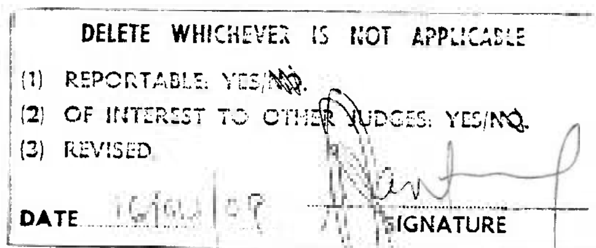
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 18/2009

DATE: 17/4/2009


DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 16/04/09 SIGNATURE

In the matter between:

THE STATE Appellant

and

AMOS TSHOTSHOZA AND OTHERS Respondent

JUDGMENT

HARTZENBERG J

[1] This matter comes before us by way of an order of a Regional Court magistrate. The order reads as follows:

"The matter herewith is referred to the High court of South Africa, Transvaal Provincial Division (as it then was) at Pretoria for review by a judge. This court requests such higher authority to consider the further steps to be taken, be it that:

1. Proceedings be stopped.

2. Proceedings start de novo without Adv Krause.

3. The finding of this court is reversed and it proceeds without further delay and/or any other order that honourable judge deems fit."

[2] The matter came before Botha J. on review. It was during the December recess. He invited comment from the Director of Public Prosecutions ("the DPP") and, in passing, raised the possibility that the matter be argued before a full bench. The reaction from the DPP's office in a memorandum by Adv. Roberts and Adv. Bredenkamp SC, was to accept that the matter stood to be argued and to indicate that the DPP did not want to anticipate its argument in the memorandum that was submitted. With the blessing of the Judge President it was arranged for the matter to be argued before the present bench upon sufficient notice to the representatives of the applicants.

[3] The order was made under the following circumstances: The six accused are charged with three counts of robbery with aggravating circumstances pertaining to an incident that happened on 13 February 2005 at First National Bank Pretoria, when allegedly the security guards were overpowered and threatened with fire arms, and R1,3 million and other items were removed. There are also charges of assault with intent to do bodily harm, kidnapping, possession of unlicensed fire arms, malicious injury to property, housebreaking with intent to steal and of having contravened the provisions of sections 87 and 88 of the Electronic Communications and Transactions Act, No. 25 of 2002, in respect of the same incident. The trial commenced on 26 July 2007. The matter was remanded from time to time but until 10 December 2008 the parties had been in court on 18 different days. Apparently the trial record is by now quite sizeable. On 8 December 2008 notice was given to the prosecutor that the accused intended to apply for an order that the

appointment of the prosecutor is unconstitutional and that the accused did not enjoy a fair trial. The matter was remanded until 9 December 2008 to allow the prosecutor to liaise with the DPP. On 9 December 2008 a senior member of the DPP's staff, Mr. Wiese, represented the State and handed a short affidavit by the prosecutor, Adv. Krause ("Krause"), in. Mr. Potgieter represented accused nos. 1, 2, 3, 5 and 6 and Mr. Pistorius represented accused no. 4.

Agreed facts were placed before the magistrate. They were:

1. Krause is a retired regional magistrate of the particular regional division.
2. Krause prosecutes in the case in terms of an agreement between himself and the National Prosecuting Authority, dated 27 and 28 October 2004.
3. The agreement was reached as a result of a mandate by an initiative known as Business Against Crime (BAC).
4. The whole of Krause's remuneration is paid by BAC.
5. An association known as SABRIC (South African Banking Risk Information Centre) makes funds available to BAC for the remuneration of Krause.
6. The agreement reads as follows:

"AGREEMENT (SS (1) + ACT 32/19998

WHEREAS an existing project co-ordinating an investigating and prosecutorial approach to bank and cash-in-transit robberies has identified, as related criminally, major bank and cash centre burglaries committed in

various provincial jurisdictions which has led to the formation of the National SVC office of the South African Police Service.

AND WHEREAS a number of accused persons are believed to commit such crimes on an organized basis and it is advisable to centralize, as far as possible, the prosecution of such accused in one jurisdiction

AND WHEREAS GEORGE FREDERICK KRAUSE as duly qualified lawyer who has prosecuting and bench experience, has agreed to make his services available to the National Prosecuting Authority

AND WHEREAS BUSINESS AGAINST CRIME (South Africa) has agreed to remunerate Mr. Krause in respect of such professional services NOW THEREFORE I, JAN SAREL MARTHINUS HENNING, Deputy National Director and Head National Prosecuting Service, do hereby in terms of section 38(1) and (3), as read with section 38(4) of Act 32 of 1998, and after consultation with the National Director engage GEORGE FREDERICK KRAUSE TO –

1. *exercise the powers provided for in Section 20(1) of Act 32 of 1998 in respect of the crimes mentioned in the preamble hereto and any other matter assigned to him by the relevant office of the Director of Public Prosecutions;*

2. *to give guidance to police investigators in the investigation and preparation of cases;*

3. *to liaise regularly with role players, including Directors of Public Prosecutions (or the designated Deputies), Chief Prosecutors, Senior Prosecutors, South African Police, Business Against Crime (SA) and SABRIC;*

4. *to collaborate and co-ordinate with Dr. J A v S d' Oliveira SC in preparation of cases for prosecution and, when available, to advise the National SVC Office on outstanding investigations into serious bank burglaries, cash in on transit and bank robberies;*

5. *to report on his work and activities to the office of the Director of Public Prosecutions: Pretoria or to any Deputy designated by such Director.*

The service to be rendered by Mr. Krause will be at no cost to the State. The services are to be rendered subject to the authority of the Director of Public Prosecutions in whose jurisdiction the matters resort and subject to my control and Direction"

7. **Vusi Moloi** (accused no. 2) and **Ignatius Molare Silokoane** (accused no. 3) appear in other bank-related matters in other courts *viz* Johannesburg and where applicable Ladysmith and Nelspruit where Adv. Krause appears as prosecutor on behalf of the State in

terms of the same agreement.

8. Accused 3 was arrested on an unrelated charge or charges on or about 15 June 2006 at Villiers in the Free State.

9. Following the arrest of accused 3, a bail application was brought in the Regional Court in Kroonstad.

10. Adv. Krause appeared on behalf of the State in the application.

11. Concerns were raised about the appointment of Adv. Krause in the Regional Court Kroonstad.

12. Adv. Krause withdrew from the bail proceedings of his own accord, having indicated to the court that he was not in possession of the document in terms of which he had been appointed.

13. The trial, that followed on the arrest in Villiers, was conducted in Villiers and in the Regional court at Pretoria North. Adv. Krause attended court on each day of that hearing until finalization of the matter against accused no. 3.

14. The assistance that he offered to the prosecutors in Villiers and

Pretoria North does not accord with his agreement between the NPA and himself.

15. In the present trial a section 204 witness by the name of Henry Waldeck admitted in cross-examination that one of his affidavits was settled by Adv. Krause.

16. That discovery of the documents supporting the State case against accused no. 6 only took place on 5 December 2008.

17. That one of the statements which forms part of such discovery, is a statement by a certain Mr. M J Botha of Telkom. The defence regards the statement as very material for the State case against accused no. 6. It was obtained on 13 August 2007 and only discovered on 5 December 2008.

18. Other material statements against accused no.6 were only obtained on 25 and 27 November 2008, whereafter they were discovered.

19. SABRIC is an association who represent the complainant in this matter.

20. Adv. Krause is not assisted in the prosecution by any member of the NPA and/or the DPP or the Chief Prosecutor Pretoria.

21. Adv. Krause has not been briefed by an attorney.

[4] Krause stated the following in the affidavit that was before the magistrate: That he is an admitted advocate; that he is a party to the above quoted agreement; that he is not remunerated by the National Prosecuting Authority ("the NPA") or any organ of state: that the agreement provides that he be paid by BAC but that for practical reasons he submits his accounts to SABRIC, a section 21 company established by the banking industry to combat crime; that the BAC was established in 1996 (he wrongly gave the date as 1966) in response to a request by the then President Mandela who invited business to join hands with the Government in the fight against crime; that he acts for the State in the matters mentioned in the agreement: that he has not received remuneration from a specific banking institution; that he never liaised with or received instructions from a bank as to how a prosecution was to be conducted: that he followed the guidelines issued by the NPA to all prosecutors; that he does not have any undue regard for any particular complainant in the cases in which he is involved: that all decisions to prosecute in the matters that he prosecuted were made by delegates (senior state prosecutors) of the DPP; that he consults about serious decisions with local senior state prosecutors and if necessary with the DPP; that he compiles a monthly report on his prosecuting activities for distribution to all DPP's and heads of Police Departments. and submits it to SABRIC who is responsible for the administrative duties.

[5] The application was made because of the decision of Du Plessis J in the unreported matter of *Beulah Evelyn Bonugli and Anor v Deputy National Director of*

Public Prosecutions and four Others, case no. 17709/2006 delivered on 1 February 2008 in this division. The court reviewed and set aside the decision of the first respondent to appoint two advocates, in private practice, to prosecute on behalf of the State in the criminal trial against the two applicants. The court found that if the reasonable objective perception, of reasonable right minded persons, applying themselves to the facts of the matter, would be one of a reasonable potential for prejudice by the prosecutor, in a criminal trial, in that he may be perceived not to be able to act without fear favour or prejudice, that there is not compliance with section 179(4) of the Constitution[1]. The court found that a prosecutor who acts without fear, favour or prejudice is a prerequisite for a fair trial.

[1] Subsections (1), (2), (4) and (5) of section 179 read as follows:

*"179 **Prosecuting authority***

(1) There is a single national prosecuting authority in the Republic structured in terms of an Act of Parliament, and consisting of –

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

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

(3)National legislation must ensure that the Directors of Public Prosecutions

(a) are properly qualified; and

(b) are responsible for prosecutions in specific jurisedictions, subject to subsection (5).

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

(5) The National Director of Public Prosecutions –

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the policy process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

[6] The facts that gave rise to the order were that after the State had withdrawn a prosecution against the applicants it re-instituted the prosecution at the insistence of the complainant on condition that outside prosecutors would be employed and paid by the complainant without any cost implications for the State. It is evident that in that matter the effect of the agreement, between the State and the prosecutors, was for the prosecutors to conduct a private prosecution as if it were a public prosecution.

[7] The Criminal Procedure Act, No 51 of 1977, by necessary implication, accepts that there may be a difference in approach towards attaining a conviction through a private prosecution and a public prosecution. Section 9 requires of a private prosecutor to furnish security as determined by the Minister and over and above that, in an amount determined by the court in respect of the accused's costs, which amount may be increased from time to time. Section 16 specifically provides that an accused in a private prosecution may be entitled to a favourable costs order in case of an unsuccessful prosecution. In the case of a public prosecution the accused is not entitled to an order for costs on his acquittal. An accused in a private prosecution, after a certificate *nolle prosequi* had been furnished by the state, cannot be faulted if he/she perceives the prosecution, and of necessity the prosecutor, to be biased against him/her. If the complainant succeeds in disguising the private prosecution as a public one he/she has all the more reason to harbour that perception. The circumstances that existed in the *Bonugli* matter were such that a perception of possible prejudice was certainly justified.

[8] Before dealing with the attack against the appointment of Krause, it is necessary to deal with two preliminary matters that cropped up during the hearing of the

review. The first is a preliminary point by the State that the magistrate should not have dealt with the points raised by the applicants but that he should have postponed the matter so that a review application like the one in the *Bonugli* matter could be brought in the High Court. The argument is that notice could then have been given to the NPA and to BAC as they have an interest in the matter. The second is a point by the applicants that a supplementary affidavit by Krause, which was before us but not before the magistrate, is to be disregarded, and if it is accepted that leave is to be given to the applicants to reply thereto.

[9] The first argument by the State really signifies that the magistrate did not have the jurisdiction to deal with the applicants' Constitutional right to a fair trial, and that the Regional Court is not a competent court for that purpose. Section 38 of the Constitution provides, *inter alia*, that anyone acting in his own interest may approach a competent court for relief in the case of an alleged infringement of a right enshrined in the Bill of Rights and that the court may grant relief. The applicants alleged an infringement of their right to a fair trial in terms of section 35 of the Constitution. This aspect has been dealt with by Jordaan J in the matter of *Van Rooyen en Andere v Departement van Korrektiewe Dienste en 'n Ander: In re S v Du Toit en Andere*, 2005 (1) SACR 77 (T). The issue, in that case, was whether awaiting trial prisoners were afforded sufficient time to prepare for their defence or whether they were denied their right to a fair trial. Jordaan J as trial judge dealt with the issue and dismissed an objection that a motion court application was necessary. He explained that it would be impractical, in every case of an alleged infringement of a Constitutional right, regardless of the extent thereof, to stop the

proceedings so that the applicant can approach the High Court for a declaratory order. He concluded at 93e:

> *"Dit is uit voormelde regspraak duidelik dat enige siening dat die afdwinging van regte ingevolge die bepalings van art 38 van die Grondwet alleenlik mag geskied nadat dit in 'n prosedurele dwangbuis geplaas is onvanpas is. Artikel 38 plaas geen prosedurele beperking op enige applicant oor hoe hy of sy enige aansoek voor 'n hof moet plaas nie."*

[10] If one bears in mind that there are many criminal trials in many courts all over the country on every day of the week, it is clear that there is a strong possibility of many applications of alleged infringements of Constitutional rights every day. The accused might, for example, perceive an interpreter not to be competent or his/her conveyance between prison and court and back to be such that he/she is deprived of the opportunity to prepare properly for trial. The possibilities are countless. It is obvious that many of those complaints can and should be dealt with by the officer presiding in the particular matter. In exceptional circumstances there may be allegations that the presiding officer has acted in such a way that the prosecution should be stopped. In such a case a postponement and a high court application seems to be the correct procedure. We cannot fault the procedure adopted by the magistrate in this matter. The matter came over a period of close to a year and a half. Some of the applicants have been in prison for longer than that. The magistrate had to see to it that this aspect was to be dealt with as expeditiously as possible. To establish a modicum of certainty he was correct to consider the matter, make an order and to send it to the High Court for either confirmation or setting aside thereof.

[11] The State justifies the submission of the further affidavit of Krause, to this court, on the basis that on 8 December 2008 the only attack against Krause's appointment was based on the *Bonugli* matter. Consequently the mode of payment of the prosecutor's remuneration was the only basis for the attack against his appointment. On 9 December 2008 certain aspects of Krause's conduct, in addition thereto, were raised to indicate that he is in fact prejudiced against the accused. Krause did not have sufficient time to reflect upon the allegations. They were formulated in haste and recorded by the magistrate. The affidavit was submitted to put Krause's conduct in perspective. The applicant's allege that by doing so, Krause has now put aspects in issue that were common cause in the court *a quo*. The matter was argued on 17 March 2009. Before the hearing the applicants were invited to have a replying affidavit ready during the hearing for in case Krause's supplementary affidavit was accepted in evidence. We made it clear all along that we still had to decide whether we would accept the supplementary affidavit in evidence and that in such an event we would also accept an affidavit by the applicants dealing with the allegations in the supplementary affidavit. Mr. Potgieter indicated during the hearing that the notice to prepare an affidavit, given before the hearing and informally, was too short and that it was impossible for him to consult with the third applicant in C Maximum prison. He indicated that he could do so and could have an affidavit ready by 24 March 2009. He was again invited to submit such an affidavit on or before 24 March 2009, if so advised. Moreover leave was granted to him to file further heads of argument together with such an affidavit.

[12] In the circumstances of this case and where the question in issue is whether the applicants' Constitutional rights had been violated I can in principle see no reason why

further evidence to put the matter in perspective would not be admissible. It would follow as a matter of course that the applicants could file a further affidavit. However, we are of the view that it is unnecessary for the purposes of this case to accept Krause's further affidavit or to accept a rebutting affidavit or affidavits by one or more of the applicants. In our view it is unnecessary for Krause to explain and justify his conduct and the matter can be decided on only the facts that were before the magistrate. In the result we did not accept Krause's supplementary affidavit in evidence and, we also do not plan to deal with the third applicant's affidavit that was submitted after 24 March 2009.

[13] Before the learned magistrate the attack against the appointment of Krause was twofold. It was argued that a perception of possible prejudice was justified by the mode of payment and by the conduct of Krause in that there was no proper discovery, that he settled an affidavit of a section 204 witness and that he played a role in proceedings in Villiers and Kroonstad where accused 3 was involved, but which proceedings were not covered by his agreement with the NPA. In this court the attack went further in that the validity of the agreement between the NPA and Krause was attacked. In this regard the arguments are firstly that the agreement as such is too wide and is not in accordance with what the NPA is entitled to do in terms of section 38 of Act 32 of 1998, The National Prosecuting Authority Act ("the Act"), and secondly that the mode of payment in itself gives rise to a reasonable perception of possible prejudice

[14] Section 179 of the Constitution provides that there is a single prosecuting authority in the Republic, structured in terms of an act of Parliament. It has the power to institute criminal proceedings and to carry out any necessary functions incidental thereto.

National legislation must ensure that Directors of Public Prosecutions are appropriately qualified and responsible for prosecutions in specific jurisdictions, in accordance with the national prosecution policy. National legislation must also ensure that the prosecuting authority exercises its functions without fear favour or prejudice[2].

[15] The Act is the national legislation envisaged in the Constitution. In the preamble specific mention is made of the fact that prosecutions are to be conducted without fear favour or prejudice; that the prosecuting authority has the power to institute criminal proceedings and to carry out the necessary functions incidental thereto and in fulfilling its Constitutional mandate to establish an investigative directorate with limited investigative capacity to prioritise and investigate serious organized crime with the object of having those offences prosecuted efficiently[3]. Section 7 of the Act provides for the establishment

[2] See footnote 1 above.

[3] Some of the introductory considerations are:

"Whereas the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without, fear favour or prejudice;"

"Whereas the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and carry out any necessary functions incidental to instituting criminal proceedings;"

"In order to ensure that the prosecuting authority fulfils its constitutional mandate to institute criminal proceedings on behalf of the state and to carry out the necessary functions incidental thereto, to make provision for-

** the establishment of an Investigating Directorate, with a limited investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in an organised fashion, or certain offences or unlawful conduct, with the object of prosecuting such offences or unlawful conduct in the most efficient and effective manner;"*

of an investigative directorate. The Constitutionality of a special investigative initiative to combat serious and organized crime has never been questioned. In the light of the high incidence of serious crime in the country, it is not surprising, as the Legislature recognizes the existence of organized crime and the special need to have it effectively prosecuted.

[16] In terms of section 20(1)[4] of the Act the power to institute criminal proceedings, to carry out the necessary functions and to conduct or discontinue them vests in the prosecuting authority. In terms of section 20(5)[5] of the Act any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorized thereto by the National Director or by a person designated by him. In section 20(6)[6] it is specifically provided that the written authorization shall state the area of jurisdiction, the offences and the court or courts in respect of which such powers may be exercised..

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4 *"20. **Power to institute and conduct criminal proceedings,** - (1) The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to –*

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings

Vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic

5 *"(5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorized thereto in writing by the National Director, or by a person designated by the National Director"*

6 *" (6) A written authorization referred to in subsection (5) shall set out –*

(a) the area of jurisdiction;

(b) the offences; and

(c) the court or courts,

in respect of which such powers may be exercised.

[17] The engagement of outside persons to perform services in specific cases is dealt with in section 38[7] of the Act. The National Director and a Deputy National Director or a Director and the National Director, in both cases in consultation with the Minister, may engage persons, with suitable qualifications and experience, to perform services in specific cases. The terms of the appointments are to be contained in written agreements. There has to be liaison between the Minister and the Minister of Finance, who is in control of State expenses, for obvious reasons. It is envisaged that there may be outside funding. Where the appointment will not result in expenses by the State, specified persons in the NPA may appoint the persons without consultation with the Minister. The services are wider than just prosecuting in cases but include prosecution of cases under the control and direction of specified officers of the NPA.

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[7] *"38 **Engagement of persons to perform services in specific cases** – (1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may in consultation with the Minister and the National Director, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.*

(2) The terms and conditions of service of a person engaged by the National Director, a Deputy National Director or a Director under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Minister of Finance.

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State –

(a) the National Director; or

(b) a Deputy National Director or a Director, in consultation with the National Director,

may, on behalf of the Sate, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection

(4) For the purposes of this section "services" include conducting of a prosecution under the control and direction of the National Director, a Deputy National Director or a Director, as the case may be."

[18] It has not been argued that section 38 of the Act or any portion thereof is unconstitutional. It is difficult to conjure up possible arguments for such a contention. After all the Constitution acknowledges that there is crime and that criminals have to be prosecuted and punished and that for that purpose there has to be a prosecuting authority which has to take the necessary initiative in respect of the institution of prosecutions and the fulfilment of all necessary steps incidental thereto. The detail is to be enacted in specific legislation and has been enacted in terms of the Act. It is a prerequisite that prosecutions must be fair and must not violate an accused's right to a fair trial in terms of section 35(3) of the Constitution.

[19] All over the world outside prosecutors are engaged to prosecute on behalf of the State. There cannot be objection in this country to the engagement of outside prosecutors in specific cases. There are many reasons why it may become necessary for the NPA to engage outsiders. One thinks of a shortage of staff or of staff with the necessary expertise and experience to prosecute in particular cases.

[20] As to the provision that outside funds may become available to pay for public prosecutions. in principle there cannot be any objection against public minded persons or institutions subjecting themselves to extra voluntary taxation in the form of a contribution to a fund for the public purpose of prosecuting criminals. In this regard. however, as became apparent in the *Bonugli* matter. there is a dividing line between acceptable contributions to funds established for purposes of the prosecution of criminals and contributions that are not acceptable. For the purposes of this judgment it is sufficient to hold that contributions aimed at assisting the NPA in its constitutional obligation to

prosecute criminals, and where the contributor has no direct control over specific prosecutions, will be acceptable and that contributions made with the object of having a public prosecution, where the NPA itself would not have prosecuted, and where the contributor arranges a form of control for itself over the prosecution, will not be acceptable. Whether a contribution will be regarded as acceptable in terms of section 38 will depend on the circumstances of each case.

[21] One question in this case is whether the arrangement for the financing of the prosecution of organized bank and cash-in-transit robberies and burglaries at banking institutions by BAC and the paying of the independent prosecutor by SABRIC as has been explained by Krause in his initial affidavit, could lead to a reasonable perception of possible prejudice on the part of the prosecutor, in the minds of reasonable right-minded persons, taking into account all the relevant circumstances of the case. If the answer is positive it is the end of the matter. If the answer is negative the other points raised are to be scrutinized.

[22] The initiative has its origin in the request by the then President, Mr. Mandela. The business community was invited to join hands with the State in the fight against organized crime. The four major banks agreed to sponsor an initiative that would co-ordinate and centralize the investigation and prosecution of organized country-wide cash-in-transit robberies and bank burglaries. As a result of the initiative a prosecutor is engaged. He has no direct contact with any specific bank. There is no direct relationship between the contribution of any one bank and the number of prosecutions in respect of burglaries at that bank or robberies of cash-in-transit of that particular bank. Although

burglaries and cash-in-transit robberies has a direct impact on the specific bank the impact is much wider. Very often there are murders and savage assaults on security personnel and even on innocent members of the public. Every such robbery and burglary has a negative impact on the confidence of individuals in the safety situation in the country. A conviction does not really benefit the specific bank so much as it is beneficial to the country as a whole.

[23] The agreement in terms of which the prosecutor has been engaged complies with section 38 of the Act in that it is between the prosecutor and the Deputy National Director in consultation with the National Director. The Minister's approval is not a requirement. The prosecutor has the necessary qualifications. He is specifically authorized to exercise the powers provided for in Section 20(1) of the Act in respect of the crimes mentioned in the preamble and any other matter assigned to him **by the relevant office of the Director of Public Prosecutions.** He has to give guidance to police investigators in respect of the investigation and preparation of cases. He has to liaise with the DPP's, Chief Prosecutors, Senior Prosecutors, the South African Police, BAC and SABRIC and has to report on his work and activities to the DPP, Pretoria. In his affidavit Krause specifically states that he follows the guidelines issued by the prosecuting authority to all prosecutors, that all decisions to prosecute in matters in which he is involved, were made by senior state prosecutors, and that all serious decisions which he has to make is discussed with senior prosecutors or with the DPP. The magistrate's finding that there is no liaison between Krause and the DPP was just not correct. On the whole there is nothing in the agreement itself, and in the way in which it was implemented, that has not been sanctioned by the Act.

[24] It follows that the argument that the appointment is not in accordance with section 38 of the Act cannot be sustained. As to what the right minded objective person would make of the mode of payment it is evident that this matter differs totally from the *Bonugli* matter. That was a matter where the prosecution was based on fraudulent conduct of the accused. The complainant tried to minimize its losses, caused as by the fraud. The complainant was busy with a civil matter. The evidence in the criminal matter would be wholly applicable to the issues in the civil matter. The complainant was conducting what in fact was a private prosecution as if it was a public prosecution. In this matter the individual banks do not have much of a hope to get redress of their losses in the case of a successful prosecution. They are not directly involved in the prosecutions, and cannot and do not prescribe to the prosecutor to prosecute, and if a prosecution commences, how to conduct the prosecution. Their contributions are more of a self-imposed tax and the payment of the prosecutor is much more akin to the payment of public prosecutors who get paid from public funds. A right-minded objective person will not have a perception of possible prejudice.

[25] What remains are the attacks against the conduct of Krause. The fact that he settled an affidavit of a section 204 witness is not improper. A prosecutor is certainly entitled to consult with State witnesses. If in the process he settles an affidavit, that is part and parcel of what he is busy with. In any event it happens, daily, in practice that counsel are briefed to settle affidavits of witnesses. That would not disqualify the particular practitioner to lead the evidence of that witness, should the matter proceed to trial.

[26] As to his appearances in Villiers and Kroonstad it is important to bear in mind that his commission includes the duty to co-ordinate the prosecution of related robberies and burglaries. Moreover there is a perception, specifically mentioned in the preamble to the agreement, that there is an interrelation between the robberies and burglaries, regardless of where they are being committed. In the circumstances it would be part of the execution of his duties to attend to the prosecution of some of the individuals who he had to deal with previously. One can understand that the third applicant detests seeing Krause whenever a new charge is proffered against him, but that does not mean that Krause has more of a wish to have him convicted than can be expected of any prosecutor in any prosecution. Although a prosecutor has to be fair it does not mean that he cannot and should not diligently try and obtain all admissible evidence against an accused. It is part of Krause's commission to liaise with prosecutors. If in retrospect it became apparent that the prosecution following on the arrest of the third applicant at Villiers was not one of the matters which is included in Krause's commission, it would be wrong to adjudicate his interest and involvement as improper.

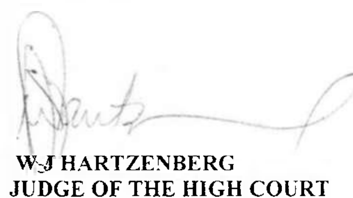
[27] The final attack against his conduct is that the State was in possession of an important statement against the 6th applicant already during 2007 and only made it available to the defence during December 2008. It has not been explained by the 6th applicant how his case was adversely effected by the failure of the State to let him have a copy of the statement earlier. If one thinks of the literally hundreds of applications for discovery every court term, it is difficult to classify a failure to discover as improper conduct on the part of a practitioner, representing a party. In any event the allegation is not that Krause intentionally kept the existence of the statement a secret in order to surprise the

6th applicant. This attack, as the other two, just do not raise a suspicion, that unlike a State Prosecutor, Krause is acting improperly, in order to obtain a conviction.

[28] The magistrate misdirected himself by finding that Krause does not work under the supervision of the DPP and that there is no liaison between him and the DPP. That finding is contradicted by the terms of the contract and by Krause's affidavit. There does not exist a basis for an objective finding that the contract is in any way improper or that Krause's conduct indicates prejudice against the applicants. It follows that the magistrate's finding is to be set aside and that the matter is to be remitted to him to finalize the trial.

The following order is made:

1. The finding of the magistrate that the appointment of Adv. GF Krause is unlawful, and insofar as he has found that Adv. Krause's conduct was improper, is hereby set aside and the application by the applicants to have him removed as the prosecutor in the prosecution against them is refused.
2. The matter is remitted to the magistrate for finalization of the trial.



W J HARTZENBERG
JUDGE OF THE HIGH COURT

I agree

S S V KAMPEPE
JUDGE OF THE HIGH COURT

I agree

E JORDAAN
JUDGE OF THE HIGH COURT

HEARD ON : 17 March 2009

ON BEHALF OF THE APPELLANT

Counsel : F C ROBERTS
Instructed by : DIRECTOR OF PUBLIC PROSECUTIONS

ON BEHALF OF THE RESPONDENTS

Counsel :	For accused numbers 1, 2, 3, 5, 6, and 7	:	P PISTORIUS
	For accused number 4	:	H J POTGIETER
Instructed by :	H J GROENEWALD ATTORNEYS		