlements. He is accused 11 in the criminal matter and in this application, seeks orders in the following terms:

"1. The offences for which the Applicant has been charged, as accused number 11, be and are hereby quashed; alternatively
2. The applicant is granted stay of prosecution; alternatively
3. The matter of the State v Mokhesi & Others; of which the Applicant is accused be struck of the roll;"

[22] Zulu, like the other accused persons, faces multiple counts of fraud, corruption and money laundering, a number of which are in terms of the provisions of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PRECCA). In counts 1 to 8 the accused is charged with fraud. As a third alternative to counts 1 to 8, the accused is charged with contravening section 34 of PRECCA, the relevant provisions of which read thus:

34 Duty to report corrupt transactions

(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act 68 of 1995).

(2) Subject to the provisions of section *37 (2), any person who fails to comply with subsection (1), is guilty of an offence.

**(Section 37(2) provides that section 34(2) shall come into operation on 31 July 2004)*

[23] Non-compliance by the respondent with section 27 of PRECCA is relied upon by Zulu as one of the main grounds for seeking the relief that he does. The relevant provisions of section 27 read as follows:

> **27 Authorisation by National Director, Deputy National Director or Director to institute proceedings in respect of certain offences**
>
> The institution of a prosecution for an offence referred to in section 17 (1), 23(7) *(b)* or 34 (2), must be authorised in writing by the National Director, a Deputy National Director of Public Prosecutions or the Director of Public Prosecutions concerned and only after the person concerned has been afforded a reasonable opportunity by the investigating or prosecuting authority, as the case may be, to explain, whether personally or through a legal representative-
>
> *(a)* in the case of section 17 (1), how he or she acquired the private interest concerned;
>
> *(b)* in the case of section 23 (7) *(b)*, how he or she acquired the property or resources concerned; or
>
> *(c)* in the case of section 34 (2), why he or she failed to report in terms of section 34 (2).

[24] Zulu contends that the charges he faces for contravention of PRECCA are improperly before court and are *ultra vires*. This assertion is based on the fact that he was arrested on 1 October 2020, while the written authorisation from the DPP is dated 3 November 2020. Section 27 requires the written authorisation to be given after the person concerned has been given a reasonable opportunity to offer an explanation in respect of the various situations set out in that section. He was never afforded such an opportunity, and contends that the written authorisation by the DPP is, therefore, invalid. He alleges that the prosecutor intimated that the state did not want to alert the suspects of their

arrest, indicating that the state took a conscious decision not to comply with the peremptory provisions of section 27. Zulu further alleges that the main counts relating to the contravention of PRECCA are improperly before this court. Therefore, the alternate charges cannot stand. The only solution, therefore, is the relief he seeks in this application.

[25] With regard to the rest of the charges against him, Zulu alleges that his fair trial rights in terms of section 35 of the Constitution have been infringed as a result of those charges being preferred against him. This is so because the charges are based on answers he gave to the investigators of the SCC and on oral evidence he gave at the SCC. He too adopts the stance that none of the evidence emanating from the SCC can be used against him, albeit that he cites Regulation 8(2) in his papers. He did not deal with the issue of self-incriminating evidence or indicate which parts of his written answers or oral testimony were self-incriminating.

[26] The respondent's Answering Affidavit was very similar to those it filed in the applications of Mokhesi and Sodi, which I have dealt with earlier, in respect of the background, material facts leading to the charges in this matter and its response to the allegations that the evidence emanating from the SCC are inadmissible against Zulu in the criminal proceedings. The respondent points out that Zulu gave no indication of what part of his evidence or statements were self-incriminatory as only those parts of his evidence would be inadmissible against him. He placed only one document before court, being a letter from the SCC investigators and his responses

thereto, which were not under oath. He cannot claim blanket privilege, as that is not afforded to him in terms of the SCC Regulations. The evidence against Zulu, argues the respondent, emanates from payments of large amounts of money, by accused 3 and 4 (Sodi and Blackhead), for his benefit to a motor car dealer. This was the basis of the questions by the investigators, indicating that this evidence was already in their possession before Zulu answered their questions.

[27] With regard to the non-compliance with section 27 of PRECCA, the respondent argues that the section must be given a "business-like and common-sense interpretation", as it does not afford the accused a reasonable opportunity to be heard in circumstances where the accused is facing multiple charges. The requirement of a "reasonable opportunity" must be read to indicate that the state is allowed to conduct further investigations. Hence the provisions of section 27 are there for the benefit of the state and not the accused.

[28] If it were interpreted otherwise, then it would be possible for the accused to require of the State to reveal its hand even before it drafted the indictment. This would lead to a grave injustice and make prosecutions for corruption-related crimes in the public sector impossible. Therefore, that provision should be read as directory and not peremptory. The other possible consequence of giving Zulu the opportunity to explain, would be that he could claim that the state has deprived him of his right against self-incrimination. The respondent argues that even if it is wrong in its interpretation of section 27 of PRECCA, the issue of whether or

not the DPP's authorisation is premature ought to be raised by the accused as a special plea at the commencement of the trial, and not by way of preliminary civil proceedings.

MAGASHULE

[29] As indicated earlier, Elias Sekgobelo Magashule is the 13th accused in the criminal proceedings. He is also the former Premier of the Free State, and the criminal charges against him emanate from certain events/transactions that occurred during the period of his tenure as Premier. He seeks orders in the following terms:

"1. Declaring that the State has not complied with section 27 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, as amended ("PRECCA") and as read with section 34 thereof

2. Declaring that Ms Moroadi Cholota was never a state witness, alternatively is a defence witness;

3. Declaring that the State's conduct, insofar as Ms Cholota is concerned and/or the manner in which the prosecution has been conducted to, *prima facie*, constitute prosecutorial misconduct;

4. Declaring that the Applicant/Accused 13 was not an *"executive authority"* at the relevant time as defined in section 1(b) of the Public Finance Management Act 1 of 1999, as amended (*"PFMA"*);

5. Compelling the state to disclose the list of witnesses which specifically implicate the Applicant/Accused 13 in any and all of the charges as contained in the indictment; and

6. Declaring that the Applicant/Accused 13 is entitled to know the case that he is required to meet before he pleads to the envisaged charges.

7. Declaring that the State does not have a prima facie case against Applicant/Accused 13 which is capable of sustaining a successful prosecution."

[30] In support of the relief he seeks, Magashule alleges that the investigation and the prosecution against him arises from the evidence delivered by Mr Mxolisi Dukoana (Dukoane) at the SCC during his appearance before the Commission on 5 April 2019 and 27 August 2019, and quotes extensively from the statement made by Dukoane to illustrate this. In further substantiation, he alleges that the first instruction in the investigation diary of the docket is on 10 October 2019, and that the record of Dukoane's evidence is contained in the docket. Magashule did not testify at the SCC.

[31] With regard to Ms Moroadi Cholota (Cholota), Magashule explains that she was his Personal Assistant from August 2013, while he was Premier of the Free State, until he vacated that position in around March 2018. She provided a statement to the SCC following allegations by Dukoane of corrupt dealings at the office of the Premier, in which Cholota was involved. She testified at the SCC. Magashule points out that Cholota consulted the same attorneys as he did, and that such attorneys assisted her in the preparation of her statement, and accompanied her when she testified at the SCC. In his Founding Affidavit, Magashule provides extensive details about the conduct of the police and the prosecutor, to demonstrate what, in his view, was improper conduct on the part, especially of the prosecution, in alleging that

Cholota was a state witness. It is not necessary to traverse such details, as subsequent events seem to have overtaken some of the relief prayed for. This explanation is assumed to be in support of prayer 2 in the Notice of Motion.

[32] In dealing with the criminal charges against him relating to certain funding which came from Mr Ignatius Mpambani, the deceased director of accused 5, which was involved in the Joint Venture in the asbestos project, he avers that there is no evidence linking him to the tender process, which resulted in the JV being awarded the contract. As Premier he was not "even remotely" involved in the tender process.

[33] With regard to the charge in terms of section 34 of PRECCA, he alleges that he is not the accounting authority in terms of section 50 of the Public Finance Management Act 1 of 1999 (PFMA) and is therefore under no duty and bears no obligation to report any suspicious transactions, nor were there any suspicious transactions that he was aware of. He also repeats the same narrative that the other accused did in respect of non-compliance with section 27 of PRECCA, alleging that he was never called on to give an explanation, as required by the statute. The prosecutor, at the pre-trial hearing on 3 November 2021 admitted that section 27 was not complied with. The state, he argues must be called to explain its "misconduct".

[34] Magashule surprisingly deals extensively with "prosecutorial misconduct", in an application such as this, providing a great deal

of irrelevant detail for current purposes. He complains essentially about the conduct of the prosecutor assigned to this matter, in initially alleging that Cholota was a state witness and thereafter (at the pre-trial hearing on 3 November 2021), declaring that she will be charged as an accused in this matter. He also alleges that the prosecution against him, and the timing thereof, is politically motivated. I refrain from dealing with these details, for reasons that will become apparent later in this judgment.

[35] The introduction to the respondent's Answering Affidavit was in the same vein as in the other three applications, which I have set out earlier in this judgment. A point that the respondent makes in its introductory remarks in answer to the relief claimed by Magashule is that he seeks only seven declaratory orders, and no substantive relief. Therefore, the application is of an academic nature and the true reason for the application is for Magashule to obtain from this court a legal opinion or a preliminary ruling on one of the alternative charges brought against him, on certain of the evidence that will serve before the trial court and on the fairness of his criminal trial. The respondent argues that this is impermissible and should not be countenanced by the court, as all of the contentions by Magashule should be raised in his criminal trial before the trial court, which is properly placed to determine their merit or otherwise, in view of all the relevant evidence.

THE LAW

[36] The Criminal Procedure Act 51 of 1977 (CPA) regulates all aspects of criminal proceedings, including the manner in which charges against an accused person are to be formulated, as well as the manner in which an accused person can exercise his right to challenge such charges. The provision that this court draws guidance from is section 85 of the CPA, which in my view, should be the starting point in deciding this matter. It reads as follows:

"Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

(a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

(b) that the charge does not set out an essential element of the relevant offence;

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court; or

(e) that the accused is not correctly named or described in the charge:

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2) (a) If the court decides that an objection under subsection (1) is well-

founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph *(a)*, the court may quash the charge."

[37] Section 85 provides an accused person with the means to have charges against him/her quashed, before he pleads to such charge or charges. Where the state is not willing to furnish certain particulars requested by an accused in order to clarify aspects of the charge, section 85 provides him with the opportunity to obtain such particulars by way of a court order. The accused is therefore, provided with adequate means to challenge the charges preferred against him in the criminal proceedings, and such means are to be utilised as part of the criminal proceedings. Therefore, if an objection to a charge is upheld, and the amendment thereof by the state does not cure the defect or shortcoming, the court will quash the charge.

[38] The court tasked with adjudicating a criminal trial is the forum which must be approached with regard to challenges or objections relating to criminal charges, during the course of the criminal trial. This includes constitutional challenges to charges or allegations that an accused person's fair trial rights guaranteed in section 35(3) of the Constitution have been infringed. A long line of cases in our courts have entrenched the well-established principle that preliminary or premature litigation, especially in criminal matters, where civil courts are approached for relief in respect of criminal charges, should be discouraged. In *Moyo and Another v Minister*

of Justice and Constitutional Development and Others 2018 (2) SACR 313 (SCA), the Supreme Court of Appeal (SCA) dealt with two separate matters, emanating from two different Regional Courts where the appellants sought declaratory orders for the constitutional invalidity of provisions of the Intimidation Act 72 of 1982. Neither of them had pleaded to the charges and their trials were still pending in the Regional Court. Their trials were postponed pending the outcome of the proceedings in the SCA.

[39] In dealing with procedural issues, Wallis JA, writing for the majority, dealt, in paras [156] to [157], with the issues of the delays in finalising trials, the timing and procedure to raise challenges and the forum in which it must be done. At para 156, the court decried the delay in the trials of the appellants of approximately six and five years respectively, as a result of these proceedings and had this to say:

"……This is most unsatisfactory, as it means that their criminal trials have not been brought and concluded without undue delay, as required by s 35(3)*(d)* of the Constitution. It has not only created a situation where the criminal charges continue to hang over their heads, but is also a denial of justice to those who made the allegations on which those charges rest. They are legitimately entitled to ask why their allegations have not been brought before a court and their complaints heard and determined by an impartial judicial officer.

[40] In the context of enforcing the right to a fair trial guaranteed by section 35(3) of the Constitution the court, at para [157] questioned why issues germane to criminal proceedings and governed by the CPA, which is the constitutionally compliant statute are canvassed in civil proceedings. The court also dealt, in para [158], with the appellants' response to this question by way of the following dicta:

“[157] In s 35 the Constitution guarantees a range of rights to arrested, detained and accused persons. Section 35(3) guarantees to all accused persons the right to a fair trial. That is secured in practice by the provisions of the CPA. The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair-trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?

[158] The appellants' response to this question is to say that the Constitutional Court has held in **Savoi* that they have standing to bring the present proceedings. *Savoi* involved confirmation proceedings where the Constitutional Court was obliged to accept jurisdiction. The issue arose indirectly because there was also an application for leave to appeal against the High Court's refusal of orders of constitutional invalidity in respect of certain portions of the legislation under consideration. In the present case the issue is not one of standing, but solely one of timing and procedure. At an appropriate stage and in appropriate proceedings a person charged with a statutory offence obviously has standing to challenge the constitutionality of the statute under which they have been charged. The concern in this case is that it has been done outside the ambit of the criminal proceedings, which is the only place where the constitutionality of the legislation is in issue. It is an abstract challenge and, as Madlanga J rightly said in para 13 of *Savoi*, courts generally and rightly treat abstract challenges with disfavour. As Innes CJ put it in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'”

[**Savoi and Others v National Director of Public Prosecutions and Another* 2014 (1) SACR 545 (CC) ; 2014 (5) SA 317; [2014] ZACC 5) para 13].

With regard to premature litigation see also *Lodi v MEC for Nature Conservation and Tourism, Gauteng, and Others 2005(1) SACR 556 (T)* and *Wilkinson and Another v National Director of Public Prosecutions and Others 2019(2) SACR 278 (GP)*

[41] The Constitutional Court (CC) has pronounced itself on several occasions with regard to the right to a fair trial as well as the issue of preliminary litigation. In *S v Shaik 2008(2) SA 208 (CC),* the court dealt with the issue of fairness of the trial and held at para 43:

"It will be convenient to restate the principles employed by a court in determining the fairness of a trial. The applicants stress that they place their reliance on the general right to a fair trial, which, as this court has held, extends beyond those specific rights enumerated in s 35(3)*(a) - (o)* of the Constitution. The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment."

The court concluded its remarks, citing para 29 of *Sv Jaipal 2005(4) SA 581 (CC)* which states that

"A fair trial also requires –

fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."

[42] In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2008 (2) SACR 421 (CC)*, the court was called upon to decide on the constitutionality of certain warrants. The court had

occasion in para 65 to deal with the issue of preliminary litigation. The court said, in essence, that preliminary litigation should be discouraged if it appears that such litigation has no other purpose than to circumvent the application of section 35(5) of the Constitution. Such litigation wreaks havoc with the ability of the prosecution to fulfil its duties, in that it must on the one hand resist preliminary litigation and on the other ensure that trials commence promptly. The court held that generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials started sooner rather than later. The court cautioned that the court's doors should never be completely closed to litigants as there may well a need for a victim to engage in preliminary litigation to enforce his rights, for example where a warrant is clearly unlawful and the trial is only likely to commence far into the future. But in the ordinary course of events, if the purpose of the litigation appears to be merely the avoidance of the application of section 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then be in a position to consider the relevant interests of all parties concerned. This approach would serve to regulate the conduct of the state in discouraging it from acting unlawfully in the application of section 35(5), thereby attracting the possibility of civil and criminal liability.

[See also *Van Der Merwe V National Director of Public Prosecutions 2011(1) SACR 94 (SCA)*, in which it was held that where a court is faced with unmeritorious litigation designed to delay or avoid having to plead in a criminal trial or to pre-empt a consideration by the trial court of the admissibility of evidence in

terms of section 35(5), that court should refuse an order that would encourage preliminary litigation].

[43] Against this sketch of the legal position, I turn to examine the relief sought by the applicants in this matter. The hallmark of all four applications is that the accused have not yet pleaded to the charges against them, yet each seeks declaratory orders without any evidence being led against any of them. They have given no indication of why these challenges in respect of the charges and the evidence to be presented are being brought before this court and not the court that will hear the trial, which is, to use the words of the court in *Moyo*, the constitutionally compliant forum. Each one appears to have simply ignored the provisions of section 85 and other relevant provisions of the CPA, which is the constitutionally compliant statute, promulgated specifically to deal with all aspects of criminal proceedings.

[44] The court has the discretion to grant declaratory orders, after due consideration of all the relevant circumstances. One of the factors to be considered is whether the issue raised before it is hypothetical, abstract or academic. If the answer to that is in the affirmative, then the court will decline to grant a declaratory order. It is not the court's function to give legal opinions or make pronouncements on abstract or academic issues or questions. This was confirmed as long ago as 1918 in the case of *Geldenhuys & Neethling v Beuthin*, cited with approval in the matter of *Moyo* referred to above. That position remains relevant to this day. With regard to the **two-stage test for whether a

declarator should be granted, my view is that the test is applicable in civil matters and not in a matter such as this, which falls into the category of preliminary litigation, relating to criminal proceedings. The latter is regulated by the CPA, with the criminal trial court being the correct forum to decide the issues in respect of which a declarator is sought in this matter.

[** The two stage test was expounded in In *Durban City Council v Association of Building Societies 1942 AD 27* where the court, per Watermeyer JA, with reference to a section worded in identical terms, said at 32:

'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'

See also Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005(6) SA 205 (SCA), which cited the *Durban City Council* case with approval.]

[45] Upon a consideration of the relief prayed for by each accused and the grounds upon which such relief is sought, it is clear that this court is being called upon to consider these applications in a vacuum, without the benefit of knowing the full extent of the evidence that will actually be led against each accused, so that a proper assessment of all relevant evidence and circumstances is not possible at this stage. What is clear is that, on the papers, the state has an arguable case in respect of the grounds and relief claimed by the accused. It is for this reason that I refrained from dealing with the state's exposition of the case it claims to have

against each accused. It is for the same reason that I am of the view that it would not be appropriate for this court to consider the merits of each accused's application. I will elaborate briefly on my reasons in respect of each application.

[46] Mokhesi relies almost exclusively on the assertion that the case against him is based on evidence arising from the SCC, reliance on which is prohibited by the Regulations to the SCC, therefore the indictment is unlawful, and he should be excused from prosecution. Reliance by the state on testimony arising from the SCC inquiry infringes his fair trial rights and may not be used against him. I pointed out earlier that Mokhesi places reliance on the previous incarnation of Regulation 8(2), which prohibits the use of any evidence emanating from the SCC against a person criminally charged. The new incarnation of that Regulation restricts the prohibition to self-incriminating evidence.

[47] Mokhesi did not correct his position, even when given the opportunity to do so. There is overlap in the relief he seeks, but most significantly, all his challenges fall squarely within the purview of the trial court, which would be is in the best position to determine the matter. The trial court will be able to fully canvass the assertions of both the accused and the state, as they appear in these papers, supplemented with all manner of necessary evidence, which are not in these papers, and which limits the ability of this court to deal with the matter meaningfully and fairly. The trial court could, for example, engage the tool of a trial-within-

a-trial to determine the admissibility of disputed evidence, which this court is unable to do.

[48] Much of what I said in my introductory remarks in paras [43] to [45] above and in relation to the Mokhesi application finds equal application to the other three applications. I pointed out earlier that the Mokhesi application is almost identical to the Sodi application. Even the relief they claim is similar. Therefore, I do not intend to repeat all that I have already said above, as it also finds application in the Sodi application. I mention one of the points I raised earlier, in respect of self-incriminatory evidence. The respondent alleged that although Sodi provided the statements he made to the SCC investigators as well as transcripts he has not pointed out which parts of his statements or evidence before the SCC, are self-incriminatory.

[49] This is indeed so, and I remark, without making any finding that in the absence thereof, it appears as if the state can rely on such evidence, without breaching Regulation 8(2). I am, however, aware that the trial court may view this differently, depending on what evidence and arguments are placed before it, should this issue be raised at the trial. In my view, all the relief that Sodi contends for, ought to be raised at the criminal trial. I earlier indicated that in the Sodi application, while some parts of Regulation 8(2) of the SCC Regulations were underlined for emphasis, the words *"self-incriminating answer"* were not. This trend continued in the Heads of Argument and the oral argument in court on behalf of these accused. The impression that is created is that attention is being

deflected away from the respondent's assertion that it can and is entitled to use evidence emanating from the SCC.

[50] With regard to the application by Zulu, the above comments apply. The respondent's response to Zulu's application is in a similar vein to the other applications. What should be mentioned is that Zulu, like Magashule, faces a charge of contravening section 34 of PRECCA, which is the third alternative to counts 1-8 which relate to fraud. Zulu's contention is that the respondent's non-compliance with section 27 of PRECCA is fatal to the charges against, as he was not given the opportunity to render the explanation envisaged in section 27. Extensive arguments were put forward in this regard and the court enquired of Mr Maakane, who appeared for Zulu, whether his only complaint was the state's non-compliance with section 27, to which he replied in the affirmative. I point out that it is only that third alternative count to Counts 1 to 8, which relates to the contravention of section 34 of PRECCA. All the other charges in terms of PRECCA relate to different sections of that Act, to which section 27 does not apply. It would appear to me therefore, that it is not appropriate for this court to even entertain the broad relief that Zulu seeks.

[51] With regard to the Magashule application, he applies only for declaratory relief. My remarks in para [44] apply to this application as well. In addition, I should point out that some of the relief prayed for Magashule has become moot and/or academic, for instance, prayers 2 and 5. The respondent has indicated that Ms Cholota is being charged as an accused in this matter. Therefore, she can no

longer be regarded as a defence or state witness. The state also alleges that a list of witnesses has been provided to Magashule, which was not disputed by Magashule. With regard to his request that a list of the witnesses specifically implicating him is a matter only the trial court can deal with, if it is of the view that such a request is permissible. The argument raised by the respondent in respect of the interpretation of section 27, which I have detailed above, in respect of prayer 1, applies equally to this application as it does to the Zulu application. As with the other applications, the orders that Magashule seeks are matters that should be addressed to the trial court. It is for this reason that I hold the view that it would not be appropriate for this court to deal with the merits of this application.

[52] In summary, the four applications before me fall into the category of preliminary litigation arising from criminal proceedings. The established practice in our law is that such litigation is to be discouraged as accused persons should not be allowed to gain an unfair advantage. The notion of a fair trial entails fairness to both the accused and the state. Refer to the *Shaik* case above. This court is called upon, in addition, to decide these applications in isolation to all the relevant facts and circumstances which the trial court would be privy to. In my view these are civil motion proceedings, where if the *Plascon-Evans Rule were to be applied, the matter should be decided on the respondent's version, together with such aspects of the respondent's version that the applicant agrees with or does not dispute. From what I have said it is obvious that there are serious disputes of fact which cannot be

resolved on these papers. For these and all the other reasons I have set out above, it is not appropriate for this court to entertain these applications and they must each fail.

[**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)*]

[53] There is another matter that bears mention. The respondent brought, in the Sodi application, an application to strike out certain paragraphs of Sodi's Founding and Replying Affidavits. These were paragraph 67 of the Founding Affidavit and paragraphs 7.4 and 24 to 27 of the Replying Affidavit. The Notice of Motion, with the Founding Affidavit appear to have been filed with the Registrar of this court on 13 January 2022, although the Founding Affidavit was deposed to on 18 November 2021 and the Notice of Motion was signed in Johannesburg on 19 November 2021. The respondent's Answering Affidavit was deposed to and served on 7 December 2021. The copy of Sodi's Replying Affidavit in the court file was deposed to on 15 December 2021. It does not bear the date stamp of the Registrar of this court, nor proof of service on the respondent. The application to strike out was served and filed on 19 January 2022.

[54] Paragraph 67 of the Founding Affidavit cites the case of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma 2021(5) SA 1 (CC)* which dealt with the interpretation of Regulation 8 of the State Capture Commission

Regulations. Sodi quoted paragraphs 93 to 109 of the judgment. The respondent, in its answer to paragraphs 66 and 67 of the Founding Affidavit, said the following in paragraph 68 of the Answering Affidavit:

"68.1 Sodi refers to section 35(3) of the Constitution and at least one judgment.

68.2 As these are not issues that I am required to answer to in an answering affidavit, legal argument will be addressed to this Court in regard thereto at the hearing.

68.3 I point out, however that paragraph 109 of the judgment referred to puts paid to any argument that Sodi and Blackhead Consulting may wish to make about having successfully (or unsuccessfully) claimed their privilege before the inquiry."

[55] Paragraphs 7.4 and 24 to 27 of the Replying Affidavit deal with the alleged conduct of Mr De Nysschen the prosecutor assigned to prosecute this matter, in making certain remarks to the court dealing with the pre-trial hearing on 3 November 2021 and the manner in which that issue was dealt with by the Acting DPP, Adv Somaru. The state alleges that it has been prejudiced by para 67 of the Founding Affidavit as its contents are irrelevant to the issues before this court, and that in motion proceedings the pleadings should deal with the facts and not the law. It has also been prejudiced by long extracts of cases which are cited out of context. With regard to the relevant paragraphs in the Replying Affidavit, the state contends that these paragraphs are irrelevant to the issues before court, and that they constitute an attack upon the dignity of persons who are not party to these proceedings. The

latter are consequently unable to answer to the allegations, which have been made in Reply.

[56] The application was opposed by Sodi who filed a lengthy Answering Affidavit denying, in essence, that the impugned paragraphs in his Founding and Replying Affidavits fell to be struck out. He avers that the state has not shown how it was prejudiced by these paragraphs and has not alleged that they are vexatious or scandalous. He pointed out that it is not open to the state to ask that paragraph 67 of the Founding Affidavit be struck out when in fact it responded to that paragraph and relied on paragraph 109 of the judgment cited therein. In addition, the state did not raise prejudice in its Answering Affidavit and only does so more than a month after filing its Answering Affidavit.

[57] I mention that the striking out application was not pursued with any vigour by the state. Mr Cassim omitted to address the court on the application during his oral address to court in connection with the Sodi application. By agreement between the parties, this was done after they addressed the court in respect of the Magashule application. When the matter was eventually addressed, Mr Cassim did not grapple with the issues raised in the Answering Affidavit to the Striking Out application. He indicated that it was not an improper application and the only issue seemed to be the attack upon the officials of the National Prosecuting Authority (NPA).

[58] In my view, the state has simply made a bald statement that it is prejudiced by these paragraphs firstly because they are irrelevant and also because they attack the officials of the NPA. The state did indeed respond to paragraph 67 of the Founding Affidavit and commented that paragraph 109 of the judgment did in fact support its case by "putting paid" to the arguments raised by Sodi and Blackhead. It is clear that Adv De Nysschen and Adv Somaru would have been affronted by the comments made by Sodi., and understandably so. However, I am not satisfied that the state has established prejudice due to the inclusion of those paragraphs in the respective affidavits or that they fall to be struck out. The issues raised therein can conveniently and appropriately be dealt with by the trial court. The application cannot succeed.

[59] With regard to the issue of costs in the various applications, Mr Cassim argued for the respondent that the costs of three counsel should be granted. When he was asked by the court to motivate this, he replied that he was over-ambitious in seeking costs of three counsel. Mr Hodes argued that the costs in the striking out application should be granted on an appropriate scale, with the costs of two counsel. In my view the application to strike out was a simple, uncomplicated matter which did not require two counsel to be employed.

[60] Consequently the following orders are made:

60.1 The application brought by Nthimotse Mokhesi is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;

60.2 The application brought by Pheane Edwin Sodi and Blackhead Consulting (Pty) Ltd is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel

60.3 The application brought by Thabane Wiseman Zulu is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;

60.4 The application brought by Elias Sekgobela Magashule is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel

60.5 The application to strike out brought by the respondent (State) against Pheane Edwin Sodi and Blackhead Consulting (Pty) Ltd is dismissed with costs.

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S NAIDOO J

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