IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

28 JULY 2016

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SIGNATURE

THE STATE

v

PORRITT, GARY PATRICK Accused no. 1

BENNET, SUSAN HILARY Accused no. 2

JUDGMENT

APPLICATION FOR CENTRALISATION

SPILG, J:

INTRODUCTION

1. The accused, Mr Porritt and Ms Bennett, have applied for declaratory orders that;

   a. The case against them be *"postponed for hearing in Pietermaritzburg"*;

   b. Any offences contained in the indictment which were allegedly committed in Johannesburg be centralised to the High Court sitting in Pietermaritzburg.

2. The starting point is that a court does not initiate the selection of the forum where a case is to be tried. Its function in so far as jurisdiction is concerned is to determine, in case of a challenge, whether the party initiating the proceedings (ie. the *dominus litis*) has selected the correct forum[1]. A statute may however confer on the court a power to transfer or re-direct the case to another jurisdiction.

3. Under s179 (2) of the Constitution, the power to institute proceedings in a criminal case vests with the national prosecuting authority (the *'NPA'*). In terms of the National Prosecuting Authority Act 32 of 1998 (the *'NPA Act'*) , which is the legislation giving effect to the constitutional directive contained in s179, there is a single national prosecuting authority structured with an office of the National Director of Public Prosecutions (the *'NDPP'*) and offices of the prosecuting authority at each division of the High Court[2]. The offices of the prosecuting authority are established under s6 (1) and headed either by a Director of Public Prosecutions (the *'DPP'*) or a Deputy Director of Public Prosecutions (the *'DDPP'*) appointed to the seat of each division of the High Court[3].

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[1] Under s110(1) of the Criminal Procedure Act 51 of 1977 it is necessary for an accused to challenge jurisdiction
[2] See s2 of the NPA Act
[3] See s6(1) and s15(1) read with s13(1)(a) of the NPA Act

The DPP or DDPP is effectively responsible, subject to the control and directions of the National Director of Public Prosecutions[4] (and in the case of a DDPP subject to the DPP) , in terms of ss20(1), (2) and (3) of the NPA Act for instituting proceedings in that Division. If regard is had to the investigative powers of the NPA it is apparent that the DPP will become involved in offences which arose within his or her area jurisdiction. The framework of the division of powers and functions between the various offices of the NPA appears to be based on that premise[5].

4. However the decision of the prosecuting authority to prosecute an accused in a particular division of the High Court is subject to the High Court having jurisdiction to entertain the case, including acquiescence to its jurisdiction by reason of s110(1) of the Criminal Procedure Act 51 of 1977 (the '*CPA*').

5. Subject to any other specific statutory provision the jurisdiction of a High Court is circumscribed by the provisions of ss21 (1) and (2) of the Superior Courts Act 10 of 2013.

In terms of s21 a High Court enjoys jurisdiction in the following cases;

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

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[4] Or the Deputy NDPP if authorised under s23(1) by the NDPP

[5] See for example s22(3)(a) and s24(7) of the NPA Act. It also finds expression in s90 of the Magistrates' Court Act 32 of 1944 which confers jurisdiction on the Magistrates' Court where the offence, one of the offences (subject to subsection (8))or an element of the offence is committed.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

6. This section re-enacts the provisions of s19 (1) of the Supreme Court Act 59 of 1959[6]. Accordingly cases decided under that Act continue to be binding.

7. Before dealing with those cases, one should refer to the fundamental common law principle that a court's jurisdiction is determined at the time the proceedings are instituted and it does not change even if the jurisdictional ground subsequently ceases to exist. In *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) Potgieter JA said at 309D:

'In my view ... the crucial time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action.

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[6] s19 of the old Supreme Court Act read:

19 Persons over whom and matters in relation to which provincial and local divisions have jurisdiction

(1) (a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power-

(i) to hear and determine appeals from all inferior courts within its area of jurisdiction;
(ii) to review the proceedings of all such courts;
(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(b) A provincial or local division shall also have jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such provincial or local division has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other provincial or local division.

Jurisdiction having once been established at such time, it continues to exist to the end of the action even though the ground upon which the jurisdiction was established ceases to exist. (See Voet, 5.1.64; R v de Jager, 1903 T.S. 36 at p. 38)'

See also *S v Mamase and others* 2010 (1) SACR 121 (SCA) *per* Snyders JA at para 12

8. In the present case the prosecution was instituted against the accused in this division during 2005.

   It is common cause that although Bennett was then resident within the area of jurisdiction of this court Porritt was a resident of Pietermaritzburg.

9. All the charges contained in the original indictment were alleged to have been occurred within this court's jurisdiction. Since Ms Bennett resided at the time in Johannesburg the State could not have instituted proceedings against her in Pietermaritzburg. She only relocated to Knysna some time later. The reason given in earlier court papers was that she wished to be nearer to her daughter who resided there. She then left her place of residence which was in Delta Road, Elton Hill, Johannesburg.

   This property has not been sold and she remains a director of the company which is the registered owner, namely Majorshelf 110(Pty) Ltd. Majorshelf continues to regularly pay the rates and taxes on the property, albeit that the municipal accounts are in the name Synergy Management (Pty) Ltd. Bennett remains, with Porritt, the contact persons with the company responsible for providing security at the property.

10. Accordingly, and disregarding the State's contention that Bennett may still have a residence within this court's jurisdiction, at the time of the institution of proceedings the State relied on the allegations, contained in the indictment as read with the further particulars supplied later, that the

offences had been committed within this court's jurisdiction. If factually correct then this would suffice for the purposes of s21 (1) of the Superior Courts Act.

11. However on 25 November 2010 the then NDPP directed under his powers in terms of section 111 of the CPA that 74 offences with which the accused were charged and which were allegedly committed "at *or near Pietermaritzburg within the area of jurisdiction of the Director of Public Prosecutions of the Kwa-Zulu Natal High Court* "be tried in the South Gauteng High Court "during *the trial of the same accused that is presently before Her Ladyship, the Honourable Ms Justice Borchers".*

These offences related to fraud, contraventions of s284, 303 and 424 of the old Companies Act 61 of 1973 and contraventions of s104(a) and s104(d) of the Income Tax Act 58 of 1962.

12. When the matter came before me last year the accused had yet to plead to the charges. Pursuant to a number of hearings an order was made with regard to the hearing of all pre-plea applications. One of them was identified by the accused as the centralisation issue.

13. The application was launched on 24 May 2016. However two weeks earlier, on 11 May, the State formally gave notice that it was withdrawing all the offences allegedly committed in Pietermaritzburg[7]. These number 74 of a total of 3160 main charges and 3254 alternative counts. Only 10 of the 74 charges relate to the main charges; the rest are alternative charges.

14. The accused dispute that with the withdrawal of the 74 counts all the other offences with which they have been charged arose within the jurisdiction of this court. When arguing for the first postponement in this matter the accused claimed that they were not at that stage raising their plea to the

[7] These are readily identifiable from the direction given on 25 October 2010 by the then NDPP to centralise the offences that were allegedly committed in Pietermaritzburg with those committed in Johannesburg.

court's jurisdiction. Their attention was drawn to certain passages of their replying affidavit, one of which (para 6) reads;

> *"It is submitted that the true essence of this application is the issue of where the vast majority, if not all, of the alleged offences were committed- in other words the correct jurisdiction for holding the trial"*

15. However during the present proceedings Porritt and Bennett confirmed that their attack on the lack of this court's jurisdiction would be raised as a s106 (1) (f) plea when they plead to the charges under s105 of the CPA.

16. In the present application the accused contended that for various reasons either the NDPP's directive was irrational and incorrect in law or their constitutional right to a fair trial was compromised if the trial was to proceed in Johannesburg.

17. Generally the accused have been unrepresented and the fair trial right was raised by the court when they indicated that they would raise the issue of centralisation. The parties were also referred to the case of *Pennington v The Minister of Justice and Others* 1995 (3) BCLR 270 (C).

18. In the present application the point of the right to a fair trial has been extended beyond that issue and is raised as a bar to the prosecution continuing in this division. This is perhaps most forcefully stated in the following paragraphs of their replying affidavit:

> *'It is denied that the applicants have alleged that every trial must be conducted in the domicilium of the accused. The constitutional point being made by the applicants is that this is an extraordinary trial in extraordinary circumstances and that, irrespective of the considerations of the correctness of the jurisdiction, the constitutional imperative for a fair trial cannot be upheld if the trial of this enormity, complexity and duration were to be held in Johannesburg*

The only manner in which this Court (if it has jurisdiction) could possibly ensure that there can be a fair trial in the circumstances which can pertain to the applicants, would be to postpone or transfer this trial for hearing in Pietermaritzburg'

The State could hardly argue that the point had not been raised separately from the centralisation issue. It is self-standing irrespective of the withdrawal of the 74 charges which the State contends are the only ones committed outside this court's jurisdiction.

THE ISSUES

19. The issues as fleshed out in the papers are:

    a. the accused's continued challenge to the NDPP's centralisation directive under section 111;

    b. whether they can raise at this stage that their right to a fair trial has been compromised if the proceedings were to continue in Gauteng; and if so, whether their rights have been infringed.

EFFECT OF WITHDRAWAL OF THE 74 CHARGES ON THE CENTRALISATION ISSUE

20. The obvious consequence of withdrawing the 74 charges, which the State alleges are the only ones that arose in Pietermaritzburg and which are the only ones to which the section 111 directive related, is that the directive is *pro non scripto.* Since there is now no charge on the indictment that requires the invocation of section 111, there can be no outstanding issue arising from the centralisation directive.

The accused accepted this and abandoned the point.

DENIAL OF FAIR TRIAL RIGHT IF TRIAL CONTINUES IN JOHANNESBURG

21. The accused contended that if the trial was to continue in Johannesburg as opposed to Pietermaritzburg, where Porritt resides and where Bennett can be put up at little or no cost, they would be deprivation of their fair trial under s35(3)(b) of the Constitution *'to have adequate time and facilities to prepare a defence'*

22. *Adv Ferreira* on behalf of the State argued *in limine* that if the court agreed with the accused then it would be directing that the court in Pietermaritzburg hears the matter and this would constitute an impermissible intrusion by the court on the powers of the NPA to direct where a trial should be held.

23. I disagree. While the accused have formulated their relief in the form of an order that this court directs the matter to be transferred to the Pietermaritzburg court, they are asserting that their right to a fair trial would be infringed if the trial proceeded in this division.

24. Although the relief is inelegantly framed this court only has to determine whether the accused's constitutional right will be infringed. If they are correct then they are entitled to an appropriate remedy based on that infringement[8].The issue therefore has nothing to do with directing the prosecuting authority to do anything. It also has nothing to do with one court seeking to impose a jurisdictional obligation on another to hear a matter[9] .

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[8] See *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at p781A-B

[9] This would only arise if a court under s110 (2) upheld a s106 (1) (f) plea to jurisdiction. In such a case the provision empowers the court to adjourn the case to a court which has jurisdiction.

25. In my view if the accused's application succeeds, then this court need do no more than declare that their fair trial rights would be infringed if the trial was to continue before it. It will then be up to the prosecuting authority to decide before which court proceedings are to continue; presumably by applying the provisions of s111 of the CPA.

26. In response Adv Ferreira expressed concern that the accused would then be in a position to contest the jurisdiction of any other court to which the prosecuting authority may direct the hearing of the trial . The accused had previously confirmed that they agreed to submit the jurisdiction of the Pietermaritzburg court. They did so again before me.

27. That leaves as a preliminary question whether it is competent for the accused to raise this issue before they plead to the charges.

28. In *Mamase* at para 8 the court considered that even an issue relevant to jurisdiction, *'but not amounting to a plea, is unknown and unprecedented'* because it reasoned that "*perfectly adequate structures and procedures are in place to determine issues of that nature*"[10].

29. It therefore appears that the Supreme Court of Appeal did not rule out the possibility of a pre-plea attack on jurisdiction if the CPA did not cater for the situation.

30. At the time the accused raised this issue they had not indicated that they were prepared to waive their right to have the charges put to them under s105 of the CPA.

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[10] The full passage at para 8 of the judgment reads:

> *'The procedure of placing before a criminal court, prior to the trial commencing, an issue relevant to the validity of a step taken by the prosecuting authority in terms of the NPAA or an issue relevant to jurisdiction, but not amounting to a plea, is unknown and unprecedented. No reasons were advanced, and I dare say none exist, why it might be necessary for such a procedure to be accommodated when perfectly adequate structures and procedures are in place to determine issues of that nature: the criminal trial and the civil courts.'*

That being so, it appeared that at least a week would be taken up reading the multiple charges which are contained in an indictment of some 1500 pages and the court's time would have been unnecessarily wasted with this case if the accused's contentions are correct on this point. So too if the plea was raised *ab initio* and determined separately: It would elevate form over substance since, as I comprehend it, the real challenge is not about which of two court enjoys jurisdiction (which if regard is had to s110(2) is the true nature of a s106(1)(f) challenge[11]) but rather whether a court should decline to exercise the jurisdiction with which it is clothed because a failure to do so would result in the infringement of the accused's fair trial right.

31. In my respectful view this type of challenge was not contemplated by s106 (1) (f) since the provision preceded the advent of the constitutionally protected rights and also because this court would be compelled under s106 (2) to direct that the trial takes place in another jurisdiction which may create the jurisdictional and separation of powers issues to which the State referred.

I should add that the State did not suggest that it was inappropriate to raise the issue at this stage. On the contrary it appeared to support this expedited manner of disposing of the issues raised.

32. I therefore turn to deal with the grounds upon which the accused rely for contending an infringement of their fair trial right if the case proceeds in this division.

33. The factual averments relied on are the following;

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[11] S110(2) reads:

'Where an accused *pleads* that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.' (emphasis added)

See also the complimentary provision of s106 (4).

The effect is that an accused is not entitled to an acquittal in cases where a plea of want of jurisdiction is pleaded under s106 but the court hearing the plea must adjourn the case to the court that enjoys jurisdiction

a. Porritt who is cited in every charge resides in Pietermaritzburg. According to the accused, the State suggests that Porritt is the mastermind and driving force behind the offences.

b. Although Bennett was residing in Johannesburg when the indictment was served, she relocated to Knysna some eight or nine years ago to be near her one daughter.

c. The head offices of most of the corporate accused were in Pietermaritzburg which is where their financial, accounting and corporate administration was undertaken and documents retained.

   Accordingly the documentation relevant to the charges was kept in Pietermaritzburg while the vast majority of corporate documentation relied on by the State was prepared in , emanated from, or was directed to the offices in Pietermaritzburg. Added to this, the offences were allegedly committed some 16 to 20 years ago.

d. Both accused claim that they are obliged to stay in hotel accommodation as neither has family or friends living in Johannesburg and that;

   i. accommodation and travel costs, of being obliged to attend proceedings in a court where neither of them reside;

   ii. having to do everything themselves because they cannot afford legal representation and cannot afford to employ anyone to assist them;

iii. not having ready access to documentation for purposes of cross examination and being obliged to transport large volumes of files up and down by air in order to prepare and for cross-examination[12];

iv. their dependency on outside sources for photocopying and the limitations of time and extra expense of external copying as opposed to in-house copying;

v. the discomfort of not having the ordinary facilities of home , such as being obliged to purchase meals at considerable extra expense and the physical and psychological strains of commuting long distances on a weekly basis;

in what will be a lengthy trial, will deprive them of their rights under section 35(3)(b) of the Constitution to adequate facilities to prepare their defence and will place the State at a clear advantage thereby transforming the trial into an unfair process.

34. In support of their contention that the State will be at a clear advantage, the accused aver that the prosecution currently do not have far to travel, enjoy extensive office facilities adjacent to the court and manpower to call upon at no expense. It is also submitted that the prosecution team will have the benefit of their homes and family to return to every evening.

While this court does not have to direct where the case should be heard, in order to determine whether there will be an infringement of the accused's fair trial right it is necessary to draw a comparison with the position the accused contend for; namely that the trial be held in the jurisdiction where

[12] The accused in para 27.4 of the application signed by Ms Bennett refer to the likelihood that the cross examination of witnesses will reveal the existence of documents not included in the docket and that these will then have to be searched for and retrieved from Pietermaritzburg

Porritt resides and where Bennett could be accommodated at little or no cost. Bennett supports the transfer of the case to Pietermaritzburg

35. Furthermore, it was submitted that if the trial is held in Pietermaritzburg then there will be no excess travel costs, save for *"some trips by the second applicant to and from Knysna"*, or costs of accommodation while the accused will have office premises and facilities available through the assistance of Porritt's relatives. The accused would also have ready access to the vast quantity of documents required for the trial. By contrast the inconvenience to the prosecution will be minimal since, although travelling on a weekly basis from Gauteng, they will not personally bear the costs of travel and accommodation.

36. The grounds for contending that their constitutional right to have adequate time and facilities to prepare a defence has been infringed may therefore be divided into;

a. the high cost of conducting a very lengthy trial in Johannesburg;

b. the inability to prepare for and conduct such a trial away from where the bulk of the documentary evidence that may be needed is located;

c. the emotionally debilitating effect of being away from home and family for protracted periods.

THE COST FACTOR

37. The main cost contended for is that the accused will be obliged to pay for hotel accommodation, car hire and weekly flights for the duration of a trial which they believe could be up to three years while at some stage the State contended it could run for two years or more. Additional costs would have to be incurred in eating away from home and in utilising photocopying and other office facilities during preparation.

38. The accused estimate the additional cost burden if the trial was to be held in Johannesburg as opposed to Pietermaritzburg at between R55 000 to R60 000 per month and that neither of them '*can afford to pay this kind of money, or anything approaching it, for a single month, let alone for the years of the contemplated trial*'. They add that the financial burden would place them in a position where they are incapable of attending at the trial.

39. On the papers before me the State has not challenged that the accused cannot afford this kind of expenditure. It however disputes the amount as there are no supporting documents, even though the accused have already appeared in this division on several occasions. The State also contends that the accused do not have to stay in a hotel, can drive a car up from Pietermaritzburg and use it here and the only airfares would be those for Bennett who would in any event have to fly either to KwaZulu-Natal or to Gauteng.

40. Perhaps the most significant challenge to the accused's main contention that they will have to come up to Johannesburg at considerable expense and inconvenience is the State's allegation that Bennett's erstwhile place of residence in Sandton is still available to them. The house is situated in Delta Road, Elton Hill, which the accused confirm is relatively up-market northern suburbs area, and is still owned by Majorshelf 110 (Pty) Ltd. Both Bennett and Porritt remain directors of that company.

41. The accused did not deal in their founding affidavit with the existence of this residence, or what additional expenses if any, would be incurred if they were to reside there during the trial. However in reply they alleged that the house is;

> '... *virtually derelict and uninhabitable. It is unfurnished and an elderly gardener lives on the premises. It has been broken into on several occasions and for this reason, a security company has been appointed.*

One of the reasons the second applicant (ie; Bennett) *moved to Knysna was because of the problem with the property. The applicants will take photographs of the property and these will be provided to this Court at the hearing...'*

42. The photographs were not provided. Even if they had, the accused have not engaged the issues that arise; namely, the additional costs that would be incurred if they were to use the Delta Road house.

Clearly security has been beefed up and there is a gardener who remains employed to work on the property. This indicates that the owner has access to funds. It is not alleged that the furniture has been stolen so it must be assumed that it was removed pursuant to Bennett relocating and neither the accused nor the owner contend that the furniture cannot be brought back.

The company does not contend that it has abandoned the property, intends selling it, is not interested in preserving its value or does not have access to financial resources. There has also not been any suggestion that Bennett was obliged to pay for the use of the residential property when she occupied it or that the accused should do so now if they have to occupy. Since the accused argued in court that they were simply directors, they would have required an affidavit from the controlling mind of the company in order for any such evidence on this score to be admissible, in the absence of an acceptance by the State.

43. Once the residence in Delta Road can be used then it would be a simple matter of setting up portable printing and photocopying facilities.

44. Porritt could not offer a reason why the motor vehicle which he uses in Pietermaritzburg cannot be driven up and used to commute within Johannesburg or to travel back and forth to Pietermaritzburg.

INABILITY TO PREPARE FOR TRIAL AND PHYSICAL AND PSYCHOLOGICAL DISTRESS

45. The main contention advanced by Porritt and supported by Bennett is that during the trial they will require access to over a million documents in order to prepare for cross-examining witnesses, most of which are in Pietermaritzburg by reason of the location of Porritt's residence and the companies which are alleged to have been utilised by the accused in the commission of the offences.

46. The State contends that the accused have already been furnished with every document it relies on. The documents are contained in exhibit bundles which have been cross-referenced to the charges. They number some 48 000 documents and according to the State the accused have had over four years to consider them and locate all other documents which they believe are necessary for their defence.

47. The State also:

a. avers that the grounds relied on apply to all accused who are on bail;

b. disputes that all financial, accounting and corporate secretarial administration were carried out in Pietermaritzburg. The State asserts that the companies' auditors were based in Gauteng; namely, Price Waterhouse and Simon Hurwitz. It alleges that both accused ran business operations in respect of the relevant companies from within this court's area of jurisdiction at the Delta Road residence, that Bennett was at all times during the commission of the offences operating from Johannesburg and that Porritt as CEO of Tigon Ltd and Shawcell Telecommunications Ltd spent a considerable time in Johannesburg attending to the business affairs of these and associated entities;

c. contends that Tigon and Shawcell were both listed companies on the Johannesburg Stock exchange ('*JSE*') and that numerous offences are related to the prospectuses of both companies. The JSE and transactions conducted on the bourse arise in this courts area of jurisdiction where the relevant documents to substantiate or disprove the State's allegations are located;

d. indicated that it does not intend calling the 3000 witnesses it has mentioned previously and that the duration of the trial will depend on the manner in which the accused approach it. The State contends that if formal admissions are made then the trial should be concluded in about a year. To this end the State has provided a number of formal admissions it will seek under s220 of the CPA. These include admissions such as whether the accused and other named individuals were directors or held certain offices in the relevant companies

e. alleges that the vast majority of State witnesses are resident in this court's jurisdiction while the remainder are not confined to KZN but are spread throughout the country and in foreign jurisdictions.

48. In my view the accused have had an opportunity to consider the documents that the State relies on. By now they should have been able to identify the documents that are not contained in the exhibit files and which they consider relevant to their defence. These should therefore already have been assimilated by them.

Furthermore the accused previously sought the production of documents which they claim the State seized from them or which are otherwise in the State's possession. They therefore appear to have a good idea of what documents they still believe may be required and from whom they can be obtained in order to have the necessary subpoenas issued.

49. I agree with the accused that they cannot anticipate every eventuality. However a court seized with the trial would afford the accused a suitable adjournment to locate documents if their relevance could not have been reasonably anticipated.

50. I therefore conclude that on the facts presented by the accused in this application the section 35(3) (b) right under the Constitution to have adequate time and facilities to prepare a defence cannot relate to pre-trial preparation. The accused were indicted in 2005 and all the particulars, exhibits and witness statements on which the State relies were supplied by 2011 save for certain documents subsequently produced in 2015 pursuant to orders of this court. They had adequate time to prepare for trial but if regard is had to preparation that may be necessary once the trial commences and in order to challenge the testimony that might not have been anticipated, or for any other adequate reason that would otherwise prejudice them, then their rights are safeguarded by a suitable adjournment or if necessary or expedient even the holding of certain parts of the trial in Pietermaritzburg under s169 of the CPA.

51. I accept that estimates of the duration of a trial are notoriously optimistic. However at an early stage it was accepted, for logistical reasons in having witnesses lined up, that the case would not run uninterruptedly for the entire duration but that, suitably motivated in advance, there would be a one or two week break during the course of any court term, subject naturally to any prejudice that the accused may claim.

52. Turning to the physical and psychological strains that would affect each accused, the starting point is that Bennett will be absent from her residence in Knysna irrespective of whether the trial is held in Johannesburg or Pietermaritzburg. The question therefore is whether she will experience the discomfort of not having the ordinary facilities of home, such as being obliged to purchase meals at considerable extra expense. The strains of commuting long distances on a weekly cannot be relied on as a factor since

they would arise irrespective of whether she commutes from Knysna to either Pietermaritzburg or Johannesburg.

53. It therefore remains to assess whether, in Bennett's case, she will be unable to enjoy access to ordinary home facilities in Johannesburg, and if so how that might affect her physically or psychologically. This is dealt with in the following paragraphs.

54. Bennett originally claimed that she left Johannesburg to live in Knysna in order to be close to her one daughter. In the present application the only reason advanced was that there were problems with the Delta Road residence.

55. Bennett has not dealt meaningfully with the Delta Road house being unsuitable to provide reasonable home facilities. It is not disputed that she had resided there permanently and it is not contended that there is any impediment to restoring the furniture in the house or that the area itself is presently unsafe, which would be a startling proposition if regard is had to the location and the fact there is no allegation that since a security company has been engaged, the unoccupied property has again been broken into. It is unnecessary to consider the impact on Bennett of being away from family since that would also arise if the trial was to be held in Pietermaritzburg, a location to which she is agreeable.

56. That leaves the impact on Porritt if he was only able to commute back to Pietermaritzburg on weekends. In my view an insufficient case has been made out as to the effect the absence of family life would have on his fair trial right, assuming that it goes further than the case actually raised under section 35(3) (b) of the Constitution that he would not have adequate time and facilities to prepare a defence once the trial has commenced.

57. So far I have assumed that home facilities are *per se* a factor in determining whether an accused has adequate facilities to prepare a defence as contemplated under s35(3)(b).

This assumption should not be misunderstood. It is no more than that for the purposes of this case. If it were otherwise then every awaiting trial detainee, including those accused of serious offences under Schedule 6 of the CPA or where a conviction might result in life imprisonment, would be entitled to raise this both in relation to being entitled to bail on the ground of an exceptional circumstance[13] or as a basis for contending that the trial cannot proceed because of the physical and psychological strains of not having facilities commensurate with those available at home.

CONCLUSION ON THE FACTS

58. In my view it is unnecessary to deal with the other factors raised by the prosecution that would have weighed in considering the competing interests of the State, the complainants and the State witnesses. These would have to be taken into account if the State relied on the limitation provisions of section 36 of the Constitution when applying the relevant legislation dealing with the power given to the State to determine which one of a number of court's having jurisdiction should be seized with the trial, or the application of those provisions which direct that a criminal trial takes place where the offence is alleged to have been committed. The present case can be decided by reference only to the accused's claims of a breach of their fair trial right and without having regard to any competing interests which the State has sought to rely on.

59. In the previous decision delivered some two months ago, dealing with the application for a permanent stay and the removal of the prosecutorial team, it was necessary to consider the question of onus. I concluded that in

[13] See s60(11)(a) of the CPA

applications of this nature the accused bore the *onus* on a balance of probabilities[14]. Adv Ferreira also drew attention to the fact that in the present case the State cannot be expected to prove a negative.

60. For the reasons given earlier, the State's allegation that the accused have an available upmarket residence in Johannesburg has not been meaningfully addressed. The accused have also not made out a sufficient case in regard to their inability to prepare for trial and to the physical and psychological distress they might endure even if these can be construed as a justifiable basis for the purposes of invoking fair trial prejudice under s35(3)(b) of the Constitution and irrespective of a consideration of any s36 constitutional limitation.

61. Accordingly the accused have failed to satisfy the court that they will not receive a fair trial or will otherwise suffer trial prejudice under section 35 of the Constitution if the case continues in Johannesburg.

ORDER

62. It is for these reasons that the application was dismissed; it being recorded that the accused were not precluded from pleading under section 106(1) (f) that the court has no jurisdiction to try the offence when the charges are read out.

FURTHER MATTER ARISING - ASSESSORS

63. When the matter first commenced the State suggested the appointment of assessors. It has since withdrawn the request. The accused were requested to indicate if they considered that assessors should be appointed. They replied in the affirmative.

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[14] *Porritt and Bennett v the State* (case no. 40/2006 delivered on 22 April 2016 at paras 9-13 and relying on *S v Mohamed* 1977 (2) SA 531 (A) at 539H-540A

64. This court believes that it is sufficiently qualified and has sufficient knowledge and experience to understand and deal with the legal and factual issues that are anticipated to arise in this case and which involve corporations, corporate structures, tax and listings or other JSE related issues, financial statements and presumably accounting records.

While the accused do not contend otherwise they submit that two additional heads with specialised knowledge are better than one. This is however true for every case.

65. The specialised nature of the issues as contended for by the accused must also be considered by reference to the availability of the category of qualified experts they have in mind. There would be significant cost implications and there is no guarantee that suitably qualified persons would be amenable to sit as assessors. In this regard, not only are assessor rates circumscribed but more significantly any assessor would be obliged to agree in advance to make themselves available for at least a year and possibly up to three years, based on the accused's estimate. A further factor to consider is the potential prejudice to the accused if an assessor becomes unavailable for periods at a time as this may unduly delay the trial.

66. While the appointment of assessors in the High Court is in the judge's discretion under s145 of the CPA, I was prepared to consider representations since the State had initially raised the issue and for at least this reason it was fair that the accused should also have an input. I again caution that I have not considered the rights, if any, of an accused ordinarily or even in a specific case to have an input into the judge's decision of whether or not to appoint assessors.

PLEA TO THE CHARGES

67. After I gave the decision to dismissing the application and deciding to sit without assessors the accused were informed that the court would sit early in the following term when the charges would be put to them. Due to the anticipated week or more it would take to read out the numerous charges both accused indicated that they would prefer to expedite the process. They confirmed that they understood the charges and said that they intended to plead not guilty to each while also raising the lack of jurisdiction plea under s106(1)(f).

68. The court indicated that this should be done in writing. An adjournment was taken to enable the accused to consider their position and discuss with the prosecution the manner of pleading to the charges without the necessity of each being read out to them in open court.

69. After resuming, the accused presented a document signed by them and confirming that they understood the charges, that the charges need not be put to them in open court and that a plea of not guilty as well as a plea of lack of jurisdiction under s106(1)(f) be entered. This was duly done and the matter was remanded to 19 August 2016 when the plea of lack of jurisdiction will be dealt with. The accused who are out on bail were duly warned.

SPILG J

DATE OF HEARING:	7 July 2016
DATE OF ORDER:	7 July 2016
DATE OF JUDGMENT:	28 July 2016
FOR THE ACCUSED:	In person
FOR THE STATE:	Adv JM Ferreira
	Adv PJ Louw