IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3626/2016

In the matter between:

VIKASH MOHAN	Applicant
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU-NATAL	First Respondent
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	Second Respondent
THE HONOURABLE MAGISTRATE: "W" COURT	Third Respondent
THE HONOURABLE MAGISTRATE: "Y" COURT	Fourth Respondent
THE HONOURABLE MAGISTRATE: "Z" COURT	Fifth Respondent
RAVLON LOGISTICS CC	Sixth Respondent
RAVENTHRAN NAIDOO	Seventh Respondent
KAIROS HOLDINGS (PTY) LTD	Eighth Respondent
SARAVAN DEVRAJ GOVENDER	Ninth Respondent
MOHAMED MAJAM	Tenth Respondent
PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Eleventh Respondent
THE PUBLIC PROTECTOR	Twelfth Respondent

JUDGMENT

CHETTY J:

[1] The applicant, who is currently facing criminal charges in three separate matters in the Regional Court, Durban, secured on interim order before Masipa J on 14 June 2016 in which he was granted a temporary stay of prosecution in respect of case numbers 112/6/2012; 417/11/2012 and 93/12/2012. The matter came before me as an opposed application, with the applicant seeking confirmation of the rule.

[2] In respect of the first prosecution pertaining to an entity known as Ravlon Logistics it is alleged that the applicant is guilty of fraud in that as the bookkeeper of Ravlon, he submitted falsified value added tax (VAT) returns to the South African Revenue Service (SARS), causing a refund of approximately R6,4 million to be paid out to the vendor. In addition to the above, the applicant alone is charged with two counts under the Prevention of Organised Crime Act 121 of 1998 relating to his purchase of a luxury apartment, which the State alleges was paid for from the proceeds of the VAT refund fraudulently secured on behalf of Ravlon Logistics.

[3] In respect of the above proceedings under case number 93/12/2012, the applicant first appeared in court on 22 May 2014, after which the matter was adjourned on several occasions thereafter. The proceedings in the criminal trial eventually commenced on 19 April 2016, with the evidence of State witnesses having already been led. The matter was then adjourned to 18 July 2016.

[4] The second criminal prosecution against the applicant relates to the entity Dunswart Plant Hire. The applicant, who practised as a tax practitioner, is alleged by the State, to have made common purpose with the tenth respondent in fraudulently submitting VAT returns to SARS, with the potential to have caused a refund of approximately R14 million to the vendor.

[5] The applicant first appeared in the district court in Durban on 30 June 2014, after which the matter was adjourned on 10 occasions thereafter. The matter was set down for trial for 4-6 May 2016. On 4 May 2016 the applicant applied for an adjournment on the basis that this application had yet to be finalised. The postponement was refused and the trial was intended to commence on 5 May 2016. On the latter date, the applicant's legal representative took ill and the matter was adjourned to 26 July 2016.

[6] The third criminal prosecution relates to an entity known as Kairos Holdings (Pty) Ltd, for whom the applicant rendered services as a tax practitioner or bookkeeper. The State alleges that the applicant submitted fraudulent VAT returns to SARS on behalf of Kairos resulting in a refund of approximately R235 million being paid out to the prejudice of SARS. In this matter, the State intends to rely on the evidence of Veni Andrews, who supplied the invoices to the applicant. Andrews, according to the State, was acting on the instructions of a director of Kairos, SD Govender, who is charged along with the applicant.

[7] The applicant first appeared in court on 27 February 2014 after which the matter was adjourned on six occasions, with some of the adjournments brought about by a challenge to the reverse onus provisions in the Tax Administration Act 28 of 2011. The trial in this matter was set to commence on 25 May 2016 but was adjourned as the State received representations from those acting on behalf of SD Govender and Kairos. On 22 June 2016 the matter was eventually adjourned to 30 September 2016, pending the outcome of this application.

[8] In all three of the criminal prosecutions, the applicant is alleged to have utilised the e-filing service offered by SARS for the submission of VAT refunds.

[9] The applicant launched this application on 15 April 2016 in which he sought that the first, third, fourth and fifth respondents be interdicted and restrained from commencing with the three criminal trials against him, pending the completion of investigations by SARS, the South African Police Services (SAPS) and the Public Protector. He further sought that the SAPS appoint a communications officer to furnish all interested parties with a "status report of the respective investigations". The applicant further sought that SARS, SAPS and the Public Protector conclude

their investigations in respect of complaints lodged by him in light of the report issued by the Honourable Justice Moosa of the Directorate for Priority Crime Investigation dated 22 June 2015.

[10] The essence of the averments contained in the applicant's founding affidavit was that he intended to plead not guilty to the charges against him and that in response to those charges he had lodged a complaint with the office of the DPCI Judge who, on the applicant's version, referred the matter to the Head of the DPCI in terms of s 17L(5) of the South African Police Service Act 68 of 1995 (SAPS Act), which provides for the following:

> '(5) The retired judge may upon receipt of a complaint investigate such complaint or refer it to be dealt with by, amongst others, the Secretariat, the Independent Complaints Directorate, the National Commissioner, the Head of the Directorate, the relevant Provincial Commissioner, the National Director of Public Prosecutions, the Inspector-General of Intelligence, or any institution mentioned in chapter 9 of the Constitution of the Republic of South Africa, 1996.' (My emphasis)

[11] The applicant contends that the criminal proceedings against him should be temporarily stayed pending the finality of the investigation of the complaints which he has made to the DPCI Judge. Consequently, the applicant contends that the matters pending against him are not ripe for hearing and should not remain on the roll as there is no indication as to when investigations will be completed. One of the complaints of the applicant was that he was not given the right to make a warning statement as an accused person during the investigation of the case against him. Although the applicant omits to mention this in his founding affidavit, it is common cause that this complaint was subsequently attended to by the SAPS, and consequently plays no part in this application. The second complaint by the applicant and which is the essence of the averments in his founding affidavit is that the kingpin of the syndicate who produced the fraudulent invoices for tax refunds, has not been charged. In particular the applicant pointed to Andrews, whom he believed to be a director of several companies and a wealthy person. Although the applicant states that he attended to the VAT submissions on behalf of SD Govender and Kairos, he does not set out in his affidavit the relationship between Andrews and the entities on whose behalf he was acting. It is also unclear on what basis he billed Andrews and

was paid approximately R300 000 by her for VAT submissions, when his clients were the eighth and ninth respondents.

[12] According to the applicant, it makes no sense that he alone is charged for a criminal offence when he was neither author of the invoices supplied by Andrews, nor did he have any knowledge as to the authenticity of the invoices. According to him he did not receive any “undue benefit” for his services rendered, in other words, he did not profit from the illegal conduct of Andrews. In particular he bemoans the fact that Andrews has not been charged nor have any employees from SARS been charged, as he holds the view that the VAT refunds could not have been transacted or approved without the connivance of employees within SARS. The applicant firmly believes that SARS is intent on persecuting him and wishes to conceal the misdemeanours of its employees for fear of public embarrassment particularly in light of the amount of the refunds issued which amount to in excess of R235 million.

[13] The applicant further contended that the State together with the SARS investigators are aware of the true nature of what has transpired, but have engaged in an elaborate cover-up as this is a matter of a complaint driven investigation by SARS, and that others including “high-ranking officials of the revenue service”, may be involved in the corruption. The applicant alleges that he took information to the State regarding the involvement of Andrews in the charges against him however the State declined to act against her.

[14] In light of the above, the applicant contends that he has a right to a fair hearing, entrenched in the Constitution, and he will be prejudiced if the criminal trials go ahead without the investigations referred to above being finalised. He further contends that he is not being given an opportunity to prove his innocence. Andrews on the other hand, is not viewed by the State as a suspect, which raises a suspicion of bias in the mind of the applicant on the part of the SARS investigators.

[15] According to the applicant, if the investigations mandated by the DPCI Judge are diligently conducted, it will expose employees of SARS and Andrews as being guilty of fraudulent conduct, and he could be exonerated of the charges against him. He consequently sought a temporary stay of the prosecution, which he submitted

would not prejudice the State, as the investigations would serve to reveal the true perpetrators.

[16] In bringing the application for a stay of prosecution, the applicant recognises that the relief sought is a drastic step but submits that the stay of prosecution being sought is only of a temporary nature, and that if the criminal proceedings against him were to go ahead, he would suffer irreparable trial prejudice. He further contends that his trial preparation is dependent on the investigations undertaken by "other government bodies", and to that extent notes that he has referred a complaint to the office of the Public Protector.

[17] The applicant further casts a net of suspicion over the prosecutor, Advocate P Govender, who has been assigned to all three matters against him. He contends that the prosecutor has ignored crucial facts pertaining to the conduct of Andrews as well as employees of SARS, and instead he is being persecuted for simply being "a messenger". Despite his aspersions, he does not seek the prosecutor's recusal.

[18] To the extent that the applicant is applying for an interdict, he contends that there is no alternative remedies available to him as his trials were set to commence from April to June 2016, and there is no guarantee that each of the trials would be adjourned, as they are being heard in separate courts. Accordingly the applicant contended that there are "exceptional and extraordinary circumstances" justifying the grant of the relief being sought.

[19] Despite the application being served on the respondents, and notices of opposition being filed by the first, second and eleventh respondents, no opposing affidavits had been filed when the matter came before Masipa J on 14 June 2016. It is necessary to note that on the same day a supplementary affidavit had been filed by the applicant for the purpose of appraising the Court of the "recent developments" in the matters pending against him in the Regional Court. In respect of the prosecutions against him, he states that the first trial has been adjourned to 18 July 2016; and second trial has been adjourned to 22 June 2016 and the third to 26 July 2016.

[20] I am advised that when the matter came before Masipa J, counsel for the second respondent was present and opposed the grant of the orders sought. There is a dispute between the parties as to whether the presiding judge had been informed that the criminal proceedings against the applicant had already commenced in the Regional Court. I will deal more fully below with this dispute and its impact on the outcome of the application. After hearing argument, Masipa J granted a rule nisi temporarily staying the prosecutions, pending the finalisation of the application. No order was made in respect of the investigations which the applicant contended were incomplete. The matter was adjourned sine die with directions for the filing of affidavits.

[21] The relief sought by the applicant is opposed by the first, second and eleventh respondents, all of whom have filed detailed affidavits from which a number of disputes emerge. Despite these disputes, for reasons which are considered below, this matter can be disposed of without the referral to oral evidence. When the matter came before me on the return day, it was argued as an opposed motion. Having had sight of the heads of argument filed by the opposing counsel for the respondents, Mr *Eades* who appeared for the applicant handed up supplementary heads of argument, which I was not disposed to consider due to its lateness and the potential prejudice to the opposing parties. There is no provision in the rules or Practice Directives for such submissions and in my view it gives the applicant an unfair advantage of attempting to remedy breaches in his argument which have been alluded to by the opposing parties. Indeed, this much is stated by counsel in the opening paragraphs of his "supplementary heads". The essence of what the applicant now proposes is a variation of the relief sought in his original notice of motion. Counsel submitted that what the applicant does not seek is to dictate to the State or the SAPS how the investigation against him should be carried out; how the prosecution against him should be conducted; that the State should be compelled to prosecute Andrews or that the first respondent be compelled to withdraw the charges against him. To that end, counsel contended that all that the applicant was now seeking on the return day was for an order that the SAPS *"comply with its duty to investigate his complaints arising from the report of Judge Moosa of the DPCI*".

[22] Both Ms *Hemraj SC,* who appeared for the first and eleventh respondents, and Ms *Norman SC* who appeared for the second respondent opposed the last minute variation by the applicant. The entire tenor of the founding affidavit seeks to dictate to the State, SAPS and SARS how to conduct their investigations and who to pursue as the 'real' miscreants in the massive fraud perpetrated against SARS. The draft order proposed is that the three criminal trials in the Regional Court are postponed pending compliance by the eleventh respondent with the report of the DPCI Judge dated 22 June 2015, and that the applicant is directed to make available to the eleventh respondent such further information as it may require, which is in the applicant's possession.

[23] I agree with the views expressed by Ms *Hemraj* and Ms *Norman* that the respondents have been brought to court to answer the case as set out in the applicant's founding papers. The attempt by the applicant, at the last minute, to deviate from the nub of its case, cannot be condoned. Consequently, the matter falls to be determined on the basis of the affidavits before me.

[24] Before dealing with the merits of the application, it is pertinent to deal with the issue of whether the applicant disclosed to Masipa J that criminal proceedings had already commenced against him in the Regional Court in respect of the Ravlon Logistics matters. The application was issued on 15 April 2016 and set down for hearing on 14 June 2016. On the day on which it was to be heard, the applicant filed a supplementary affidavit in order to bring the Court up to date with recent developments. I assume that this would have included matters having arisen between the date when the application was launched to the date when it had been set down for hearing.

[25] What emerged from the answering affidavits of the first, second and eleventh respondents is that the trial against the applicant in the Ravlon Logistics matter had already commenced before the Regional Court from 18-21 April 2016 during which time the viva voce evidence of six witnesses had been led. These witnesses had also been cross-examined by the applicant's legal representative, who coincidentally also represents him in these proceedings. Nowhere in his supplementary affidavit does the applicant make any mention of these proceedings. This omission is conceded by counsel for the applicant. On the basis of this non-disclosure, those

respondents opposing the application submit that the application should be dismissed on this ground alone. The applicant, in reply, says the following about the non-disclosure:

> 'I submit that the decision of the magistrate to refuse the postponement is manifestly incorrect and accords with a gross violation of my fundamental right to a fair trial. I submit that the decision exercise by the magistrate does not encapsulate the recognition of the constitution and my rights therein contained. Therefore the trial which has commenced in W regional court is a regular and I submit that I am entitled to a permanent stay of prosecution in this regard, the merits of which I shall expand on and deal with in a separate application.'

[26] Despite his complaint of a violation of his rights, the applicant still does not provide any explanation as to why he failed to bring to the Court's attention the proceedings which had already commenced against him. In dealing with the replying affidavit filed on behalf of SARS where the non-disclosure point is raised, the applicant says the following:

> 'The contents hereof are denied, at the time of the deposing to the founding affidavit no trials had commenced. I have indicated that the matter is set down for trial in a supplementary affidavit which was prepared in haste during the course of the hearing of the application. Therefore, there is no merit in the submission that there has been a nondisclosure. The first, second and 11th respondents were all represented at the hearing of the application by the state attorney and by counsel which turned to be partly an opposed motion. The second respondent's counsel raised the issue therefore there was no nondisclosure. I also repeat the contents of paragraphs 45, 46 and 47 herein.'

[27] The stance of the opposing respondents is that the applicant has been economical with the truth in respect of bringing the criminal proceedings to the attention of the Court prior to or on 14 June 2016. Firstly, he is correct in saying that at the time when he deposed to his founding affidavit, no proceedings had commenced. However when the matter came before this Court on 14 June 2016, he patently omitted, on affidavit, to make any reference to the part-heard criminal trial against him in the Regional Court. His averment that he raised this matter in his supplementary affidavit is simply not true. This much has been conceded by his

counsel. There is also not much to support his contention of the supplementary affidavit being prepared in haste, as at the time when the matter came before Masipa J, the respondents had not filed any answering papers. In addition the applicant states unequivocally that the proceedings in the Regional Court have been adjourned to 18 to 20 July 2016 for trial. He neglected to mention that the matter was indeed part-heard, and that the trial had commenced in April 2016.

[28] At the hearing of this matter, counsels for the respondents were insistent that Masipa J was unaware that one of the criminal trials against the applicant had already commenced in the Regional Court. Counsel, who appeared for the respondents on the day, I am advised, was briefed to resist the granting of the interim order. It would appear that the counsel had limited information about the matter. The respondents at that stage had not filed any opposing affidavits. Mr *Eades*, while conceding to the omission of this fact from the applicant's affidavit, submitted that even if such omission did occur that it was not a material non-disclosure and would have had no bearing on the eventual decision by Masipa J to grant the order which she did.

[29] Ms *Norman*, on behalf of SARS, was taken aback by the submission, and perhaps rightly so in light of the authorities on the duty to disclose. The issue of disclosure, both by litigants as well as by the legal representatives, who owe a duty at all times to place the full facts before a court, is an essential ingredient in a system designed to achieve a fair and just outcome of a dispute. In *National Director of Public Prosecutions v Pilane & others* (692/06) [2006] ZANWHC 68 (16 November 2006) Landman J considered a matter where it was common cause that the applicant failed to disclose the fact that the criminal trial had started and that the evidence was led during the criminal trial. He found that these were material facts which should have been disclosed. The matter has some parallels to the application before me. The Court went on to state the following:

> '[10] Mr Pistor SC conceded that the rule requiring the utmost good faith by a party to *ex parte* applications apply to an *ex parte* application contemplated in section 26 (1) of POCA. The rule of practice requires that:
>
> (a) all material facts must be disclosed which might influence the court in coming to a decision;

(b) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission of the order obtained ex parte. see also National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) where Nugent JA said at 489 H-J:

> "Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B)."

and

(c) the court, apprised of the true fact, has discretion to set aside the former order or to preserve it. See De Jager v Heilbron & Others 1947 (2) SA 415 W; Venter v Van Graan 1929 TPD 435; Barclays Bank v Giles 1931 TPD 9; Hillman Bros v van den Heuvel 1937 WLD 41 and Schlesinger v Schlesinger 1979 (4) SA 342 W.

[11] Mr Pistor SC submitted that a court will not discharge a rule nisi where a reasonable explanation for a non-disclosure of information in the founding papers has been given and where it is doubtful if the court would have refused the application if the relevant information had indeed been disclosed.

[12] Margo J in Cometal-Mometal S A R L v Corlana Enterprises (Pty) Ltd 1981 (2) SA 412 (W) at 414E-414H referred to certain factors that could be taken into account by a court in the exercise of its discretion not to rescind the order as follows:

> "It seems to me that, among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the uberrima fides rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interests of innocent third parties, such as minor children, for whom protection was sought in the ex parte application. . ."

Van Reenen J in M v Rizcun Trader (4); MV Rizcun Trader v Manley Appledore Shipping Ltd 2000 (3) SA 776 (C) at 799 E-F referred to this approach with approval.'

[30] Counsel for the applicant attempted to minimise the extent or impact of the applicant's non-disclosure by submitting that counsel for the respondents were

present at the time when the matter was called before Masipa J and furthermore the application had not been brought ex parte, but on notice. While this is true, in my view this does not exonerate a litigant, and especially not the legal representative, from being anything other than fully candid with the Court as to the correct state of facts as at the time when the matter is argued, even if such disclosure would be adverse to one's case. This duty cannot be switched on and off depending on whether an application is ex parte. It is an abiding duty worn at all times by legal practitioners. In dealing with the aspect of full disclosure and its consequences, albeit in the context of ex parte applications, Justice BR Southwood in *Essential Judicial Reasoning* (2015) at 34 et seq says the following:

> 'In an *ex parte* application for interim relief the applicant must disclose all material facts, which could influence court to grant or refuse the relief sought. Failure to comply with the school can have serious consequences on the return day.
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> These material facts are described by the court in Schlesinger v Schlesinger 1979 (4) SA 342 W 348C-350C:
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> The next preliminary aspect to be considered is whether there has been such a serious non-disclosure or misstatement of material facts as would entitle a Court of law to set aside the original order, and whether a Court should do so in the instant case if this is found to be so. The enquiry thus falls naturally into two parts namely, first, whether material facts were undisclosed and, secondly, whether a Court should exercise its discretion in favour of the applicant and set aside the order for leave to sue by edict granted by F S STEYN J.
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> Before dealing with the facts, it would in my opinion be advisable to examine the principle of full disclosure in *ex parte* applications more closely, and, especially, when a Court should exercise its discretion in favour of the party who has been guilty of non-disclosure or misstatement. Counsel for the applicant (Mr *Kriegler*) has referred me to a number of South African and English authorities which support the statement found in the excellent work of Herbstein and Van Winsen on *The Civil Practice of the Superior Courts in South Africa* 2nd ed at 94, to the following effect:
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> "Although, on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts, which might affect the granting or otherwise of an *ex parte* order.
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> The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court; so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which *might* have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."
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> This synopsis is certainly supported by venerable authority in this country, such as *In re The Leydsdorp and Pietersburg (Transvaal) Estates Ltd (in liquidation)*

> 1903 TS 254 at 257 - 8 (where it was still stated that if in the opinion of the Court the facts withheld *would* have influenced the Court in its decision, it could be set aside - subsequently changed to "*might* " - see GREENBERG J in *Phillips v May* 1936 (1) PH C16 (W)); *Estate Logie v Priest* 1926 AD 312 at 323; *De Jager v Heilbron and Others* 1947 (2) SA 415 (W) at 419 - 420; *Barclays Bank v Giles* 1931 TPD 9 at 11; *Spilg v Walker* 1947 (3) SA 495 (E). It appears quite clearly from these authorities that:
> (1) in *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;
> (2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and
> (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.
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> Although these broad principles appear well-settled, I have not come across an authoritative statement as to when a Court will exercise its discretion in favour of a party who has been remiss in its duty to disclose, rather than to set aside the order obtained by it on incomplete facts. On the other hand, the circumstances may be so divergent and variegated that it is impossible to lay down any guideline at all. It appears that in former times in English practice a failure to disclose material facts fully in *ex parte* applications was invariably visited with rescission (see eg the judgment of KAY J (Chancery Division) in *The Republic of Peru v Dreyfuss Brothers & Co* (1886) 15 LTR 802 at 803). This strict approach was subsequently relaxed and now appears to be in line with the approach in our own Courts (see *Becker v Noel* (1971) 1 WLR 803 *per* Lord DENNING MR). The rule was apparently applied strictly in applications for leave to sue outside the jurisdiction, even more than in other *ex parte* applications, where a rule *nisi* was issued (see *Bloomfield E v Serenyi* (1945) 2 All ER 646 (CA) at 648D).'

[31] See also *National Director of Public Prosecutions v Basson & another* [2002] 2 All SA 255 (A) para 21 which reaffirmed that 'where an order is sought *ex parte* it is well established that the utmost good faith must be observed.' As set out above, I am not persuaded by the argument that the requirement to observe the utmost good faith should only apply to ex parte applications. In any event, in the matter before me, at the time when the supplementary affidavit had been deposed to by the applicant on 14 June 2016, it was being moved on the basis that although the respondents had filed notices to oppose the relief, they had not complied with the rules to file opposing affidavits. The applicant contended that the respondents had no defence to the relief claimed. As such the only affidavits before Court were his founding and supplementary affidavit.

[32] I am furthermore not in the least persuaded by Mr *Eades* contention that the omission to mention that criminal proceedings had commenced in the Regional Court was not material. It is unfathomable that an applicant can come to Court

seeking the temporary stay of criminal proceedings without informing the Court that such proceedings had already commenced. If one has regard to the relief sought in paragraph 1.1 of the notice of motion, the applicant seeks an order that the respondents are interdicted and restrained "*from commencing with the trials against the applicant*". On a literal interpretation, this implies that proceedings have not yet commenced. To the extent that there is a dispute of fact as to whether disclosure of the proceedings had been made to Masipa J on 14 June 2016, this dispute in my view can be resolved on the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) in favour of the respondents opposing the application. The applicant could have easily discharged the burden on him in relation to whether such disclosure had been made. He could have secured a copy of the transcript of the proceedings on 14 June 2016, which would have settled the debate. He chose not to.

[33] In light of the above, I am in agreement with counsel for the respondents that the application should be dismissed on this ground alone. An alternative consideration would be that only the part of the application pertaing to Ravlon Logistics trial ought to be dismissed. The alternative postulated, in my view finds no application, as the applicant has not sought separate orders in respect of each criminal trial facing him. In addition, his founding affidavit creates the impression that Andrews has a role to play in each of the three trials when in actuality she is a witness for the State only in the Kairos trial. The allegation of the failure of the SAPS to investigate the matter in accordance with the DPCI Judges' report is one which straddles all three trials, and there is no attempt to distinguish the lack of investigation on a case by case basis. I would therefore have dismissed the entire application on this ground.

[34] For the sake of completeness, I deem it imperative to deal with all of the arguments raised before me. Apart from questions of *uberrima fides*, Ms *Hemraj* disputed that the Court had been informed on 14 June 2016 of the part-heard trial. The fact that proceedings in respect of the trial pertaining to Ravlon Logistics remains part-heard in the Regional Court raises the question as to whether this Court has jurisdiction, or is the proper forum, to hear this application. It is well established that a bar to criminal proceedings is likely to be available to an accused

only in a narrow range of circumstances, where it is established that the accused has probably suffered irreparable "trial prejudice" as a result of any trial related delays. In this regard see *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) where a stay of prosecution was sought on the ground that there had been an unreasonable delay in the prosecution. Of the relief sought, the court said the following at para 38:

> '…the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.'

[35] The principle enunciated by Kriegler J is one of long-standing in our law. In *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 at 261, Schreiner JA said:

> 'Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already been commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of case such an order would be entirely out of place.'(My emphasis)

[36] It has been held that an accused who seeks a permanent stay of prosecution for reasons associated with an unreasonable delay, before the commencement of criminal proceedings must bring such application before the High Court having jurisdiction. On the other hand an "intra-curial" delay occurring after the commencement of criminal proceedings is a matter falling to be dealt with *exclusively* by the court seized with the criminal proceedings. See *S v Naidoo* 2012 (2) SACR 126 (WCC). In any event, the issue of jurisdiction was raised by counsel for the respondents, but this argument was advanced for reasons that the trial court is better suited to deal with the applicant's fair trial concerns rather than a High Court

being asked to grant what in effect is a prohibitory interdict. Moreover, it has been held that the lower court has the necessary jurisdiction to determine whether or not evidence has been constitutionally obtained and to determine whether or not to exclude such evidence from a particular trial before it. See *Mendes & another v Kitching NO & another* 1995 (2) SACR 634 (E). At the same time it is worth noting that this Court will not interfere in incomplete criminal proceedings in the lower courts, unless the case is a rare one where a grave injustice might otherwise result or "where justice might not by other means be attained". In this regard see *Wahlhaus & others v Additional Magistrate, Johannesburg & another* [1959] 3 All SA 194 (A) where the court stated that:

> 'The appellants are alleged to have committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial.'

[37] The applicant placed considerable emphasis on the report on the DPCI Judge and submitted that until his recommendations to have the complaints lodged by the applicant properly investigated, the criminal prosecutions against him had to be stayed. The applicant further contends that the findings of the investigations would exonerate him from the charges currently facing him. The referral of a complaint to the DPCI Judge came about after the applicant was charged for the submission of fraudulent VAT returns. The applicant was aggrieved by this as Andrews and other employees at SARS appeared to have avoided the net of prosecution, despite his belief that they had orchestrated an elaborate plan to defraud SARS.

[38] The DPCI Judge received two complaints from the applicant – the first pertaining to allegations of improper investigations against members of the DPCI and the second of an infringement of his rights during the course of the investigation by members of the DPCI. That has been complied with. What remains and is yet to be complied with, according to the applicant, is an investigation by the SAPS into the selective prosecution against him while the "kingpins in the syndicate that produced the fraudulent tax invoices" have not been charged. The applicant's focus of

attention in this regard is Andrews and other unnamed employees of SARS, with whom he contends she has colluded with.

[39] It is appropriate to have regard to the wording of the report of the DPCI Judge. In the section entitled "Action" the following is set out:

> 'The office of the DPCI judge has made a referral of the matter to the head of the DPCI in terms of section 17L(5) of the SAPS Act.
> The acting head of the DPCI has in terms of the protocol between it and SARS referred the matter for investigation to SARS.
> After the investigation has been completed by SARS, the matter will be referred back to the head of the Hawks for such further steps as may be necessary depending on the outcome of the SARS investigation.
> The acting head of the Hawks will keep the complainant informed of further developments in the matter and engage the complainant made necessary.'

[40] The applicant correctly points out that it is an offence for state entities to refuse to carry out a directive or recommendation from the DPCI Judge. The applicant's founding affidavit is replete with the averments that if investigations are diligently conducted by SARS, it would result in him being exonerated of the charges against him. Throughout his affidavit he points to Andrews as being the mastermind behind the entire episode. He further alleges that he has all of her emails as well as the attachments thereto in his possession. What is clear from the answering affidavit of the first and eleventh respondents is that the applicant has not furnished any of this information to them to consider. In particular, in respect of the criminal prosecution in the Kairos matter, the eighth and ninth respondents, who are co-accused together with the applicant, have made representations through their attorneys to the first respondent. The applicant on the other hand has steadfastly resisted the opportunity to do the same. Subsequent to the report of the DPCI Judge, the eleventh respondent has made its investigators available to interview the applicant. In particular, a Colonel Mngwengwe was assigned to interview the applicant in December 2015. A meeting between the two did take place, but in the absence of the applicant's legal representative. The meeting ended without an affidavit been obtained from the applicant. Thereafter a Colonel Sibiya was deployed

to obtain an affidavit from the applicant. Instead the applicant indicated that he would rather deal with Colonel Mngwengwe.

[41] The point emphasised by counsel for the first and eleventh respondents is that while the applicant complains that no investigations have taken place as recommended by the DPCI Judge, he has on the contrary stonewalled efforts by the SAPS to interview him and to obtain the necessary affidavit. The applicant, it seems, wishes to dictate who should be assigned to investigate the matter, how such investigations should be done and that he would be the arbiter as to whether the investigations had been properly concluded. The International Association of Prosecutors' Standards, referred to in *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA), contains a provision that prosecutors shall perform their duties fairly, consistently and expeditiously, and in the institution of criminal proceedings only proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence. At the same time, if there is evidence which the prosecutor knows or reasonably suspects may be destructive to the State's case or which lends support to the defence case, it is his duty to bring this evidence to the attention of the accused's legal representative.

[42] In the present matter, the SAPS have made it abundantly clear that they have properly investigated the matter and will rely on Andrews as a witness in the Kairos matter. SAPS find no reason, from their investigations, to charge Andrews much to the chagrin of the applicant. On the other hand, if the prosecution believes that it has reasonable and probable cause for prosecuting the applicant and at trial is unable to discharge the burden of proof, the applicant will be acquitted. In the course of the trial, the applicant would have the opportunity to cross-examine all of the State's witnesses, and to call his own, in his defence. Indeed, in respect of the first criminal trial, this is precisely what has been done. As such, there can be no complaint of trial prejudice or a violation of any of the applicant's rights. If upon the conclusion of the criminal trial, the applicant is of the view that he has been the victim of a malicious and unwarranted prosecution; his relief is to lay a civil suit against the State. It is highly inappropriate for this Court to pre-empt the prosecution from bringing proceedings in a criminal trial against the applicant, and especially in

circumstances where a significant amount of public money was paid to an individual in circumstances where he was not entitled to it.

[43] Returning to the recommendations suggested by the DPCI Judge, it is pertinent to point out that there is nothing in the wording of the recommendations which may be interpreted (even if one were to be overly favourable to the applicant) as recommending that the prosecution should not proceed against the applicant. Furthermore, the DPCI have indicated that its investigation is complete and that it has closed its file, and that the Hawks and SARS are also not conducting any further investigation. As pointed out above, should the State be lacking in evidence to prove its case against the applicant, the applicant will be exonerated.

[44] Ms *Norman* submitted further that it would be an infringement of the doctrine of the separation of powers for the court, or the DPCI Judge for that matter, to dictate to the National Prosecuting Authority (NPA) how to go about the investigation and the prosecution of the case. This is precisely what the applicant had set out to do in his founding affidavit although he attempted, belatedly in his 'supplementary heads of argument', to veer from his stance contending that he did not intend to prescribe to the State how the prosecution should be conducted or whom it should be compelled to prosecute. In *R v Director of Public Prosecutions, Ex parte Manning & another* [2001] QB 330 at para 23 the court held that:

> 'The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else.'

[45] It bears noting that s 179 of the Constitution vests in the prosecuting authority the power alone to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to the institution of such proceedings. Section 179(5)(d) provides that the National Director of Prosecutions (NDPP) may review a decision to prosecute after taking representations from amongst other, an accused person. Although the applicant has provided the DPCI Judge with information he considers to be confidential and which he believes will exonerate him,

he has to date not made representations or furnished this information to the first respondent or the specialist prosecutor assigned to all three criminal trials.

[46] I now proceed to consider whether the interim interdict granted and the final order for a temporary stay of prosecution are mandatory interdicts which infringe on the doctrine of separation of powers, as contended by the respondents. In *Attorney-General v Additional Magistrate, Middledrift, and others* 1987 (4) SA 914 (CK) at 918B-C the court stated:

> 'I do not hesitate to state that judges, for as long as I can recall, have taken the attitude that in criminal matters they do not readily interfere with the prosecution in any fashion that could be detrimental to the accused. Only when a complete miscarriage of justice becomes imminent and due regard is had to the risk of irreparably prejudicing the accused, do judges risk any action on their part which would favour the interests of the prosecution.'

[47] The applicant has not pointed to any miscarriage of justice that would befall him in the event of the three criminal trials proceeding. He is legally represented in all three trials, and to the extent that he complains that this is a compliant driven investigation, the decision to prosecute is solely that of the Director of Public Prosecutions, not the SAPS. In any event, there is nothing inherently prejudicial or sinister about compliant driven investigations, especially in a case of alleged tax fraud where the necessary expertise to properly investigate such matters resides with those within the revenue service. In fact the applicant, according to the affidavit of Edward Rasiwela, a Deputy Director in the Office of the DPCI Judge, was informed of the established practice in matters of tax fraud where the allegations are first investigated by SARS and only handed over to the SAPS after SARS has finalised its investigations. A letter from Mr Inderparsad of the Criminal Investigation section of SARS confirms that after receipt of the DPCI Judge's report, no further investigations were done by SARS as the matter had already been referred to the NDPP. Rasiwela confirmed that the DPCI Judge had completed his investigation into the complaint and considered the matter closed.

[48] It is becoming increasingly more prevalent for complainants to turn to private investigative agencies to carry out probes which the State cannot undertake because of the lack of necessary or skilled personnel, or lack of resources. This per se does not constitute fair trial prejudice. Where evidence has been improperly obtained or tainted in some or other way, the accused will be entitled to object to its admissibility. In the present matter, the applicant complains of the hand of Andrews being instrumental behind the entire fraud perpetrated against SARS, although the State contends that she is a witness in only the third trial. The State has not found her to be implicated in the matter and therefore has not charged her nor do they intend using her as a s 204 witness. The applicant will have every opportunity to cross-examine the State witnesses and raise the possibility of someone else being the perpetrator of the fraud against SARS. Section 166(1) of the Criminal Procedure Act 51 of 1977 (the CPA) provides that an accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused or any witness called on behalf of such co-accused at criminal proceedings. In *Carroll v Carroll* 1947 (4) SA 37 (D) at 40, Henochsberg AJ said:

> 'The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.'

Wigmore On Evidence, 3rd ed vol. V, para 1367, famously proclaimed:

> 'Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovering of truth.'

[49] The interdict sought by the applicant albeit for a temporary as opposed to a permanent stay of prosecution, is nonetheless a drastic incursion into the powers of the first respondent to prosecute a complaint on behalf of the public, or in this case, on behalf of the state treasury. In support of this argument in *Freedom Under Law v National Director of Public Prosecutions & others* [2013] 4 All SA 657 (GNP) para

122 it was observed that 'courts all over the world are reluctant to interfere with a prosecuting authority's *bona fide* exercise of the discretion to prosecute.' It added:

> ' ….In *R (On the Application of Corner House Research and Others) v Director of the Serious Fraud Office*, the House of Lords (*per* Lord Bingham) expressed the need for deference and caution, stating that courts should disturb the decisions of an independent prosecutor only in "highly exceptional cases". Courts recognise that at times it will be within neither their constitutional function nor practical competence to assess the merits of decisions where the polycentric character of official decision-making, including policy and public interest considerations, mean they are not susceptible or easily amenable to judicial review. The constitutional requirement that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice, justifies judicial restraint.' (Footnotes omitted)

[50] On appeal in *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA) the court was petitioned to review and set aside the decisions of the NPA and to direct the NPA to reinstate some withdrawn criminal charges. On the issue of separation of powers, the court said the following:

> '[51] What remains are issues concerning the appropriate remedy. As we know, the court a quo did not limit itself to the setting-aside of the impugned decisions. In addition, it *(a)* ordered the NDPP to reinstate all the charges against Mdluli and to ensure that the prosecution of these charges is enrolled and pursued without delay; and *(b)* directed the Commissioner of Police to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings (paras 241*(e)* and *(f)*). Both the NDPP and the Commissioner contended that these mandatory interdicts were inappropriate transgressions of the separation-of-powers doctrine. I agree with these contentions. That doctrine precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions, and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. …The court below went too far.'

[51] In light of the authorities cited above, I am of the view that to grant an order of the nature sought by the applicant, that is, for a temporary stay of prosecution in all three criminal trials pending the finalisation of whatever investigations he believes are outstanding (despite the averments by the DPCI and the SAPS to the contrary) would infringe the doctrine of separation of powers. If I were to grant such an order, it could have the effect of a never ending saga in which the applicant could indefinitely frustrate the prosecutorial process by adopting the view that no level of investigating would be sufficient or adequate for him. It is for this reason that a criminal trial is the most suitable forum for the State to adduce all of the evidence available to it, and for the applicant to use the arsenal of cross-examination to challenge such evidence. If at the conclusion of all of the evidence, the court arrives at the conclusion that the State has failed to prove its case, the applicant must be acquitted. He then has a further option of whether to institute proceedings for malicious prosecution, if he believes that he could overcome the applicable threshold.

[52] The eighth and ninth respondents also joined forces with the applicant, contending that he is justified in asking for a temporary stay of the prosecution in the Kairos matter, in light of the incomplete investigations and failure to fully comply with the recommendations of the DPCI Judge. Counsel for the eighth and ninth respondents conceded that his clients had availed themselves of the opportunity provided for in the CPA by making representations to the first respondent to review the decision to prosecute. That process has not yet been finalised as no decision has been made. If a decision is made in their favour, that would be the end of their concerns and involvement with the applicant as their co-accused. Their support for the relief sought by the applicant is entirely opportunistic. They too take aim at Andrews in their affidavit as being the culprit behind the entire episode. In the same vein as it applies to the applicant, they are free to cross-examine all of the State witnesses at length if they believe that charges have been improperly brought against them.

[53] The applicant is also seeking an interdict, the requirements for which are trite. However, even though he seeks a temporary stay such an order could be final in effect. As indicated above, I am not persuaded that his rights to a fair trial are in any

way infringed or that he will suffer irreparable harm if the trials were to continue. The applicant is also required to demonstrate that he had no other option but to bring this application to protect his rights in the absence of an alternative remedy. He fails, in my view on this score as well, as he could have simply followed the course adopted by the eighth and ninth respondents and waited for the outcome of such representations. A further option available, to the extent that the applicant believed that the Hawks have failed or neglected to comply with the recommendation of the DPCI Judge, was to have applied for a mandamus compelling the relevant state entities to comply with the report. Neither of these options has been pursued in a matter which is already seven years old.

[54] In the result, I am satisfied that that no grounds exist for the confirmation of the rule nisi granted on 14 June 2016 or for any of the ancillary relief sought in the notice of motion. Although the applicant, on the day of the hearing, sought a diluted version of the relief contained in the initial notice of motion, I am of the view that this was simply a rear-guard attempt to rescue the application once it had become apparent from the respondents' heads of argument of the significant obstacles in the path of the applicant. I would therefore dismiss the application.

[55] The applicant sought costs, jointly and severally, against the first, second and eleventh respondents. It is an established principle that in constitutional litigation unsuccessful litigants against the government are generally not mulcted in costs; otherwise they would shy away or become reluctant to enforce their constitutional rights because of the potential of an adverse cost order. See eg *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC). In this case however, I have accepted the respondents' version that the applicant failed to make disclosure of material information to the Court on 14 June 2016 of the one criminal trial which had already commenced, and was part-heard. His application was misguided and brought without considering other options available to him. The relief sought by the applicant is granted in exceptional cases, where an injustice will result. This has not been shown to be the case. I am of the view that costs should follow the result.

[56] I make the following order:

1. The rule issued on 14 June 2016 is discharged;
2. The application is dismissed.
3. The applicant is directed to pay the costs of the first, second and eleventh respondents in opposing the application, including those costs occasioned on 14 June 2016, such costs to include the costs of two counsel where so employed.

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M R CHETTY

APPEARANCES

For the Applicant:	Adv. D W Eades
Instructed by	Azgar Ally Khan & Associates [Ref : VM/04-DNB]
For the First & Eleventh Respondents:	Adv. P D Hemraj SC
Instructed by	State Attorney Durban
For the Second Respondent:	Adv. T V Norman SC and Adv. Nako
Instructed by	State Attorney Durban
Date of judgment:	07 February 2017