IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

In the matter between:	Case No: 250/2020
AFRICAN PAPER PRODUCTS (PTY) LTD (REGISTRATION NUMBER: 2003/005955/07)	First Applicant
VISHAL DEVRAJ SEEBRAN	Second Applicant
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS: EASTERN CAPE	First Respondent
THE REGIONAL MAGISTRATE COMMERCIAL CRIMES COURT, PORT ELIZABETH **MR CLAASEN**	Second Respondent

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Coram:	Lowe J *et* Bands AJ
Date heard:	21 July 2022
Delivered:	31 October 2022

JUDGMENT

BANDS AJ:

[1] Fundamental to our criminal justice system and at the heart of the rule of law, is an accused's right to a fair trial. In the words of the Constitutional Court in *S v Jaipal*:[1]

> *"The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness".*

[2] This application concerns unterminated proceedings emanating from the Regional Court of the Eastern Cape in the Specialised Commercial Crimes Court, Port Elizabeth (as it then was), under case number CCC1/47/14 ("*the Commercial Crimes Court*"), in which the first and second applicants stand accused of various offences. The applicants seek relief in the alternative, both of which pertain to a ruling made by the second respondent on 6 November 2019, during the course of the said proceedings. In the first instance, the applicants seek a review *in medias res* of the said ruling, and in the alternative, seek a *mandamus* against the second respondent directing him to order that particulars to the charge sheet be furnished.

[3] By virtue of the High Court's inherent power to restrain illegalities in inferior courts, this court may, in a proper case, by way of review, interdict or

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[1] 2005 (4) SA 581 (CC) at paragraph [25].

mandamus, grant relief against the decision of a magistrates' court given prior to conviction.[2]

[4] The first respondent opposes the relief sought.

Relevant factors leading to the present application

[5] The first and second applicants were arraigned before the Commercial Crimes Court on a charge of fraud. In addition, the second applicant faces two further charges of fraud and two charges of forgery. Central to the charges is a contract awarded to the first applicant by the Department of Education, Eastern Cape ("*the Department*"),[3] for the provision of Learning and Teaching Support Materials, inclusive of textbooks, and scholastic stationary before the commencement of each year.

[6] On a reading of the charge sheet, together with its preamble, and simplistically put, the State contends that the Department, as part of the bidding process, required bidders to furnish certain supporting documentation as proof of experience (and success) in similar previous projects, such as letters of recommendation by contactable references. In addition, valid Tax Clearance Certificates were required in respect of each bidder. On 19 October 2009, the second applicant, in his capacity as a director of the first applicant, as well as in his capacity as a director of two further corporate entities, Mega Papers

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[2] *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119G.

[3] Pursuant to a tender.

(Pty) Ltd ("*Mega Papers*") and Paper Active (Pty) Ltd ("*Paper Active*"), which have since been deregistered, signed tender documentation on behalf of the first respondent and the two corporate entities respectively, and submitted same to the Department.

[7] In respect of the 2 charges of forgery against the second applicant, the charge sheet reads as follows:

> "*In that upon or about 19 October 2009 and at or near the Department of Education, Eastern Cape in the Regional Division of the Eastern Cape the Accused did unlawfully, falsely and with the intent to defraud and to the prejudice or potential prejudice of the Department of Education and/ or SARS forged an (sic) instruments in writing to wit: a tax clearance certificate relating to…*"

"*Mega Papers*", in respect of count 3; and relating to "*Paper Active*", in respect of count 5.

[8] Subject to what I set out below, the respective charges of fraud are formulated in materially the same terms as against the first and second applicants; alternatively, the second applicant only, where applicable. Accordingly, and for illustrative purposes, the content of count 1, which pertains to both the first and second applicant, reads as follows:

> "*In that during the period from 19 October 2009 to 21 December 2009 and at or near the Department of Education, Eastern Cape in the Regional Division of the Eastern Cape the Accused did unlawfully, falsely and with the intent to defraud, gave out and pretended, expressly or impliedly, to the Department of Education that:*

- *documents in the name of Tevo, Office Elements, Mtuba Book Sellers and Stationers and G&T Office Supplies were true and authentic and issued by the said businesses in the normal course of business,*

And the Accused did, by means of the said false pretences induced the said Department of Education to its loss and prejudice, actual or potential, or the loss and prejudice, actual or potential, of the unsuccessful bidders, to accept the misrepresentations as true and correct and to award a tender in the amount of R13,585,917 to Accused 1,

Whereas in truth and fact, the Accused, when they gave out (sic) pretended as aforementioned well knew that the said documents were not true and authentic."

[9] The remaining 2 charges of fraud, being counts 2 and 4, relate to the second applicant only. Such counts pertain to the actions of the second applicant, acting in his capacity as a director on behalf of Mega Papers and Paper Active respectively; and relate not only to the supporting documentation, but also to Tax Clearance Certificates pertaining to Mega Papers and Paper Active as detailed in the respective charges, where relevant, all of which documentation the State contends not to be true and authentic, such fact being within the knowledge of the second applicant.

[10] The first and second applicants, being dissatisfied with the formulation of the charge sheet, requested further particulars from the state, to which a response was received. The applicants thereafter delivered a notice of objection to the charges in terms of section 85(1) of the Criminal Procedure Act, 51 of 1977 ("*the CPA*"), in which they sought the quashing of the charges; alternatively, an order directing the State to deliver better particulars to the applicants' request for particulars.

[11] The applicants' grounds of objection were formulated as follows:

> *"1. That the averments contained in the aforesaid charges as amended... are vague and embarrassing and infringes the accused's constitutional right to be informed of the exact nature of the charges against them;*
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> *2. That the averments in the charges lack particularity pertaining to the actus reus in respect of each count as allegedly committed by each of the accused and in particular by accused number 2 in a personal capacity;*
>
> *3. That the averments and the charges therefore do not disclose an offence;*
>
> *4. That the charges do not comply with the provisions of section 84 of Act 51 of 1977 read with the provisions of section 85(1) of Act 51 of 1977 and further read with section 35(3) of the Constitution."*

[12] In essence, the applicants' case in the unterminated proceedings before the Commercial Crimes Court was that the State's failure to inform them of the charges that they are facing, with sufficient particularity to enable them to answer properly thereto, amounts to a violation of their right to a fair trial.

[13] Following the submission of detailed heads of argument on behalf of the parties, which dealt not only with the applicable legal principles, but which also contained comprehensive submissions in respect of each of the queries raised by the State in the request for particulars, and the respective answers thereto; and after the hearing of oral argument, the second respondent dismissed the applicants' objection. Ultimately, the second respondent found as follows:

> *"All in all I am satisfied that the charges contained in the amended charge sheet, as amplified in the further particulars constitute offences and the manner it is alleged to have been committed with sufficient particularity to comply with section 84(1) and can be regarded as reasonably sufficient to inform the accused of the nature of the charges. Consequent to the*

above, no Order is made relating to the amendment of the charge or delivery of further particulars or quashing of the charges."

[14] It is this ruling, which forms the subject matter of the present proceedings.

Interference with unterminated proceedings in a lower court

[15] The applicants contend that the second respondent failed to consider and deal with the grounds of objection to the charge, as contained in their notice of objection, and, as foreshadowed above, seek to review and set aside the second respondent's ruling of 6 November 2019 under case number CCC1/47/17, dismissing the applicant's application for the quashing of the charges against the applicants. In the alternative, the applicants seek an order directing the second respondent to compel the State to provide the particulars sought by the applicants, to the charges.

[16] The main thrust of the applicants' contentions is encapsulated in paragraph 31 of the founding papers, under the heading "*GROUNDS FOR REVIEW*", and is as follows:

"I humbly submit that a gross injustice has resulted based on:

31.1. Second Respondent's failure to uphold the objection to the charges and rule on the Quashing Application;

31.2. Second Respondent's failure to consider and deal with the grounds of objection set out in my Notice to Object to the charges;

31.3. Second Respondent's finding that the charge sheet contains clear and unambiguous charges especially referring to the forgery charges;

31.4 Second Respondent's finding that no order compelling the state to provide particulars was called for."

[17] What follows in the succeeding paragraphs of the founding affidavit are the detailed grounds upon which the applicants rely for their contention that the second respondent failed to consider the applicants' grounds of objection to the charge sheet.

[18] At this juncture, I am mindful of the fact that the crucial enquiry in review proceedings is whether the conduct of the decision-maker, complained of, prevented a fair trial on the issues; and that such complaints must be directed at the method or conduct of the proceedings, and not at the result thereof.[4] I return to this aspect later.

Legal framework relevant to the present proceedings

[19] In terms of section 22 of the Superior Courts Act, 10 of 2013:

"(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—

(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and

[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at 112E.

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[20] It is an established principle of our law that the High Court will not ordinarily, by way of appeal, review or *mandamus*, interfere with unterminated proceedings in a lower court. The court's power to interfere is exercised sparingly and only in those cases in which the court is satisfied that grave injustice may otherwise result or where justice might not by other means be obtained. The court's reluctance to interfere in unterminated proceedings stems primarily from (i) the effect that such procedure has upon the continuity of proceedings in the court below;[5] (ii) the undesirability of hearing appeals and reviews piecemeal;[6] and (iii) the fact that redress by other means, such as review or appeal, will ordinarily be available in due course.[7]

[21] In *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* (*supra*) the Appellate Division (as it then was) commented as follows at 120D:

"[T]he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction... As indicated earlier, each case falls

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[5] *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119H – 120A.

[6] *Motata v Nair and Another* 2009 (1) SACR 263 (TPD) at 267 at paragraph [12].

[7] *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) at 119H – 120A.

to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[22] In *Adonis v Additional Magistrate, Bellville and Others*,[8] the court at paragraph [22] stated that:

"*Intervention on review will be justified in the case of a gross irregularity which has caused, or is likely to cause, prejudice to the applicant... In Rynders v Bankorp Ltd t/a Trust Bank and Others 1995 (2) SA 494 (W) it was held that a magistrate's court did not have power to grant an ex parte application for the provisional liquidation of a close corporation. According to MacArthur J (at 497B-D) the grant of such an order constituted any regularity which caused the applicant 'substantial wrong' in that he was confronted with all the consequences of a provisional liquidation order. This entitled the applicant to take the magistrate's decision on review, despite the fact that he might have failed to exhaust his remedies in the Magistrate's Court.*"

[23] In *Ismail and Others v Additional Magistrate, Wynberg and Another*,[9] the court, in assessing what constitutes a gross irregularity justifying interference before conviction, stated:

"*I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (AD at p119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage where no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave*

[8] 2007 (2) SA 147 (C).

[9] 1963 (1) SA (A).

injustice might otherwise result or where justice might not be by other means attained.' (Wahlaus's case, supra at p120)."

[24] The aforesaid approach, as set out in *Wahlhaus (supra)* and *Ismail (supra)*, was endorsed by the court in *Motata v Nair NO and Another*[10] and more recently, by the full bench of this court in *Mispha CC and Another v The Honourable Regional Magistrate and Others*.[11]

[25] In v *Matshikwe NO v M*,[12] the Supreme Court of Appeal commented that:

"*The higher courts have however emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity – where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. At the same time, although the cases in which intervention has actually occurred are uncommon, this Court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open.*"

[26] Amongst the rare cases in which the High Court, has on occasion, seen fit to intervene in unterminated proceedings are cases where an accused has complained that the charge against him/her lacks sufficient particularity to sufficiently inform him/her of the case that he/she has to meet in order to prepare and present his/her defence.[13]

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[10] 2009 (1) SACR 263 (TPD) at paragraphs [9] and [10].

[11] Case No.: 2647/2011, ECD Grahamstown (as it then was) (delivered on 18 September 2013). See also: *Sizani v Mr Mpofu N.O. and Another*, Case No.: 2804/2019, ECD Grahamstown (as it then was) (delivered on 18 August 2020).

[12] [2003] 3 All SA 11 (SCA).

[13] *Weber and Another v Regional Magistrate, Windhoek* 1969 (4) SA 394 (SWA) at 397 F-G. See also: *Behrman v Regional Magistrate, Southern Transvaal and Another* 1956 (1) SA 318 (T). See also: *Essop v Regional Magistrate, Western Transvaal and Another* 1963 (1) PH H16 (T).

[27] In *S v Mashinini and Another*,[14] the court pointed out that:

> *"Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush."*

[28] Having said that, each such case is fact specific having regard to the threshold for intervention as set out above.

[29] Accordingly, the question which falls to be determined by this court is whether the applicants have demonstrated that there are circumstances which justify the interference of this court in the unterminated proceedings. Put differently, are there circumstances to satisfy this court that should we not intervene at this stage, grave injustice may result, such as to materially prejudice the applicants, which could not, in due course, be corrected on review or appeal.

[30] For the reasons detailed below, I am of the view that the answer to this question must be in the negative.

Review *in medias res*

[14] 2012 (1) SACR 604 (SCA) at paragraph 11.

[31] On a careful consideration of the papers before court, the grounds of review relied upon by the applicants take issue with the result of the proceedings in the Commercial Crimes Court and not with the method thereof. Accordingly, such grounds constitute grounds of appeal and not grounds of review. Where proceedings, in substance, amount to an appeal from the magistrate's decision upon the objection, and in the absence of circumstances justifying the intervention of the court in the unterminated proceedings, the courts are aligned in their view that appeals will not be entertained piecemeal. Matters must run their course to fruition and in the event of a guilty finding, the whole matter ought to be decided on appeal, should such appeal be brought.[15]

[32] In the context of review proceedings, the court, in the oft-quoted passage in *Ellis v Morgan*, stated as follows:[16]

> *"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."*

[33] The aforesaid principle was thereafter qualified in *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another*[17] wherein the court expressed that:

> *"The law, as stated in Ellis v Morgan (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed*

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[15] *Lawrence v ARM of Johannesburg* 1908 TS 525.

[16] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576.
See also: *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paragraph [72].

[17] 1938 TPD 551.

or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."

[34] The Supreme Court of Appeal, in *Telcordia Technologies Inc. (supra)*, drew a distinction between the reasoning of the decision-maker and the conduct of the proceedings, and warned that the two concepts ought not to be confused with one another.

[35] The Constitutional Court *in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, with reference to the aforesaid distinction, said as follows:[18]

"Both Ellis and Goldfields make it plain that the crucial enquiry is whether the conduct of the decision-maker complained of prevented a fair trial of issues. The complaint must be directed at the method or conduct and not the result of the proceedings. And the reasoning of the decision-maker must not be confused with the conduct of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and at times it may be difficult to draw the line; there is nevertheless an important difference."

[18] 2008 (2) SA 24 at paragraph [265].

[36] The applicants have conflated the reasoning of the second respondent with the conduct of the proceedings.

[37] The grounds of review, belatedly raised in the applicants' heads of argument, which are at variance with the grounds of review relied upon in the papers before court, were no doubt included in an attempt to supplement the applicants' papers due to the inherent shortcomings in the allegations contained therein. Not only were such grounds not properly raised before this court, but they do little to assist the applicants if regard is had to the second respondent's ruling as a whole. Further and in any event, such grounds do not lead to a conclusion that the conduct of the proceedings was such as to vitiate the applicants' rights to a fair trial.

[38] Regard being had to the aforesaid, and having arrived at the conclusion, which I have recorded in paragraph [31] above, this aspect alone warrants the dismissal of the applicants' review *in medias res*.

[39] Even if I am incorrect in this conclusion, whether or not the applicants are satisfied with the result of the objection proceedings, there can be no doubt that the second respondent considered the applicants' grounds of objection and applied his mind thereto in deliberating the issues before him. This much is clear from a reading of the ruling in question. There is nothing from the second respondent's reasons from which it is apparent that his mind was not in a state to enable him to try the matter fairly or that his conduct prevented a fair trial of the issues.

[40] I am not persuaded that the applicants have shown the presence of any of the grounds referred to in section 22 of the Superior Courts Act; nor have they demonstrated that there are circumstances to satisfy this court that absent an intervention at this stage, grave injustice may result, such as to materially prejudice the applicants, which could not, in due course be corrected on review or appeal. I deal with this in greater detail below.

[41] Accordingly, the applicants' application for review *in medias res*, must, on either of these additional grounds, meet the same fate.

Applicants' request for a *mandamus*

[42] Having previously established that the applicants have failed to set out any circumstances which warrant the interference of this court at the present juncture, it follows that whilst the court, in principle, has the power to order a *mandamus* in proceedings of this nature, the applicants' application, in the particular circumstances of this matter, must fail.

[43] What follows are my reasons for the aforesaid conclusion.

[44] Prior to giving context to the applicants' complaints in respect of the charges in further detail, it is significant that the applicants, whilst they arrive at certain conclusions of fact and law, have failed to set out a factual foundation therefor.

[45] The highwater mark of the applicants' case is that (i) "*a gross injustice has resulted*" given the ruling of the second respondent; (ii) the second respondent's failure to consider the replies to the request for particulars, with specific reference to count's 3 and 5, adequately or at all, "*was a gross irregularity and irreparably infringed*" the second applicant's "*right to a fair trial*"; (iii) the charges lack particularity especially insofar as they concern the second applicant, in his personal capacity, and accordingly, the second respondent "*did not consider that*" the second applicant's "*fair trial rights as well as that of the First Applicant have been negated alternatively infringed*"; and (iv) the second respondent's failure to properly consider that the forgery charges, at best, lack particularity as to the second applicant's involvement and that such failure "*amounts to a gross irregularity and a negation of*" the second applicant's "*constitutional rights which would bring justice into disrepute.*"

[46] However, notwithstanding the aforesaid allegations, the applicants have failed to state (i) what grave injustice they contend may result, absent an intervention by this court at the present stage; and (ii) in what manner the applicants are materially prejudiced, which prejudice cannot, in due course, be corrected on review or appeal.

[47] On a proper analysis, the applicants' main contentions are that the second respondent failed to consider that the respective charges of fraud and forgery lack particularity as to the second applicant's alleged involvement, in his personal capacity, and as such, such charges do not disclose offences. As a consequence, the applicants contend that they are entitled to an order for the

quashing of the charges (which requires in the first instance a review of the second respondent's decision, and which aspect I have dealt with earlier in this judgment); alternatively, to a *mandamus* directing the second respondent to order the delivery of the particulars sought. It is this latter aspect, which is currently under consideration.

[48] At this juncture, it is apposite to revisit the respective definitions of fraud and forgery. Whist fraud is the unlawful and intentional making of a misrepresentation, which causes actual prejudice or which is potentially prejudicial to another; forgery is the unlawful and intentional making of a false document to the actual or potential prejudice of another.

Forgery

[49] In respect of charges 3 and 5, being those of forgery as against the second applicant, the applicants contend that the charges fall foul of section 84(1) of the Act in that the State does not know who forged the documents in question; when and where the said documents were forged; and in what manner they were forged. Accordingly, the applicants objection to the charges is taken in accordance with section 85(1)(c) of the Act, in that the charges do not disclose an offence.

[50] Leaving aside for the moment the question of whether or not the State knows who forged the documents; on a reading of the charges, transcribed above, together with the preamble to the charge sheet, the State contends that the

documents in question were forged on or about 19 October 2009, at or near the Department of Education, Eastern Cape. No ambiguity is created by the State's response to the further particulars as to time and place, if such responses are read contextually. The responses to the relevant questions merely served to advise that the State was unable to state with precision, the time and place of the forgery save as already set out in the charge sheet. In any event, if the time when an offence was allegedly committed is not a material element of the offence (as in the present instance), the failure to refer to time, does not render the charge defective.[19] This too is so for the place where the crime was allegedly committed.[20]

[51] As to the manner in which the documents were said to be forged, it is clear that the State's contention is that same were forged in their entirety in that they were not issued by SARS. It is trite that the falsification of a document can be achieved in one of many ways. In this respect, a document which falsely purports to be a copy of a non-existent document is a forged document.[21]

[52] This then leaves the aspect of *actus reus*. If regard is had to the wording of the charge sheet, together with the preamble thereto, there can be no doubt that the State's case against the second applicant is that it was he who forged the documents in question, personally. This much is apparent from the clear

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[19] *S v Vilakazi* 2016 (2) SACR 365 (SCA); read with section 92(1)(c) of the CPA.

[20] It is only where the offence for which the person is alleged to have been charged with may only be committed in a particular place, such as on a public road, that the place is an indispensable element of the offence. See *R v Mapikitla* 1950 91) SA 336 (GW).

[21] *R v Motete* 1943 OPD 55.

See also: *R v Leballo* 1954 (2) SA 657 (O).

wording of the respective charges. The second applicant is not charged as an accomplice or an accessory of any kind. The difficulty which arises is that, notwithstanding the above, the applicants requested, in their request for particulars, for the State to confirm unequivocally if it is the State's case that the second applicant forged the documents personally. This query was raised in respect of both counts of forgery. In answer thereto, the State responded as follows:

"*The State does not know who forged the document, however the accused was the only person or entity who stood to benefit through the said action.*"

[53] It is for this reason that the applicants contend that the State does not know who forged the documents in question and conclude that the charges do not disclose an offence, warranting the relief sought.

[54] It is accordingly necessary to consider what is required of the State at this stage of the proceedings. On a procedural level it is required of the state to inform the accused of all the essential averments, and a charge sheet should contain all the essential allegations to be proven by the prosecution in order to sustain a guilty verdict.[22] Section 84 of the CPA reads as follows:

"*(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of*

[22] *S v Sewela* 2007 (1) SACR 123 (W).
See also: *S v Essop* 2014 (2) SACR 495 (KZN) at paragraph [38].

which the offence is alleged to have. been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge."

[Own emphasis].

[55] A charge sheet ought to inform an accused with sufficient detail of the charge he or she has to face. An accused's right to be duly informed of the charge against him or her is guaranteed in section 35(3)(a) of the Constitution, 1996, which reads as follows:

"Every accused person has a right to a fair trial, which includes the right-
(a) to be informed of the charge with sufficient detail to answer it."

[Own emphasis].

[56] The charge sheet should set forth the relevant elements of the offence that has been committed and the manner in which such offence was committed. An accused should not be left to speculate about an element of the offence.[23]

[57] In *R v Alexander and Others*,[24] it was stated that:

"The purpose of a charge-sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the

[23] *S v Essop* (supra) at paragraphs [42] and [47].

[24] 1936 AD 445 at 447.

indictment or portions of sections together what the real charge is which the Crown intends to lay against him."

[58] Accordingly, the primary determination is whether the charges sufficiently inform the second applicant of what case he has to meet.[25]

[59] I am satisfied that the charge sheet sets out the relevant elements of the offence of forgery in respect of counts 3 and 5, including the manner in which the offences were committed. Notwithstanding that the State, at this point, does not know, with certainty, the identity of the person who forged the documents, it is clear from the unambiguous terms contained in the charge-sheet that the State has nailed its colours to the mast and relies solely on the personal liability of the second applicant. It cannot be gainsaid that the second applicant has sufficient detail to (i) inform him of the nature of the charges against him; (ii) enable him to answer thereto; and (iii) properly mount his defence. There can be no question that the second applicant is not at risk of a trial by ambush or prejudiced in his preparations for trial. Whether the State will, in due course, be in a position to prove its case on the evidence available to it, which evidence is not within the particular knowledge of this court, is not for this court to determine. I am not at liberty, at this stage of the proceedings, to draw an inference concerning the strength or weakness of the State's case from the prosecutor's inability to furnish particulars.

Fraud

[25] *Behrman v Regional Magistrate, Southern Transvaal and Another* 1956 (1) SA 318 (T) at 320 A.

[60] Taking into account the aforesaid authorities, and on a careful consideration of the charge-sheet, read together with the preamble thereto, as amplified by the further particulars, I am satisfied that the charge sheet sets out the relevant elements of the offence of fraud, as against the first applicant, in respect of count 1, and as against the second applicant in respect of counts 1, 2 and 4, and that same complies with section 84(1) of the CPA.

[61] Insofar as the applicants contend that the State has refused to identify the presumptions in terms of section 332 of the Act, upon which it shall rely at trial, same is without merit. The State has advised that it intends relying on the presumptions, which have not yet been declared unconstitutional. The relevant sub-sections of section 332 of the CPA which remain in operation, and which are of relevance to the proceedings against the respective applicants are limited to those which pertain to corporate bodies and directors/servants thereof and are self-evident.

[62] Moreover, it is clear that the State, in the main, seeks to hold the first applicant liable for the actions of the second applicant in the exercise of his powers or in the performance of his duties as a director of the first applicant, such actions being the respective misrepresentations as contained in the respective charges. It is further clear that the State seeks to hold the second applicant liable for his own actions. In the alternative, the applicants are appraised of the fact that the case that the second applicant has to meet is that he assisted another person in committing the frauds (ie, he could be held liable as an accomplice for the actions on behalf of a servant or agent of the first applicant

on the instructions of the second applicant). By the same token, the first applicant is appraised of the fact that its liability may stem from the performance of the actions of a servant or an agent of the first applicant in the exercise of his or her powers or in the performance of his or her duties as a servant or an agent in the furthering or endeavouring to further the interests of the first applicant, on the instructions of the second applicant.

[63] Failure to provide the identity of the said servants and/or agents, which in any event is not within the knowledge of the prosecutor, does not render the charge defective.[26]

Conclusion

[64] I am accordingly of the view that the applicants have not made out a case to warrant departing from the general principle that the High Court will not ordinarily interfere with unterminated proceedings in a lower court.

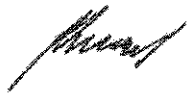
[65] Given the nature of these proceedings, I am of the view that each party should be ordered to pay their own costs.

[66] In the result, I make the following order:

1. The application is dismissed.

[26] Section 84(2) of the Act.

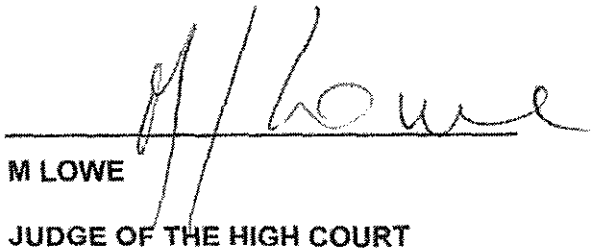
2. Each party is ordered to pay their own costs of the application.



I BANDS

ACTING JUDGE OF THE HIGH COURT

I agree:



M LOWE

JUDGE OF THE HIGH COURT

Appearances:

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