IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 5867/2013P

In the matter between:

GASTON SAVOI	**FIRST APPLICANT**
INTAKA HOLDINGS (PTY) LTD	**SECOND APPLICANT**
FERNANDO PRADERI	**THIRD APPLICANT**

and

THE NATIONAL PROSECUTING AUTHORITY	**FIRST RESPONDENT**
THE SOUTH AFRICAN POLICE SERVICE	**SECOND RESPONDENT**

ORDER

The following order shall issue:

The applicants' application in terms of s 32 of the Superior Courts Act 10 of 2013, is dismissed with costs, such costs to include the costs of two counsel where so employed.

JUDGMENT

Steyn J (Kruger J concurring):

[1] In *United States v Nixon*, where the President claimed privilege against disclosure of confidential information, Chief Justice Burger said:

'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.'[1] (Footnote omitted).

The applicants in this interlocutory application claim that some documents seized by the State in various operations are protected by legal professional privilege. This application is part of a series[2] of applications brought by the applicants after they launched their permanent stay application on 27 May 2013. The applicants place reliance on legal professional privilege to have a portion of the permanent stay of prosecution[3] hearing held in camera and not in open court. It is therefore necessary to examine the privilege and its operation in our law. In *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others,*[4] the Constitutional Court dealt decisively with the doctrine and its operation in our law. I shall return to the doctrine later in this judgment.

Background facts

[2] The applicants are charged with bribery, racketeering, money laundering, fraud, and corruption in the KwaZulu-Natal and Northern Cape divisions of the high court. The first respondent, the National Prosecuting Authority (NPA), alleges that

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[1] *United States v Nixon,* 418 U.S. 683 (1974) at 710.

[2] See *Savoi & others v National Director of Public Prosecutions & another* 2014 (1) SACR 545 (CC) and *Savoi & others v National Prosecuting Authority & another* (5867/2013) [2018] ZAKZPHC 7 (23 February 2018).

[3] The alleged abuses in the permanent stay application were aptly summarised by Mnguni J in *Savoi & others v National Prosecuting Authority & another* (5867/2013) [2018] ZAKZPHC 77 (23 February 2018) in para 2 as:

'(a) repeated violations of the applicants' legal professional privilege which occurred through the police seizing, keeping and utilising in their reports documents which are subject to such privilege and which go to the heart of the applicants' defence in the criminal trial;

(b) deliberate and concerted infringements of the applicants' constitutional rights by detaining the first and third applicants unlawfully and in circumstances where detention was unnecessary, seeking to punish the first applicant by opposing his release on bail in circumstances where palpably there were no grounds to do so, restricting the first applicant's right to communicate with his legal representatives, unreasonably seizing the applicants' property and hampering the applicants' business, disregarding the presumption of innocence and ignoring and violating binding court orders made in favour of the applicants;

(c) adopting an impermissible "convict-at-all-costs" approach in the State's dealings with the applicants; and

(d) the unlawful, irrational and inexplicable refusal by Advocate Noko (Noko), who is the Director of Public Prosecutions in KwaZulu-Natal, to withdraw the charges against the applicants, in circumstances where charges have been withdrawn against certain of the applicants' co-accused who are alleged to be politically connected on the ground that the evidence against them was unconvincing, unsubstantiated and insufficient to ground a conviction beyond a reasonable doubt.'

[4] *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC).

the applicants participated in a criminal enterprise involving the supply of water purification plants and oxygen self-generating units to the KwaZulu-Natal and Northern Cape Departments of Health.[5]

[3] The respondents oppose the interlocutory application inter alia on the ground that the applicants have failed to make out a special case that warrants an order to have a portion of the permanent stay application heard in camera. The respondents have also raised three points in limine:

(a) The absence of jurisdiction of this court to hear issues that relate to the Northern Cape cases;

(b) The Nkosi AJ order precludes this court from hearing the application; and

(c) The trial court is best suited to deal with the admissibility of evidence and any challenge thereto.

[4] The applicants aver that 69 documents were unlawfully seized from them in three separate operations and that the search and seizures of these documents were in violation of their right to legal professional privilege. They contend that a mechanism is required to view the said documents when the permanent stay application is heard and submit that the proposed mechanism should not infringe on the applicants' privilege. For this reason, they require the State's representatives to sign the confidentiality undertaking as per the proposed form "X" attached to the notice of motion.[6]

[5] Mr Willem Schalk Burger van der Colff (Mr van der Colff), the applicants' attorney, filed an affidavit in support of the applicants' application. He avers that the applicants' case is a special case as envisaged by s 32 of the Superior Courts Act 10 of 2013 (the Act) since the in camera order is necessary to protect the applicants' rights and the integrity of the court process. According to him, the applicants will be prejudiced since they will have to exercise the following choices if the order is not granted:

'5.1 Either they must by (sic) deal with the privileged documents in open court, and thereby risk disclosing the contents of highly privileged information to the State, dealing with the applicants' defence strategy and legal advice received; or

[5] See permanent stay application, answering affidavit para 4 at 1316.
[6] See s 32 application at 4-6.

5.2 The applicants must proceed hamstrung in the presentation of their case for a permanent stay of prosecution, inasmuch as they must argue that their privilege has been breached, without referring this Court specifically to any privileged documents.'[7]

[6] Mr van der Colff avers in the founding affidavit that the NPA previously had no issue with giving them an undertaking. He specifically refers to para 88 of the NPA's answering affidavit in the permanent stay application, which states:

'The applicants then say that, on 8 September 2009, their attorney, Mr George van Niekerk, met with the NPA's Hein van der Merwe and SAPS' Colonel Clarens Jones and Lieutenant Colonel Kobus Roelofse. At this meeting, it is alleged that Mr van Niekerk advised the other parties that some of the documents seized were privileged. It is not alleged that he identified the privileged documents. It is said, however, that Mr van der Merwe indicated that a team would be put together whose duty would be to determine whether the material was privileged or not. Mr van de Merwe, it is alleged, never reverted to the applicants in this regard. Instead, the applicants say they were surprised to learn, a year later, that "the State" had used the privileged material in an affidavit deposed to by Mr Trevor White.'[8]

[7] In the next paragraph, the NPA states as follows:

'The applicants' complaint, then, is that, first, the NPA never reverted back to them in order to identify material over which privilege was claimed. Second, it is alleged that SAPS and the NPA viewed the alleged privileged material. It is clear, however, that the applicants did not at this stage assert privilege over any specified documents. They were apparently happy to let SAPS and the NPA keep the documents for over a year without, in that period, requesting a meeting at which privileged material could be identified. I am advised that this is a factor to be taken into account in assessing whether the claim of privilege was being genuinely made.'[9]

[8] The respondents aver that the 69 documents were obtained on three different occasions. Firstly, when a search was conducted on 27 August 2009 at the Intaka offices, thereafter when the first applicant was arrested on 3 November 2010, and then when the Mazars'[10] s 205 subpoenas were issued on 25 January 2011.[11]

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[7] See s 32 application at 9.
[8] See permanent stay application at 1343.
[9] See permanent stay application, answering affidavit para 89 at 1344.
[10] The applicants aver that Mazars Forensic Services (Pty) Ltd was engaged in assisting them in their legal defence.
[11] See s 32 application, answering affidavit at 59.

[9] We are mindful that we have not been called upon to adjudicate on the permanent stay application at this stage. This court, however, endorses the defined conceptual basis of a permanent stay of prosecution as highlighted by the court in *Harksen v Attorney-General of the Province of the Cape of Good Hope & others*:[12]

'The relief sought by Harksen is a permanent stay of the extradition enquiry. This is a radical remedy which will not be granted in the absence of significant prejudice to the person concerned. In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (1998 (1) SACR 227; 1997 (12) BCLR 1675) the Constitutional Court had to deal with the question whether a permanent stay should be granted where there had been undue delay in the commencement of a criminal prosecution. At para[38] Kriegler J, in delivering the judgment of the Court, stated that:

"[T]he 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."

At para[39] Kriegler J proceeded as follows:

"A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has *probably suffered irreparable trial prejudice* as a result of the delay."' (My emphasis).

[10] The Constitutional Court in *Wild & another v Hoffert NO & others*[13] stated that a stay of prosecution cannot be granted in the absence of trial-related prejudice or extraordinary circumstances.

[11] In this application, we will determine:

(a) Whether the applicants have shown that their case is a special case that justifies a partial hearing in camera;

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[12] *Harksen v Attorney-General of the Province of the Cape of Good Hope & others* 1998 (2) SACR 681 (C) para 79.

[13] *Wild & another v Hoffert NO & others* 1998 (3) SA 695 (CC) para 26. Also see *Klein v Attorney-General, Witwatersrand Local Division, & another* 1995 (3) SA 848 (W) where the court emphasised that not every violation of a fair trial right will result in avoiding the trial. At 862D-E it was held:

'There has, however, never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial. Such a rigid principle would operate to the disadvantage of law enforcement and the consequent prejudice of the society which the law and the Constitution is intended to serve. Before any remedy can be enforced the nature and extent of violation must be properly considered.'

(b) Whether the applicants have placed sufficient evidential material before this court that supports a claim of legal professional privilege;

(c) Whether the Nkosi AJ order precludes the consideration of the documents by another court including this court;

(d) Whether this court has jurisdiction over the Northern Cape criminal cases and documents related to the Northern Cape prosecutions; and

(e) Whether there is any need for a confidential undertaking to be concluded absent any legal professional privilege shown by the applicants.

Special case

[12] The applicants rely on s 32 of the Act[14] to have a portion of the permanent stay application heard in camera, and apply to this court to direct the State's representatives to sign a confidentiality undertaking[15] before they view the documents which the applicants allege are subject to legal professional privilege. Section 32 of the Act reads:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.' (My emphasis).

[13] A special case in terms of the relevant dicta would be a case where the administration of justice would be hindered by the presence of the public. In *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd & another*,[16] Van Dijkhorst J held:

'In my view the emphasis should not, on the one hand, fall on the right of the public to know (in so far as there may be one) or, on the other hand, on the right of the private individual not to be embarrassed, but on the proper administration of justice. Should the administration of justice be rendered impracticable or materially hampered by the presence of the public, that would constitute a special case as envisaged by the statute. There is no need, and it would be inadvisable, to define those circumstances which could be described as special. They will vary from case to case. They may occur where private rights only are involved or where the public has an interest. The decision as to whether a case is special should be left to the

[14] Cf. s 16 of the Supreme Court Act 59 of 1959 that provided:
'Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'
[15] The confidentiality agreement is marked "X" and attached to the notice of motion.
[16] *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd & another* 1984 (4) SA 149 (T).

discretion of the presiding Judge, who will bear in mind that the general rule that all cases must be heard in open Court should not lightly be departed from.'[17] (My emphasis).

[14] Post 1994, the open court principle is constitutionally entrenched.[18] Presently it is necessary to weigh up the rights of all parties and reconcile them with the values protected in the Constitution.[19]

[15] Whilst s 32 of the Act may very well grant protection to litigants in certain circumstances, it may only be granted once a party has shown that the case is special. In fact, the dicta on this point direct that only in special circumstances will there be a departure from the general rule. Whether a case is special or not will be determined by the interests of justice and weighing up all the competing rights.[20]

Open court principle

[16] The general rule is that justice should be administered in an open court. This rule may be restricted if the administration of justice would be hampered by the presence of the public in court.[21] In *Shinga v The State & another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae) O'Connell & others v The State*,[22] Yacoob J underlined the importance of open courts as follows:

'Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that

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[17] Ibid at 158G-I.

[18] See s 34 of the Constitution of the Republic of South Africa, 1996 that reads:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' (My emphasis).

[19] In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 9, Nugent JA defined the process as follows:
'They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36. That they are to be reconciled within the constraints of s 36 is apparent from the following observation of Langa DCJ in *Islamic Unity Convention v Independent Broadcasting Authority and Others:*
"There is thus recognition of the potential that [freedom of] expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution."' (Original footnote omitted, my emphasis).

[20] *Du Preez v Du Preez: Standard Bank of SA Intervening* 1976 (1) SA 87 (W) at 88C and *Scott & another v Scott* [1913] AC 417.

[21] See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC) paras 44-46.

[22] *Shinga v The State & another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae) O'Connell & others v The State* 2007 (4) SA 611 (CC).

process. Open courtrooms foster Judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal-justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.'[23] (My emphasis).

[17] In *S v Leepile & others (4)*,[24] the court dealt with an application in terms of s 153(2) of the Criminal Procedure Act 51 of 1977 (the CPA), that the evidence of a certain witness be given in camera. The ratio of the case regarding open justice remains relevant today. Ackermann J in his judgment relied on the opinion of Chief Justice Burger in *Richmond Newspapers Inc v Commonwealth of Virginia* where he observed at 986:

'"People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open there is at least an opportunity, both for understanding the system in general and its workings in a particular case."'[25] (My emphasis).

[18] The open court principle is deeply rooted in our procedural law and as stated above is constitutionally entrenched. Over the years, the principle has been jealously protected.[26] The Supreme Court of Appeal (SCA) in *Cape Town City v South African National Roads Authority & others*[27] considered the history of the principle and the rationale for open courts:

'The idea that South African civil courts should be open to the public goes back to 1813. The principle of open courtrooms is now constitutionally entrenched. "Publicity", said the philosopher Jeremy Bentham –

"is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."

The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. In *Independent Newspapers* the Constitutional Court dealt with an application for access to classified documents which formed part of an appeal record. National security, so the minister asserted, required that the documents not be made available to the media and the

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[23] Ibid para 26.
[24] *S v Leepile & others (4)* 1986 (3) SA 661 (W).
[25] Ibid at 664B-D.
[26] *Economic Data Processing (Pty) Ltd & others v Pentreath* 1984 (2) SA 605 (W) at 607B-C.
[27] *Cape Town City v South African National Roads Authority & others* 2015 (3) SA 386 (SCA).

public. The Constitutional Court confirmed that the default position is one of openness and disavowed an approach that proceeded from a position of secrecy, even in a case where the documents in question had been lawfully classified as confidential in the interest of national security. In deciding whether to make the disputed documents publicly available, the court expressly recognised a cluster of related constitutional rights and principles which captures the "constitutional imperative of dispensing justice in the open". It concluded that open justice is a crucial factor in any consideration of a request to limit public disclosure of a court record. Although the issue at stake concerned only access to the record – all the court proceedings were held in public – the court still emphasised the importance of openness and ordered that, despite claims of national security, the vast majority of the record should be made publicly available.'[28] (Original footnotes omitted, my emphasis).

[19] The Constitutional Court emphasised the principle of open justice in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa & another*[29] and held:

'There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, s 16(1)*(a)* and *(b)* provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in s 35(3)*(c)* which entitles every accused person to a public trial before an ordinary court.'[30] (Original footnotes omitted, my emphasis).

[20] Most recently, in *Centre for Child Law & others v Media 24 Ltd & others*,[31] the SCA confirmed the general principle that proceedings be conducted in public.[32]

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[28] Ibid para 16.
[29] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC).
[30] Ibid para 39.
[31] *Centre for Child Law & others v Media 24 Ltd & others* 2018 (2) SACR 696 (SCA).
[32] Ibid para 56 where it was held:
'In similar vein, the media respondents have referred to the affirmation in the Constitutional Court in *Independent Newspapers* that "the default position is one of openness". So too, they have referred to the speech in the United Kingdom's House of Lords in *In re S* (*a child*) in which the "general and strong rule" in favour of openness and general public access to information concerning court proceedings was affirmed. There can be no question that, as general principles, these are to prevail in our country.' (Original footnotes omitted).

Legal professional privilege

[21] Returning to the doctrine, in examining legal professional privilege as a right, it is necessary to look at English law as the historical source of our law of evidence. Our rules of evidence as recognised by the scholars Schwikkard and Van der Merwe,[33] 'are found in local statutes and, where these are silent on a specific topic or issue, the English law of evidence which was in force in South Africa on 30 May 1961 serves as our common law'. All rules of evidence however must comply with the Constitution,[34] which remains the supreme law. The common law rule as developed must be read with s 201 of the CPA that reads:

'No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.'

[22] For purposes of this judgment, it is necessary to focus on what legal professional privilege means.[35] Langa CJ in *Thint* above defined privilege in a succinct manner:

'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.'[36] (Original footnote omitted).

[23] For communications between a legal adviser and his or her client to qualify as privileged communications, the following requirements[37] have to be met:

(a) The legal adviser had to act in a professional capacity at the time;

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[33] See P J Schwikkard and S E van der Merwe *Principles of Evidence* 4 ed (2016) at 26-28.
[34] The Constitution of the Republic of South Africa, 1996.
[35] *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd & others (2)* 1983 (2) SA 626 (W) at 629F-G:
'The basis of privilege is confidentiality. When confidence ceases, privilege ceases.'
[36] 2009 (1) SA 1 (CC) para 184.
[37] See D T Zeffertt et al *The South African Law of Evidence* (2017) at 713-718.

(b) The legal adviser must have consulted in confidence;

(c) The communications had to be made for the purpose of obtaining legal advice; and

(d) The advice ought not to have been for the facilitation of a crime or fraud (the crime – fraud exception).[38]

[24] In *S v Safatsa & others*,[39] Botha JA recognised that legal professional privilege is a fundamental right and referred to *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing & others*[40] where the court emphasised:

'that inroads should not be made into the right of a client to consult freely with his legal adviser, without fear that his confidential communications to the latter will not be kept secret.'[41]

[25] It remains the duty of this court to determine whether legal professional privilege has been established. The SCA fortified this view in *Bogoshi v Van Vuuren NO & others; Bogoshi & another v Director, Office for Serious Economic Offences, & others*[42] where it was held:

'It is, of course, the task of the Court vigilantly to safeguard legal professional privilege. The right of governmental authorities to enter upon an attorney's office and there to seize client's documents must be critically examined. At the same time, however, "(i)t is important...that the protection which privilege affords should be applied strictly in accordance with the conditions necessary for the establishment of privilege" (per Friedman J in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) at 643H). But this is not always easy. It has been said that cases arise where a mechanical application of the rules of privilege is not possible (see Professor Paizes 'Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege' (1989) 106 *SALJ* 109 at 135).'[43] (My emphasis).

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[38] See *R v Cox and Railton* (1884) 14 QBD 153 at 165-166; *Botes v Daly & another* 1976 (2) SA 215 (N) at 222 and *Harksen v Attorney-General of the Province of the Cape of Good Hope* above.
[39] *S v Safatsa & others* 1988 (1) SA 868 (A) at 885G-I.
[40] *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing & others* 1979 (1) SA 637 (C).
[41] Ibid at 643H.
[42] *Bogoshi v Van Vuuren NO & others; Bogoshi & another v Director, Office for Serious Economic Offences, & others* 1996 (1) SA 785 (A).
[43] Ibid at 795D-F.

[26] Not every breach of privilege will result in an unfair trial. It is trite that the unjustified infringement of the right will depend on the nature of the breach and the circumstances under which it was breached.[44]

Applicants' annexure K

[27] The applicants rely on annexure K as the factual basis for their contention that the communications are privileged. It is necessary to examine the communications contained in annexure K, since the respondents oppose the claim of the documents being privileged. The respondents, in their opposition, contend that the information in annexure K is not specifically identified and that it is generic and general in terms. Simply put, it lacks detail regarding the privilege claimed.[45] Mr *Marcus SC*, for the applicants, during the oral submissions, stated that the description of the documents are brief so as not to waive the privilege that exists. In my view, if annexure K provides the factual basis of the legal professional privilege claimed, then this court should be able to establish from the information provided that the communications are privileged.

[28] For purposes of the examination of annexure K, it is necessary to quote it in full:

'INTAKA

INDEX TO PRIVILEGED DOCUMENTS

Item	Date	Description
1	Undated	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor In respect of a consultation with the DSO.
2	28 November 2006	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
3	04 December 2006	Communication between members of the Applicants' legal team reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of anticipated litigation/criminal investigation.

[44] See *Klein v Attorney-General, Witwatersrand Local Division* above. Inasmuch as the right was violated, the court held that it did not warrant a permanent stay despite the fact that the privileged information came to the attention of the Attorney-General.
[45] See s 32 application, answering affidavit paras 6-8 at 58-59.

4	04 December 2006	Communication between the Applicants and a member of the Applicants' legal team reporting on the progress of the matter, and recording advice to client, and strategy in respect of the future conduct of the matter in light of anticipated litigation/criminal investigation.
5	06 December 2006	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
6	12 December 2006	Memorandum prepared by the Applicants' legal advisor reporting on the progress of the matter, and recording instructions provided by client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
7	15 December 2006	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
8	19 February 2007	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
9	28 February 2007	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
10	11 April 2007	Invoice which provides detail of actions taken by the Applicants' legal advisors in furtherance of the matter.
11	18 April 2007	Invoice which provides detail of actions taken by the Applicants' legal advisors in furtherance of the matter.
12	03 July 2007	Handwritten file notes prepared by the Applicants' legal advisor
13	08 July 2007	Communication between members of the Applicants' legal team on the reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
14	19 July 2007	Handwritten file notes prepared by the Applicants' legal advisor
15	22 February 2008	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
16	31 March 2008	Contemporaneous handwritten consultation notes prepared by the Applicants' legal advisor during consultation with the Applicants.
17	11 May 2008	Memorandum (with tracked changes) prepared by members of the Applicants' legal team recording instructions provided by client, advice to client, and

		strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
18	11 May 2008	Memorandum (with tracked changes) prepared by members of the Applicants' legal team recording instructions provided by client, advice to client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
19	12 May 2008	Communication between members of the Applicants' legal team recording instructions provided by client, advice to client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
20	16 May 2008	Communication between the Applicants and their legal advisor recording instructions provided by client and advice to client in light of pending litigation/criminal investigations.
21	05 June 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
22	05 June 2008	Communication between members of the Applicants' legal team reporting on the progress of the matter, advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
23	09 June 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
24	17 June 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter.
25	17 June 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter.
26	18 June 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording instructions provided and advice sought by the Applicants in light of pending litigation/criminal investigations.
27	18 June 2008	Communication between the Applicants and their legal advisor recording instructions provided and advice sought by the Applicants in fight of pending litigation/criminal investigations.
28	18 June 2008	Communication between the Applicants and their legal advisor recording instructions provided and advice sought by the Applicants in light of pending litigation/criminal

		investigations.
29	18 June 2008	Communication between the Applicants and their legal advisor recording instructions provided and advice sought by the Applicants in light of pending litigation/criminal investigations.
30	18 June 2008	Communication between the Applicants and their legal advisor recording instructions provided and advice sought by the Applicants in light of pending litigation/criminal investigations.
31	01 July 2008	Communication between the Applicants and their legal advisor (including a draft affidavit) recording instructions given and advice sought by the Applicants in light of pending litigation/criminal investigations.
32	01 July 2008	Communication between members of the Applicants' legal team recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
33	03 July 2008	Communication between the Applicants and their legal advisor (including a draft affidavit) recording instructions provided and advice sought by the Applicants in light of pending litigation/criminal investigations.
34	04 July 2008	Communication between the Applicants and their legal advisor (including a draft affidavit) recording advice to client in light of pending litigation/criminal investigations.
35	09 July 2008	Communication between the Applicants and their legal advisor (including a draft affidavit) recording advice to client in light of pending litigation/criminal Investigations.
36	15 August 2008	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
37	15 August 2008	Communication between the Applicants and their legal advisor recording instructions given and advice sought by the Applicants in light of pending litigation/criminal investigations.
38	15 August 2008	Communication between the Applicants and their legal advisor (including a draft affidavit) reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
39	06 March 2009	Communication between the Applicants and their legal advisor recording advice to client in light of pending litigation/criminal investigations.

40	06 March 2009	Communication between the Applicants and their legal advisors (including draft letters) reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigations.
41	11 March 2009	Communication between the Applicants and their legal advisors recording instructions provided and advice sought by client, advice to client, and strategy in respect of the future conduct of the matter.
41A	11 March 2009	Communication between the Applicants and their legal advisors recording instructions provided and advice sought by client, advice to client, and strategy in respect of the future conduct of the matter.
42	07 April 2009	Invoice which provides detail of actions taken by the Applicants' legal advisors in furtherance of the matter.
43	04 May 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter.
44	05 May 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in tight of pending litigation/criminal investigation.
45	17 June 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording instructions provided and advice sought by client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
45A	18 June 2009	Communication between the Applicants and their legal advisors recording instructions provided and advice sought by client in light of the pending litigation/criminal investigation.
46	10 July 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
47	16 July 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording instructions provided and advice sought by client, advice to client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
48	21 July 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording instructions, provided and advice sought by client, and strategy in respect of the future conduct of the

		matter In light of pending litigation/criminal investigation.
49	26 August 2009	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording instructions provided and advice sought by client, advice to client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
50	30 November 2009	Communication between the Applicants and their legal advisor reporting on the progress of the matter and recording advice to client.
51	08 July 2010	Communication between members of the Applicants' legal team reporting on the progress of the matter.
52	13 October 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording advice to client, strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation, and representations to be made in the Applicants' defence.
53	14 October 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter.
54	19 October 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording advice to client and strategy in respect of the future conduct of the matter in light of the pending litigation/criminal investigation.
55	21 October 2010	Communication between the Applicants and their legal advisors recording instructions provided and advice sought by client, and strategy in respect of the future conduct of the matter in light of the pending litigation/criminal investigation.
56	21 October 2010	Communication between the Applicants and their legal advisors recording strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
57	21 October 2010	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording advice to client in light of pending litigation/criminal investigation.
58	21 October 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
59	22 October 2010	Memorandum prepared by members of the Applicants' legal team recording instructions provided and advice sought by client, and advice to client in light of pending

		litigation/criminal investigation.
60	22 October 2010	Communication between the Applicants and their legal advisors recording advice to client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
61	22 October 2010	Communication between the Applicants and their legal advisors recording further advice to client and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
62	01 November 2010	Communication between the Applicants and their legal advisors recording instructions provided and advice sought by client in light of pending litigation/criminal investigations.
63	01 November 2010	Contemporaneous consultation notes prepared by a member of the Applicants' legal team in respect of a consultation with legal team and client.
64	01 November 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording instructions provided and advice sought by client in light of pending litigation/criminal investigations.
64A	01 November 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording advice to client In light of pending litigation/criminal investigations.
65	02 November 2010	Communication between the Applicants and their legal advisors reporting on the progress of the matter, and recording advice to client in light of the pending litigation/criminal investigation.
66	03 November 2010	Communication between the Applicants and their legal advisor reporting on the progress of the matter, and recording strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.
67	03 November 2010	Communication between members of the Applicants' legal team reporting on the progress of the matter, and recording instructions provided and advice sought by client, and strategy in respect of the future conduct of the matter in light of pending litigation/criminal investigation.'

[29] The very first item in annexure K shows that the information is insufficient to support a claim of privilege. What was discussed during a meeting with the DSO is not specified nor has it been contextualised. In fact, it is doubtful that the meeting

could have taken place in confidence as would be required for the purposes[46] of claiming legal professional privilege. The privilege does not exist in a vacuum.

[30] Further, item 6 on the list in annexure K is a memorandum drafted by the applicants' legal adviser reporting on the progress of the matter. It is so vague that in my view, this court cannot on the information provided, determine that it is a document that will in all likelihood attract legal professional privilege.

[31] Item 10, is an invoice for work done. It is not specified as to the kind of work done nor whether the work was done in relation to the charges the three applicants are facing in this division. In fact, the heading of annexure K describes the client as Intaka, yet the description of the documents in column three refers to more than one applicant. The aforesaid criticism is applicable to many other items listed in annexure K. It is not, for purposes of this judgment, necessary to evaluate them all.

[32] Since the applicants rely on legal professional privilege as the factual foundation to qualify as a special case, they have an onus to place relevant facts before this court that justifies their claim to legal professional privilege, which in turn would give them the right to have part of the permanent stay application being heard in camera. Mr *Marcus* in oral argument submitted that the purpose of annexure K is to identify the documents in respect of which the privilege is claimed. This submission is untenable in the light of the concession made by the applicants that the documents listed in annexure K underpin their claim of legal professional privilege, which supports the case as being special.

[33] As of right, privilege cannot be claimed without jurisdictional facts being placed before the court. Annexure K serves as the factual foundation for the privilege and should specify the circumstances that qualify the communication to be privileged. To do differently will mean that any communication, if claimed to be privileged, would qualify as privileged communication without meeting any of the requirements.

Onus

[46] See for example *Giovagnoli v Di Meo* 1960 (3) SA 393 (N) where an attorney had to negotiate a settlement. It was held by Caney J that the meeting was not confidential since it was intended to be communicated to a third party and accordingly not privilege.

[34] It has been submitted by the applicants that the issue of onus does not arise in the interlocutory application since the application deals with a procedural mechanism that should be adopted at the hearing of the permanent stay application. I disagree. Whilst the onus is not an onus in the strict since, the applicants ought to place facts before this court that justify a departure from the open court principle. This court has to determine, on the facts submitted by the applicants, that there is a special case and that special circumstances exist to justify an order in terms of s 32.[47] Since the general rule is that all hearings are conducted in an open court, there is an onus on the party that requests that the rule be dispensed with.[48] The facts placed before this court should show that the applicants are entitled to the relief sought. It is trite that in civil proceedings the incidence of onus of proof is primarily determined on the factual allegations contained in the pleadings.[49]

[35] Principally, the person who claims legal professional privilege bears the onus to prove the circumstances which warrant the claim to be privileged. In *Mohamed v President of the Republic of South Africa & others*,[50] the court held:

'It is common cause that the *onus* in respect of the claim of legal professional privilege rests upon the respondents. This accords with first principles and is line with the notion that the *onus* of establishing a constitutionally acceptable justification in terms of s 36 of the Constitution rests upon the party relying on it (see *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at para [9].'[51] (My emphasis).

[36] When a court resorts to a 'judicial peek' to determine whether a document is privileged or not, the party claiming such privilege should provide sufficient information that warrants the claim.[52] In *South African Airways SOC v BDFM Publishers (Pty) Ltd & others*,[53] the court criticised the shorthand used to say a 'document is privileged'. I agree with the views of Sutherland J at para 46:

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[47] In relation to a special case see *Financial Mail (Pty) Ltd v Registrar of Insurance & others* 1966 (2) SA 219 (W) at 221F.
[48] See *S v Pastoors* 1986 (4) SA 222 (W) at 224B-C albeit stated in an in camera application in terms of s 153 of the CPA.
[49] See Schwikkard and Van der Merwe op cit at 571-575.
[50] *Mohamed v President of the Republic of South Africa & others* 2001 (2) SA 1145 (C).
[51] Ibid para 5.
[52] See *A Company & others v Commissioner, South Africa Revenue Service* 2014 (4) SA 549 (WCC) para 40.
[53] *South African Airways SOC v BDFM Publishers (Pty) Ltd & others* 2016 (2) SA 561 (GJ).

'[46.1] First, it is not, in truth, the document which is "privileged", rather what is really meant to be said is that the *information* which is contained in the document is privileged. This distinction is less precious than it may seem, at first glance, to be.

[46.2] Secondly, to describe the *information* as privileged, obscures the point that the right *vests in the client*, not in the information, and that the right is an *entitlement to claim* "privilege" over the information. This can and must mean no more than *a right to refuse to divulge the information and prevent it being adduced in evidence in any proceedings,* usually legal proceedings, but also any sort of adversarial proceedings where the recipient of legal advice is involved. The information is, thus, never more than the subject-matter of a claim of privilege.

[46.3] Third, the "privilege" cannot reside in the information anyway, because it only becomes the subject-matter of the claim of privilege *when that right not to disclose it is claimed, and not before*. At most, the information per se can never be more than *eligible* to be the subject-matter of legal advice privilege, ie if it satisfies the test of being (1) legal advice; (2) given by a legal advisor; (3) in confidence to a client; and (4) is claimed. If privilege is not claimed the information about the legal advice can be adduced in legal proceedings because then, to use the shorthand, it is not "privileged".' (Original footnotes omitted).

[37] In *President of the Republic of South Africa & others v M & G Media Ltd*,[54] Nugent JA warned courts not to take a judicial peek without an evidential basis having been laid. The court cautioned as follows:

'There is one further aspect of the procedures that are provided for in the Act that I ought to mention. Section 80(1) permits a court to take what counsel for M & G described as a "judicial peek" at the record that is in issue. A court that does that is prohibited from disclosing to any person, including the requester, "any record . . . which, on a request for access, may or must be refused . . .". Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.'[55] (My emphasis).

[38] The applicants have submitted that the State has acknowledged that certain documents are privileged. In support of this submission the applicants have placed

[54] *President of the Republic of South Africa & others v M & G Media Ltd* 2011 (2) SA 1 (SCA).
[55] Ibid para 52.

reliance on para 83 of the answering affidavit filed on behalf of the NPA in the permanent stay application. On a point of procedure, we (the presiding judges) were informed by the applicants, for purposes of this application, not to read the voluminous papers filed in the permanent stay application,[56] yet the applicants relied on some of the affidavits filed in the permanent stay application during submissions.

[39] In light of the submissions made it was necessary to read and consider a large part of the papers filed in the permanent stay application. In para 83, the NPA stated the following:

'I must point out that it is not possible, at this stage, fully and properly to deal with the allegation that certain material on the list is legally privileged. This Honourable Court has not had the opportunity of seeing the listed documents; nor has the NPA's attorney of record, the applicants having been reluctant to allow him to peruse the documents. The NPA will submit at the hearing of this matter that the Court and the respondents' legal representative be afforded an opportunity to view the listed documents so as to enable them to argue the privilege point. That I have been advised, is the only meaningful way in which the contentions around privilege could be ventilated in this court.'[57] (My emphasis).

[40] The aforegoing paragraph was relied on as an admission made by Mr *Ramaite* of the NPA that some documents are privileged. A clear reading of the paragraph shows that he is not agreeing on the issue that some documents are privileged. Any doubt about such an alleged admission should disappear when para 85 is read with para 83. This is what is stated further in the very same affidavit:

'In any event, I submit that even IF some of the documents are privileged, and can be shown to have been read by the NPA (which allegations are, save as otherwise indicated, denied), that would be no basis for a permanent stay of prosecution because the applicants have other remedies in this regard, less drastic than that sought. Further argument will be advanced at the hearing of this application.'[58] (My emphasis).

[41] The applicants further submit that this court should focus on how the court hearing the permanent stay application in due course is to deal with the category of

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[56] See applicants' practice note paras 16 and 17 that read:
'16. The affidavits in the section 32 application fall to be read.
17. It is not necessary, for present purposes, for the voluminous papers in the permanent stay application to be read.' (My emphasis).
[57] Permanent stay application at 1341-1342.
[58] Permanent stay application, answering affidavit para 85 at 1342.

documents over which privilege is claimed.[59] This submission places the cart before the horse.

[42] In my view, we have to decide on a narrow issue, namely, whether the applicants succeeded in showing that their case is sufficiently special to be heard partly in camera. This court's role is therefore not to devise a procedure for the court hearing the permanent stay application as to how that court should deal with the application. Instead, this court is required to determine whether the applicants have shown that they are entitled to the relief sought.

[43] The relevant issue is not whether or not the State would be able to give a confidentiality undertaking, but whether the applicants can legitimately claim that the State should give such an undertaking. In the circumstances of this case, the applicants have failed to lay a factual foundation that would qualify their case as a special case. In the absence of such speciality, they are not be entitled to the relief sought.

Nkosi AJ order

[44] In relation to the Nkosi AJ order, the respondents submit that the court order granted by Nkosi AJ (as he then was), precludes any determination by this court of the documents dealt with by the court.[60] The order reads as follows:

'1. The Second and Third Respondents be and are hereby interdicted and restrained from accessing, reviewing or attempting to access or view the documents presently in the custody of the Registrar of this Court in sealed bags (collectively "*the documents*") until a decision has been made by the Criminal Court seized with the matter whether the documents as listed in annexure "A" hereto are subject to privilege or not.

2. The Registrar be and is hereby directed to keep the documents in custody until a decision has been made by the criminal court seized with the matter, whether the documents as listed in Annexure "A" hereto are subject to privilege or not.

3. It is recorded that the Applicants have placed the Second and the Third Respondents in possession of copies of all the documents, except for those listed in Annexure 'A' hereto.

[59] See applicants' heads of argument para 3.4.
[60] Hereinafter reference will be made to Nkosi AJ.

4. Third Respondent is to pay the costs of this application as between party and party, including the costs consequent upon the employment of two counsel.' (My emphasis).

Annexure A attached to the order lists 40 documents of which four appear to be duplicated, so in essence 36 documents are identified in the order.

[45] The applicants submit that the Nkosi AJ order does not stand in the way of a separate and anterior cause of action, which is the permanent stay of prosecution. It has been argued by counsel that the court hearing the permanent stay application will be required to consider the documents and determine the breach of the privilege. Mr *Marcus* submits that since the Nkosi AJ order was one agreed to and granted for a specific purpose - that it does not mean that a different court may not view the documents for a different purpose. I disagree. To do so would mean that one would be in contempt of a lawful order. It matters not that the order was granted for a specific purpose, it still precludes any court other than the criminal court hearing the trial from looking at the said documents. The order issued by the court is clear and to the point. In any event, it is irrelevant to the issue before us to state that the order is of a lesser standard, since the parties consented to the order.

[46] In *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd*,[61] Wallis JA endorsed this view:

'For so long as that order stood, it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is res judicata as between the parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies.'[62] (Original footnotes omitted, my emphasis).

[47] There is no room for the applicants' argument that the order by Nkosi AJ is different from others. In *Eke v Parsons*,[63] the Constitutional Court decided that it

[61] *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA).
[62] Ibid para 10.
[63] *Eke v Parsons* 2016 (3) SA 37 (CC).

remains an order like all other court orders provided that it is a competent order.[64] Madlanga J reasoned as follows:

'Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage".'[65] (Original footnotes omitted).

[48] In *Airports Company South Africa v Big Five Duty Free (Pty) Ltd & others*,[66] Froneman J, on behalf of the of the majority of the court, endorsed the principles of *Eke* above.[67]

[49] This court is not persuaded that the Nkosi AJ order should be disregarded. It remains final and valid until amended or varied. The applicants have not identified which of the items listed in annexure K relate to the Nkosi AJ order. For the reasons outlined in this judgment they are to be excluded.

Absence of jurisdiction in relation to the Northern Cape matters

[50] The respondents have opposed the application inter alia on the basis that this court does not have jurisdiction over the Northern Cape matters.

[51] The applicants firstly placed reliance on what they perceive as an extant agreement between them and the State, agreeing to this court's jurisdiction over the Northern Cape cases. Secondly, the applicants submit that the State cannot raise the issue of jurisdiction in this interlocutory application since the application is limited to finding a practical solution on how to deal with the alleged privileged documents when the stay application is heard. The applicants also rely on *S v Naidoo*.[68] Their reliance on *Naidoo* is misplaced. In *Naidoo*, the court dealt with the litigant's choice of forum, which should have been the high court, not the regional court since the application was not brought in terms of s 342A of the CPA.[69]

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[64] Ibid paras 25 and 27-30.
[65] Ibid para 26.
[66] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd & others* 2019 (2) BCLR 165 (CC).
[67] Ibid para 13.
[68] *S v Naidoo* 2012 (2) SACR 126 (WCC).
[69] Also see *Naidoo v Regional Magistrate, Durban & another* 2017 (2) SACR 244 (KZP).

[52] *Lawsa*[70] deals comprehensively with the jurisdiction of our courts. For the sake of completeness, I repeat it:

'The jurisdiction of the courts is regulated by primary or "original" legislation (principally the Constitution and certain Acts of Parliament), secondary or "subordinate" legislation, and the common law. While there are a host of statutes (apart from the Constitution) which have a bearing on jurisdiction, the principal ones are the Supreme Court Act, the Magistrates' Courts Act and the Criminal Procedure Act. Common-law principles occupy a position of pre-eminence only in the absence of statutory enactments altering them, for the provisions of the common law are overruled and displaced by valid legislative pronouncements, which are abrogative.' (Original footnotes omitted).

[53] In a criminal matter, jurisdiction is determined by the area in which the offences have been committed (territorial jurisdiction), the nature of the offence (substantive jurisdiction) and also the nature of the penalty that should be imposed (punitive jurisdiction). Of course, jurisdiction may also be obtained in terms of a consolidation of multiple offences committed in various provinces, if the National Director of Public Prosecutions issues a certificate to have all of the offences being heard in one province.[71] No such certificate has been issued in this matter.

[54] Jurisdiction is not something that derives from an agreement[72] between the parties, nor can a court assume jurisdiction not conferred upon it by statute.[73] It is based on legislation, and the KwaZulu-Natal division exercises jurisdiction over criminal matters within its jurisdiction. The applicants have failed to show that this court has jurisdiction over the Northern Cape matters and for the reasons given in this judgment, the Northern Cape matters are excluded.

The court's powers in relation to granting confidentiality agreements

[55] Much of the argument presented dealt with the issue whether this court is empowered to order a confidentiality regime. Undoubtedly this court is empowered to issue such an order; the question is whether the applicants have shown on a

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[70] 11 *Lawsa* 2 ed para 526.

[71] See s 111 of the CPA read with s 22(3) of the National Prosecuting Authority Act 32 of 1998. See also *S v Ndzeku* 1996 (1) SACR 301 (A). In addition, see s 110 and s 110A of the CPA in respect of offences committed outside the Republic of South Africa.

[72] The applicants in their replying affidavit consider the address of the State advocate, Mr *Cloete*, as an agreement on the issue of jurisdiction. See s 32 application, replying affidavit paras 22-28 and 30-31.

[73] See *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E-G.

balance of probabilities that they are entitled to such an order. This court was referred to *Bridon International GmbH v International Trade Administration Commission & others*[74] and the endorsement by the SCA of the regime. The applicants concede that the *Bridon* case dealt with sensitive commercial information that needed to be protected by the parties in circumstances where they agreed to a confidentiality agreement. In *Bridon*, the other party, Casar, pertinently conceded that there was confidential information that required protection. In casu, the respondents do not agree to such an undertaking nor have the applicants shown that the listed communications are protected by legal professional privilege.

[56] The respondents submit that the *Bridon* case is distinguishable from the applicants' criminal case and that confidentiality agreements do not lend themselves to the criminal process and procedure. Ms *Mansingh*, on behalf of the respondents, argued that the proposed confidentiality agreement signed by the previous counsel and the attorney for the second respondent differs vastly from the confidentiality agreement that the applicants want the respondents to sign. We were referred to para 7 of "X" attached to the notice of motion, which reads:

'I confirm having signed this undertaking and had sight of the privileged documents. I will not act as a legal representative of the State in any criminal or civil proceedings against the Applicants, prosecute any criminal proceedings against the Applicants, advise the State in respect of its proceedings against the Applicants or testify against the Applicants in any future proceedings.'[75]

[57] It has to be stated that the confidentiality undertaking, previously agreed to by Mr *Notshe SC* and Mr Lekabe indeed differs from annexure "X".[76] In light of the findings reached in this judgment, it is not necessary to elaborate on the differences between "X" and "WC5".

[58] Lastly, the applicants submit that they intend to prevent the criminal trial from being heard, hence the application to have their trial permanently stayed. What is evident from this interlocutory application is that they want the court hearing the application for the permanent stay to decide on the admissibility of documents not

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[74] *Bridon International GmbH v International Trade Administration Commission & others* 2013 (3) SA 197 (SCA).
[75] See s 32 application at 5-6.
[76] See "WC5" at 127 of the s 32 application.

yet presented to the trial court. In my view, it will lead to a piecemeal trial process. I echo the sound advice of the Constitutional Court in *Savoi v NDPP*[77] where the court emphasised that it is pre-eminently the duty of the trial court to decide on the admissibility of evidence, including deciding on whether the admission of evidence of a particular type would render the trial unfair. The applicants will indeed be able to challenge evidence illegally obtained during the criminal trial. If there had been any abuse of obtaining evidence then the trial court would be the best forum to decide on allegations of abuse.[78]

[59] That the trial court is best suited to deal with issues of admissibility of evidence has been repeated in various dicta. As early as 1996, Kriegler J on behalf of the court stated in *Key v Attorney-General, Cape Provincial Division, & another*:[79]

'It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded. It follows that the applicant is not entitled to an order from this Court in these proceedings that the evidence secured as a result of the searches and seizures will be inadmissible in criminal proceedings against him. In so far as the decision in *Park-Ross* is inconsistent with this conclusion, it must be taken to be incorrect.'[80] (My emphasis).

[60] Having carefully considered this application, I am not persuaded that the applicants have made out a special case as is required in terms of s 32 of the Act. It follows that the application be dismissed with costs.

Order

[61] The following order shall issue:

The applicants' application in terms of s 32 of the Superior Courts Act 10 of 2013, is dismissed with costs, such costs to include the costs of two counsel where so employed.

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[77] 2014 (1) SACR 545 (CC) para 71.
[78] See *Zuma v Democratic Alliance & others* 2018 (1) SACR 123 (SCA) para 91.
[79] *Key v Attorney-General, Cape Provincial Division, & another* 1996 (4) SA 187 (CC).
[80] Ibid para 14.

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Steyn J

I agree

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Kruger J

HENRIQUES J (Separate concurring judgment)

Introduction

[62] An eminent jurist, the late United States Supreme Court Justice Ruth Bader Ginsburg, said: ‘You can disagree without being disagreeable’. With this in mind and having the benefit of reading the erudite judgment of my sister, Steyn J, with whom Kruger J concurs, I arrive at the same destination, albeit taking a different route.

Nature of the application

[63] This is an opposed application in terms of section 32 of the Superior Courts Act,[81] in which the applicants seek orders directing that a portion of the proceedings in the application for a permanent stay of prosecution be heard *in camera*. Such portion of the proceedings relate to documents which the applicants assert are confidential as they are subject to legal professional and/or litigation privilege. In addition, an order is sought requiring the respondents' legal representatives to sign appropriate confidentiality undertakings.

The relief

[64] The relief foreshadowed in the notice of motion dated 3 March 2020, is the following:

'1. It is declared that in failing to file its heads of argument timeously, the State has failed to comply with its obligation in Section 165 (4) of the Constitution to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[82]

2. The portion of the proceedings relating to the inspection and discussion of the documents claimed by the applicants to be privileged, is to be held *"in camera".*

3. Apart from the applicants' legal representatives, only those representatives of the respondents who undertake and sign confidentiality agreements in the form annexed to the notice of motion, marked "X" are permitted to appear in court.

4. No person who has been present in the court during the *"in camera"* session is permitted to be involved with any subsequent investigation or prosecution of the applicants.

5. There is no order as to costs, save in the event of opposition, in which case, costs will be sought from any party who opposes the granting of relief sought in this application.'

[65] Annexed to the notice of motion as X' is the privilege and confidentiality undertaking proposed by the applicants for signing by the representatives of the respondents. The applicants require the respondents' legal representatives to sign 'X' before they view documents which the applicants allege are either subject to legal

[81] Superior Courts Act 10 of 2013.
[82] This relief was not argued at the hearing of the opposed motion.

professional and/or litigation privilege and/or are confidential.

The applicants' request to hold bifurcated hearings

[66] The applicants essentially seek procedural relief before this court, prior to its intended application for a permanent stay of the criminal proceedings. The premise of the relief sought is on the basis that the documents reflected in Annexure 'K' (which has been transposed in the main judgment) are privileged. Hence, *in camera* proceedings are appropriate to protect the confidential and privileged status of the documents.

[67] It is perhaps useful at this juncture to briefly consider the approach adopted in other jurisdictions to *in camera* proceedings.

Foreign jurisprudence

[68] The issue of *in camera* proceedings has been deliberated on in various international forums. In *Rizzuto c. R,*[83] which involved the interception of private communications and the violation of client privilege, the trial court in refusing the request for a bifurcated hearing held as follows:

'In the absence of any truly special, indeed exceptional, circumstances, a two-stage proceeding is unwise.

. . .

A proceeding to birfurcate the hearing would not be an effective use of judicial resources.

It might result in the Court rendering multiple judgments, when the issues should all be decided in a single judgment.

. . .

The Court's discretionary power should be exercised in favour of a framework that guarantees procedural fairness and the sound administration of justice.'[84]

[69] The judge, in a detailed analysis, considered the concept of public interest, the administration of justice, prejudice and the interest society has in having a final decision on the merits of the case. It warrants mentioning that an order was granted for a publication ban on the members of the press and public present at the hearing. However, the main application for a stay of the prosecution was dismissed. Similar

[83] *Rizzuto c. R* 2018 QCCS 582 (CanLII).
[84] Ibid para 37.

authorities emanating from the Canadian Supreme Court can be found in *Smith v Jones,*[85] and *R v Bacon.*[86]

[70] The court in *Smith v Jones* similarly acknowledged the importance of the rules relating to privilege, especially attorney-client privilege in criminal matters. It recognised that attorney-client privileged was the 'highest privilege'[87] recognised by the courts but was not an absolute one and was subject to exceptions.[88] It directed a psychiatrist who had consulted with the accused to disclose such information to the police and the Crown. It further dismissed the request for a hearing *in camera* but directed that members of the press and public present in court were subject to a publication ban.

[71] The English courts have reaffirmed the normal rule that criminal court proceedings should be conducted publicly. Nonetheless, courts do have the inherent power to order that the public be excluded. The effect of which is to restrict the proceedings to be held *in camera*. The exercise of such power, together with any other derogation from the principles of open justice, should be strictly confined to cases where the public's presence would 'frustrate or render impractical' the administration of justice.[89]

[72] I now turn to consider the current application.

Legal framework

[73] Section 32 reads as follows:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

[74] The provisions of the section must be interpreted in line with section 34 of the Constitution, which entrenches the right to have disputes resolved in 'a fair public

[85] *Smith v Jones* [1999] 1 SCR 455.
[86] *R v Bacon* 2020 BCCA 140 (CanLII).
[87] *Smith v Jones supra* para 44.
[88] Ibid para 51.
[89] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450, see also *R v Dover Justices, ex Parte Dover District Council and Wells* [1992] Crim LR 371 DC.

hearing before a court', the public interest in having open court hearings and the interests of private litigants. All proceedings would include arguments on behalf of litigants.[90] The predecessor to section 32 was section 16 of the Supreme Court Act.[91] The section and its predecessor apply to both civil and criminal proceedings, although the Criminal Procedure Act[92] has its own sections applicable to *in camera* hearings.

[75] The section confers a discretion on the court which is to be exercised in 'special cases'. Exactly what is meant by 'special cases' must depend on the circumstances of each particular matter, and it may be invoked in matters involving private individuals or where the public has an interest.

[76] Van Dijkhorst J in *Cerebos Food Corporation Ltd vs Diverse Foods SA (Pty) Ltd*,[93] indicated that:

'. . . the emphasis should not, on the one hand, fall on the right of the public to know . . . or, on the other hand, on the right of the private individual not to be embarrassed, but on the proper administration of justice'.

What constitutes 'special cases'?

[77] The earlier cases dealing with *in camera* applications and what constituted 'special cases', evolved from Anton Piller applications and section 16 of the Supreme Court Act, and some guidance can be sought from those decisions.

[78] In *Financial Mail (Pty) Ltd v Registrar of Insurance and others*,[94] Marais J issued an order directing that an application be heard *in camera* and that the papers and proceedings be sealed and not be made public. This case involved an application by the Financial Mail, a newspaper publication, which learnt of an application by the Registrar of Insurance for the winding-up of an insurance company called Auto Protection Insurance. This newspaper publication devoted itself to matters of public interest in the field of finance, financial institutions and investment.

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[90] *Transvaal Industrial Foods Ltd vs BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 628E-H.
[91] Supreme Court Act 59 of 1959.
[92] Criminal Procedure Act 51 of 1977.
[93] *Cerebos Food Corporation Ltd vs Diverse Foods SA (Pty) Ltd and another* 1984 (4) SA 149 (T) at 158H.
[94] *Financial Mail (Pty) Ltd v Registrar of Insurance and others* 1966 (2) SA 219 (W).

[79] The court subsequently rescinded those orders sealing the proceedings as well as holding the proceedings *in camera*, as after it had granted such orders, the judicial manager of the insurance company consented to the judgment. The court held as follows:

'In civil matters the Court must decide whether in the particular circumstances of a specific occasion such "a special case" is constituted as to justify a departure from what has actually been the absolute rule in parts of the country for more than one and a half centuries and in none for less than half a century, namely, that the civil court never closes its doors to the public.

The wisdom of allowing a discretion to the presiding Judge is clearly illustrated in the present matter. The insurance company concerned had run into financial difficulties of such a serious nature that the Registrar of Insurance, whose duty it is to guard against insolvent insurers continuing to write business, approached the Court with an application for its liquidation. On the day of the hearing it was suggested by the company that it would be able to offer the Registrar of Insurance acceptable guarantees that it could extract itself from its difficulties. The proposals were ultimately accepted by the Registrar, on condition that the company would cease to undertake compulsory third party motor insurance.

If the Court had not acceded to the request of the parties to take the quite exceptional course of not only closing the doors of the Court but also of issuing an order that the outcome of the application be kept secret for an indefinite period of time, the public would have learnt of the financial difficulties of the company at once: it being an institution dependent on public confidence in its stability, the company's liquidation would have been inevitable, no matter what efforts its management and the Registrar could have taken to save it.

Unlike with most other commercial enterprises, its premature closing down would not only have harmed the shareholders. Policy-holders would have lost their cover also; and, what is more serious, third parties having claims against the company under third party insurance might have had to abandon their claims for compensation. An insurer, and more particularly a third party insurer, has obligations extending far beyond those of shareholders and ordinary creditors - third parties, who had had no say in the choice of the insurer who would have to compensate them for losses in road accidents, and who might have to face a future of destitution if the insurer failed, are also involved. That is the reason why the Registrar of Insurance is bound to explore every possibility of saving an insurance institution before taking the final step of seeking its winding-up. Every such possibility is ruled out as soon as the Court refuses to have the matter heard *in camera.*

This then, in my respectful view, was pre-eminently a "special case" in terms of the Act where the Court should have ordered, as it did, that none of the proceedings, nor even the fact of the proceedings, was to be made public. The fact that a year later the efforts to save the company did come to nought is irrelevant to the question whether or not at the first stage secrecy was imperative - a matter in which the Court would obviously be guided by the expert views of the Registrar.'[95]

[80] In *Economic Data Processing (Pty) Ltd and others v Pentreath*,[96] Coetzee J in considering an Anton Piller application and the need for it to be heard *in camera*, also had regard to the provisions of section 16 of the Supreme Court Act, and held that:

'The openness of our judicial proceedings is jealously guarded. It is entrenched in this provision as only when the Court so directs in "special cases" can there be a departure therefrom. This is not lightly done.'[97]

Coetzee J referred to the decision of Marais J in *Financial Mail (Pty) Ltd supra* and *Du Preez v Du Preez: Standard Bank of South Africa intervening*.[98]

[81] *Du Preez* concerned sequestration proceedings in which one of the applicants applied for an order that the proceedings be held *in camera* so as not to jeopardize negotiations for the disposal of certain mineral rights. Hiemstra J, in considering such application, had regard to section16 and quoting from *Halsbury, Laws of England*, held the following:

'The kind of circumstances envisaged can be judged from passages in Halsbury, *Laws of England*, to one of which I will refer. In *Halsbury*, vol. 9, p. 345, para. 813, the following is said:

> "In general all cases, both civil and criminal, must be heard in open Court, but in certain exceptional cases where the administration of justice would be rendered impracticable by the presence of the public, the Court may sit *in camera*. Thus the Court may so sit, either throughout the whole or part of the hearing, whether it is necessary for the public's safely or whether the subject-matter of the suit would otherwise be destroyed for example, by the disclosure of a secret process or of a secret document, or where the Court is of the opinion that the witnesses are hindered

[95] Ibid at 221F-222E.
[96] *Economic Data Processing (Pty) Ltd and others v Pentreath* 1984 (2) SA 605 (W).
[97] Ibid at 607B-C.
[98] *Du Preez v Du Preez: Standard Bank of South Africa intervening* 1976 (1) SA 87 (W).

in or prevented from giving evidence by the presence of the public."

From a case there quoted, *Scott* v. *Scott*, 1913 A.C. 417, it appears that such a ruling, namely that proceedings take place *in camera*, would be made "in the interests of justice". The same is said in *Halsbury*, vol. 16, p. 440, para. 795, namely that such an order would be given where

> "the administration of justice would be rendered impracticable by the presence of the public".'[99]

[82] Hiemstra J took the view that if the interests of the State or the public had been involved, he would have considered clearing the court and holding an *in camera* hearing. In addition, he found that the applicant for the *in camera* hearing created the situation by aligning himself with the sequestration proceedings instituted by his son. In addition, once an estate was placed under sequestration, the trustees would be dealing with the negotiation of the sale of the assets, and the trustees expressed no view or any concern of the likelihood of a breakdown in such negotiations, should a sequestration order be granted and the proceedings not be heard *in camera.* He thus ruled that the proceedings would take place in open court.

[83] In *Pentreath*,[100] Coetzee J considered the two decisions in *Financial Mail* and *Du Preez* and took the view that 'special cases' as defined can seldom refer to those cases between parties where their own private interests are involved. He opined that 'special cases' involve public interest, and held as follows:

'I would not hold that a case qualified as "special" unless I were satisfied that the public interest demand that that course be followed. If in a particular case the relief to which an applicant is entitled might be academic if he gave notice of the application, the practice is to apply ex parte. There is no need to resort to secrecy of this nature.'[101]

Obviously he was stating this in the context of Anton Piller orders.

[84] The position relating to *in camera* proceedings, as contemplated in section 32, is in line with international practice in comparable jurisdictions. It has long been a fundamental tenet of common law that judicial proceedings must take place in an open court. This principle was codified in section 152 of the Criminal Procedure Act and constitutionally entrenched in section 35(3)*(c)* of the Constitution. In *S v Geiges*

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[99] Ibid at 88A-D.
[100] *Economic Data Processing (Pty) Ltd and others v Pentreath supra*.
[101] Ibid at 607D-G.

and others (*M & G Media Ltd and others intervening)*[102] Labuschagne J, opined that:
'The open justice principle is a fundamental principle of our law. The starting point should therefore be that trial proceedings should be held in open court unless there are compelling reasons to close the doors of the court to the media and/or the public. If it then transpires that in the interests of the State, or of good order, or of the administration of justice, that such proceedings be held behind closed doors the court may make an appropriate order in the exercise of its discretion.'

[85] In *Young and another v Minister of Safety and Security and others*,[103] the application for a hearing *in camera* was dismissed by Plasket J, who reaffirmed the approach by Van Dijkhorst J in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and another supra,* which approach Plasket J summarised as:
'. . . at the centre of the enquiry was the question whether the proper administration of justice required the closing of the court's doors but that, in exercising the discretion vested in him or her by s 16, a Judge should work from the default position that all cases should be heard in public and that this rule should not be departed from lightly.'[104]

[86] In *Cape Town City v South African National Roads Authority and others*,[105] Ponnan JA, in dealing with the provisions of section 16 of the Supreme Court Act, referred to the *dictum* of the late Chief Justice Dickson of the Canadian Supreme Court in *Attorney General (Nova Scotia) v MacIntyre*,[106] where he said the following:
'Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.'

[87] In summary, having regard to the South African authorities, the starting point when considering such applications is the premise that court proceedings must be open to all and be open to the public. For the exception in section 32 of the Superior

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[102] *S v Geiges and others* (*M & G Media Ltd and others intervening)* 2007 (2) SACR 507 (T) para 80.
[103] *Young and another v Minister of Safety and Security and others* 2005 (2) SACR 437 (SE).
[104] Ibid para 18.
[105] *Cape Town City v South African National Roads Authority and others,* 2015 (3) SA 386 (SCA) para 14.
[106] *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 at 185.

Courts Act to apply, truly convincing reasons must exist to depart from the principle of open justice. Each case must however be determined on its own particular set of facts, and there are no hard and fast rules which apply.

[88] In relation to the matter which served before this court, the premise of the applicants' contention is that the succeeding application for a permanent stay of prosecution should be restricted to *in camera* proceedings in so far as that portion which relates to the alleged confidential/privileged documents, as reflected in Annexure 'K', is concerned. Counsel for the applicants, Mr Marcus SC in his written submissions, stated that the court in this interlocutory proceeding was not seized with the issue of making a final determination as to whether or not any or all of the documents were privileged, as a decision on these questions would equate to pre-judging the very issues which are central to the permanent stay hearing itself.

[89] In my considered view, if this court is excused from the obligation of making a determination regarding the privileged status of the documents in Annexure 'K', the conclusion that a special case or special circumstances exist to warrant the deviation from the general rule of open public hearings, is nullified. I am mindful of the fact that the applicants find themselves in an invidious position in attempting to establish the 'special case' as is contemplated in section 32 without addressing the status of the alleged privileged documents.

[90] This circular argument leads to the inescapable conclusion that the onus on the applicants cannot be discharged in establishing special circumstances, nor that the administration of justice deems it necessary to depart from the clearly entrenched rule, both at common law and in terms of the Constitution, that hearings should be held in open court.

[91] With the exception of the argument relating to the documents in Annexure 'K', it is common cause that no other circumstances are present that warrant a finding that a 'special case' exists, necessitating a hearing *in camera*. It is common cause that the only basis for this application is Annexure 'K'.

The main judgment

[92] The deviation from the main judgment penned by Steyn J, which I refer to in the introduction lies in the fact that having reached the conclusion that the requirements of section 32 have not been met by the applicants, the procedural interlocutory application falls to fail on such grounds on its own standing. The analysis in the main judgment in relation to the status of the communications set out in Annexure 'K' does not require determination by this court and ought not to have been opined upon.

[93] As concluded by Labuschagne J in *S v Geiges*,[107] if it then transpires in further hearings, 'that such proceedings be held behind closed doors the court may make an appropriate order in the exercise of its discretion'. In view of the fact that any order made by this court will be of an interlocutory nature, the applicants will be entitled to renew their application on the same papers, amplified by such evidence as may be necessary, at any stage during the proceedings. That court will then have to consider or reconsider and assess the matters raised, and the evidence placed before the court on an ongoing basis, before exercising its discretion to close the proceedings and hold them *in camera.*

[94] In deciding such application, this court is called upon to make a preliminary finding on the confidential and/or privileged nature of these documents. In my view, this approach is problematic as it may very well have the effect of usurping the discretion of the court hearing the application for a permanent stay of prosecution by pre-empting a finding on the confidential and/or privileged nature of these documents.

[95] By analysing the purport of the documents contained in Annexure 'K' and expressing a finding in respect of such documents, this may result in impeding or restricting the court hearing the application for a permanent stay of the prosecution, and the criminal trial of the matter, from arriving at a different or variant conclusion.

[96] I am equally of the view that the main judgment ought not to have delved into the respondents' points *in limine* relating to inter alia jurisdiction, piecemeal litigation

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[107] *S v Geiges and others* (*M & G Media Ltd and others intervening) supra* para 80.

and the pre-existing order of Nkosi AJ, and to make findings in respect of such issues. I align myself with the unanimous view that the applicants have failed to discharge the precondition of a 'special case', hence rendering the application incapable of success. The above departure does not detract from the fact that I concur with the order proposed in the main judgment.

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HENRIQUES J

APPEARANCES

Counsel for the applicants	:	Mr Marcus SC / Mr Du Plessis SC
Instructed by	:	ENS Africa

		c/o Nicholson & Nicholson 40 Hilton Avenue Hilton REF: B Nicholson/BNL2328 Email: brett@nicholsonlaw.co.za
Counsel for the respondents	:	Mr Choudree SC / Ms Mansingh
Instructed by	:	State Attorney, KwaZulu-Natal Durban c/o Cajee Setsubi Chetty Inc 195 Boshoff Street Pietermaritzburg Ref: 4272/13/P1/kp Email: PKevan@justice.gov.za
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