IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. A 458/2012

(1) **REPORTABLE: YES**

(2) **INTEREST TO OTHER JUDGES:** ~~NO~~ YES

13/6/2013
DATE

SIGNATURE

In the appeal of:-

THE STATE	Appellant
and	
HENDRIK FREDERICK DELPORT	First Respondent
CHRISTOPHER ARTHUR PICKARD	Second Respondent
PETRUS CASPARUS HORNE	Third Respondent
H FOURIE	Fourth Respondent
IANNIS PAPOULIAS	Fifth Respondent
MICHIEL HERMANUS KINNEAR	Sixth Respondent
VICTOR WILLIAM ARLOW	Seventh Respondent
DEIDRE ARLOW	Eighth Respondent

JUDGMENT

.../...

Makgoba J *et* Van der Byl AJ:-

Introduction

[1] This is an appeal by the State in terms of section 310 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("*the Criminal Procedure Act*"), against a decision of a regional magistrate sitting in the regional court at Pretoria allowing and upholding a plea in terms of section 106(1)(h) of the Criminal Procedure Act raised by the Respondents after the close of the State case.

[2] The eight Respondents were (together with six other accused persons) charged as Accused Nos. 1, 3, 4, 5, 9, 10, 12 and 13 with 7 239 charges consisting of charges of, *inter alia*, fraud and contraventions of section 2(1)(a) of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998) (racketeering activities), the Customs and Excise Act, 1964 (Act 91 of 1964) (export of goods to a destination other than the one indicated at the time of clearance of such goods for export), the Value-Added Tax Act, 1991 (Act 89 of 1991) (submitting false returns claiming refunds or exemptions), and the Riotous Assembly Act, 1956 (Act 17 of 1956) (conspiracy to commit fraud).

[3] The charges relate to an alleged unlawful enterprise which was allegedly commenced and continued by the Respondents during the period May 1998 to March 2002 with the common purpose and aim to obtain, unlawfully and intentionally, certain tax benefits or to avoid the payment of any tax having allegedly given rise to a loss to the South African Revenue Service or the *fiscus* in a sum of R263 951 804,69.

.../...

[4] The Respondents, like their co-accused pleaded not guilty on all the charges against them on 12 July 2004, whereupon, the trial commenced and proceeded for some five years when the State, after having adduced the evidence of many witnesses, closed its case.

[5] The prosecution was, a decision having earlier been taken by Advv Henning and Smit, being member of the National Prosecting Authority, to prosecute, conducted on behalf of the State by Adv P A van Wyk SC, a practising advocate at the Pretoria Bar, together with Adv T Kannemeyer, an advocate in the employ of the South African Revenue Service.

[6] At the commencement of the prosecution and before the charges were put to the Accused and before they were called upon to plead, Adv. Van Wyk, announced that Adv Kannemeyer and himself were, by virtue of an appointment or "*engagement*" by the Director of Public Prosecutions, acting on behalf of the State, and handed in two documents dated 24 June 2004 which were admittedly issued and signed by Adv MJ Mpshe SC, the then Director of Public Prosecutions, each indicating that, he in terms of section 38(1) and (3) of the National Prosecuting Act, 1998 (Act 32 of 1998) ("*the National Prosecuting Authority Act*"), "*engaged*" Advv Van Wyk and Kannemeyer to conduct the prosecution against the Accused.

[7] The document relating to Adv Van Wyk reads as follows:

"*ENGAGEMENT IN TERMS OF SECTION 38(1) AND (3) OF ACT 32 OF 1998 (NATIONAL PROSECUTING AUTHORITY)*

.../...

I, Mokotedi Joseph Mpshe, Director of Public Prosecutions for the Transvaal Provincial Division of the High Court, in consultation with the National Director of Public Prosecutions, hereby engage Adv P A van Wyk to:

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

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

within my area of jurisdiction and subject to my control and directions in the matter of the State versus Hendrik Frederick Delport and others.

DATE: 24 JUNE 2004

(sgd) ADV M J MPSHE SC
DIRECTOR OF PUBLIC PROSECUTIONS
TRANSVAAL PROVINCIAL DIVISION".

(The document relating to Adv T Kannemeyer is similarly worded)

[8] We may add that Adv Van Wyk was, in accordance with the traditions followed by practising counsel at the Bar, duly briefed by a firm of attorneys on behalf of the South African Revenue Service which was at the time its client.

[9] After the State closed its case the magistrate upon or about 10 December 2008 granted, in terms of section 174 of the Criminal Procedure Act, an application for the discharge of Accused Nos. 2, 6, 8, 11 and 14, but refused to discharge the Respondents.

[10] The magistrate, after having delivered his judgment on the application for discharge in terms of section 174 of the Criminal Procedure Act, *mero motu* requested the parties to address him on the principles enunciated in the then unreported judgment

of Du Plessis J in this Court under Case No. 17709/2006 on 1 February 2008 (now reported as ***Bonugli and Another v Deputy National Director of Public Prosecutions and Others 2010 (2) SACR 134 (T)***).

[11] In ***Bonugli's case, supra,*** Du Plessis J was concerned with an application for an order reviewing and setting aside a decision of the Deputy National Director of Public Prosecutions to appoint, in terms of section 38 of the National Prosecuting Authority Act, two practising advocates and members of the Johannesburg Bar to conduct the prosecution against the two applicants on charges of fraud. The two applicants contended that the appointment of the two advocates were unlawful in effect on the grounds thereof that in view of the factual background of their appointments, the prosecution will not be conducted without fear, favour or prejudice as required by section 179(4), read with section 35(3), of the Constitution and section 32(1) of the National Prosecuting Authority Act.

At **144g** Du Plessis J after having alluded to the facts relevant to the matter concluded as follows:

> "*In my view, a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit subconsciously, act without fear, favour or prejudice. In the course of a criminal prosecution the prosecutor must, virtually on a daily basis, take decisions that might seriously impact on the rights and interests of the accused. The potential for a prosecutor paid by the complainant* ***who had urged the prosecution****, subconsciously to have undue regard to the interests of the complainant who foots the bill, is self-evident.*" (Our emphasis).

As is apparent from the report -

.../...

(a) the two applicants did not raise a plea in terms of section 106(1)(h) of the Criminal Procedure Act, but instead elected, before their trial commenced, to rather approach this Court for an order reviewing and setting the decision to appoint the two advocates to conduct the prosecution on behalf of the State;

(b) the learned Judge held, as already indicated, that in the particular circumstances of that case the decision to appoint the two advocates was unconstitutional, but did not hold, as a general principle, that the appointment of practising advocates as prosecutors is under all circumstances to be held to be unconstitutional.

The circumstances in that case were the following -

(a) that the first applicant was a trustee of a Trust that owned all the shares in the U Company, a finance company, and the Chief Executive Officer of the U Company, and the second applicant was the Discounting Administration Manager of that company;

(b) that the Trust during 1997 sold all its shares to Unibank Ltd warranting that the U Company had earned certain annual profits;

(c) that Unibank refused to pay a last payment for the shares sold to it on the grounds that the first applicant had fraudulently inflated the U Company's profits;

(d) that the first applicant was arrested on charges of fraud relating to the alleged

inflation of the U Company's profits;

(e) that the U Company's attorney at some stage briefed the second respondent for his opinion as to whether a fraud had been committed in relation to inflation of the U Company's profits;

(f) that the Director of Public Prosecutions then decided to prosecute, *inter alia*, the first applicant and, as the State had difficulty in formulating the charge-sheet, the U Company's attorney retained the second and third respondents to assist the State in the criminal proceedings;

(g) that, on representations made by the first applicant's attorney, the Director of Public Prosecutions withdrew the charges against the first applicant and her co-accused;

(h) that, following certain developments, the attorney of the U Company approached a member of the staff of Director of Public Prosecutions, with a view to getting the fraud charges reinstated;

(i) that it was, thereupon, decided that the charges be reinstituted on condition that outside prosecutors be employed and paid by the complainant without any cost implications for the State;

(j) that the second and third respondents were, thereupon, appointed in terms of

section 38 of the National Prosecuting Authority Act on the basis that they would be paid by the complainant;

(k) that, bearing in mind the fact that the facts show -

(i) that the second respondent previously advised the complainant in the case against the applicants on the prospects of successfully prosecuting at least the first applicant;

(ii) that the prosecution was reinstituted at the urgings of the complainant's attorney acting on its behalf;

(iii) that the advocates were to be paid with funds that the complainant made available and that the prosecution would, but for the complainant's funding, not have proceeded,

Du Plessis J held that the question whether a reasonable, objective and informed person would on these facts have reasonably apprehend that the second and third respondents would not act without fear, favour or prejudice, should be answered in favour of the applicants.

In these circumstances we fail to understand why the regional magistrate seems to have regarded these facts, which are in all respects distinguishable from the facts in this case, to be *in pari materia* with the facts in this matter.

[12] Having heard argument on behalf of all the parties on the principles referred to in that matter and, particularly, on the issue whether the appointment or "*engagement*" of Advv Van Wyk and Kannemeyer was contrary to the law, the regional magistrate held on 1 April 2009 as follows:

> "*MY BEVINDING IS DAN EERSTENS DIE REG IS GESKEND, JA. TWEEDENS, VOLGENS MY IS DIT NIE VAN SO 'N FUNDAMENTELE AARD DAT DIT NOODWENDIG MOET LEI TOT, EN KAN DIT NIE OP HIERDIE STADIUM LEI TOT 'N VRYSPRAAK NIE.*".

[13] The magistrate thereafter elected to refer the matter for special review.

[14] On 14 January 2011 this Court (Van der Merwe DJP), having considered the special review, handed down a judgment holding that no case has been made out why this Court should review the proceedings in the regional court and remitted the matter to the magistrate to deal with the matter in accordance with the law.

[15] On 7 November 2011, ie., some 10 months later, the Second Respondent (Accused No. 3) filed an application to change his plea to one whereby, in terms of section 106(1)(h) of the Criminal Procedure Act, it is pleaded that the prosecutors did not have the necessary authority to prosecute in this case, alternatively, that his original plea of not guilty stand, but that he be allowed to raise the said section 106(1)(h) as an additional plea.

[16] Thereafter Accused Nos. 1, 4, 5, 9, 10, 12 and 13 (ie., the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents) elected to join in the proceedings in a

similar application.

[17] After having heard argument on behalf of all parties in this regard, the magistrate delivered judgment on 20 March 2012 and held -

(a) that the Respondents were entitled to change their pleas at that stage of the proceedings, ie., after the State had closed its case;

(b) that their plea in terms of aforesaid section 106(1)(h) be upheld; and

(c) that they are all in terms of section 106(4) of the Criminal Procedure Act entitled to be acquitted.

[18] It is against this decision that the State lodged this appeal in terms of, as we already indicated, section 310 of the Criminal Procedure Act.

[19] As is apparent from the magistrate's reasons he approached the matter on the basis of the following questions, namely -

(a) **firstly**, the question whether an accused can at any stage during a criminal trial raise a plea in terms of section 106(1)(h) of the Criminal Procedure Act;

(b) **secondly**, the question as to the legal consequences of such a plea being upheld;

.../...

(c) **thirdly**, the question as to what is in law to be understood under the expression "*engage, under agreements in writing*" in section 38(1) and (3) of the National Prosecuting Authority Act;

(d) **fourthly**, the question whether it is in law a requirement that a person appointed under the aforesaid section 38 should, furthermore, also be authorized in writing in terms of section 20(5) of that Act to conduct prosecutions;

(e) **fifthly**, the question whether it is in law a requirement that a person who is so authorized to also comply with the provisions of section 20(6) of that Act; and

(f) **sixthly**, the question whether it is in law a requirement that a person appointed under section 38 of the National Prosecuting Authority Act to also take the oath envisaged in section 32(2) of that Act.

[20] In our opinion the first question, which may be decisive of this appeal, is the question whether or not a plea in terms of section 106(1)(h) of the Criminal Procedure Act can or should, assuming for present purposes that the Respondents were entitled to raise such a plea (being a question to which we will return later in this judgment) succeed which was dealt with by the magistrate under the third question posed by him.

Question whether or not a plea in terms of section 106(1)(h) of the Criminal Procedure Act can or should in the circumstances of this case succeed

[21] On this question the magistrate held that, upon a proper interpretation of section 38(1) and (3) of the National Prosecuting Authority Act, the documents handed in at the commencement of the trial entitled "*ENGAGEMENT IN TERMS OF SECTION 38(1) AND (3) OF ACT 32 OF 1998*" cannot be regarded as "*agreements in writing*" as envisaged in section 38(1) of that Act and that in any event no consultation had taken place with the Minister as is likewise envisaged (being an issue which was not raised by any of the parties in argument before us).

[22] It does not appear from this finding that, apart from the alleged procedural shortcomings of the respective appointments, the appointments rendered the proceedings, as was held by Du Plessis J in ***Bonugli's case, supra***, regard being had to the circumstances surrounding their appointments, to have been unconstitutional.

[23] The contention is merely one that, upon a proper interpretation of section 38, read with sections 20 and 32 of the National Prosecuting Authority Act, the two prosecutors were not duly appointed and authorized to conduct the prosecution against the Respondents.

[24] There is no indication or allegation, whether remotely or otherwise, that in the conduct of the proceedings there was at any time any decision or action taken by the two counsel concerned which had or has the potential for the two counsel concerned to have, consciously or subconsciously, undue regard to the interests of the South African Revenue Service or anyone else.

[25] In our opinion the magistrate took a too narrow and particularly legalistic approach in considering the relevant legislation.

[26] Section 38 of the National Prosecuting Act reads as follows:

> *"(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 State, 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 purposes of this section, 'services' include the 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.".*

[27] The evidence shows that Adv Van Wyk had, in anticipation of concluding an agreement as envisaged in subsection (1) of section 38, prepared and signed such an agreement which he submitted to Adv Mpshe SC, **Annexure JHC 3, Volume 7, record p. 776 *et seq*** on 22 June 2004 providing, *inter alia* -

(a) that the National Prosecuting Authority must immediately upon the acceptance of the instruction to the prosecuting counsel furnish the prosecuting counsel with a written authority to prosecute in terms of section 38 of the National Prosecuting Authority Act (which, bearing in mind that the agreement prepared and signed by Adv Van Wyk was signed on 22 June 2004 (followed, incidentally, by Adv Mpshe's "*engagement*" two days later on 24 June 2000);

(b) that the National Prosecuting Authority must make the Policy and Procedural Guideline, the Operational Procedures of the SCCU available to the prosecuting counsel;

(c) for the obligations of the prosecuting counsel;

(d) that the agreement has no cost implications for the National Prosecuting Authority;

(e) for progress reviews between the National Prosecuting Authority and the prosecuting counsel.

[28] The evidence, furthermore, shows -

(a) that, on a request by Respondents' counsel on 11 February 2009 that the "*contract*" concluded with Adv Van Wyk be made available to the defence, such an agreement which was indeed submitted by Adv Van Wyk could not be traced

in the records of the National Prosecuting Authority;

(b) that a copy of the agreement made available by Adv Van Wyk was submitted to Adv Mpshe SC to establish whether he could remember having signed the agreement, but he was, possibly because of the elapse of five years, unable to recall having signed the document.

[29] In argument at the hearing of this appeal counsel who appeared on behalf of the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents heavily relied on the decision in ***Philips v Botha 1995 (2) SACR 228 (W)*** and, particularly, the passage at ***231i*** where the learned Judge expressed himself as follows:

> *"It seems to me that the failure to take objection by way of pleading to a charge does not prevent an accused from raising it thereafter. Absence of title in the prosecutor is fundamental to the proceedings, a jurisdictional void.".*

[30] In relying on this decision and, particularly, on this passage counsel submitted that there is no need to show, as we have indicated in paragraph [24] above, that in the conduct of the proceedings there was at any time any decision or action taken by the two counsel concerned which had the potential for them to have, consciously or subconsciously, undue regard to the interests of the South African Revenue Service or anyone else.

[31] We find ourselves, regard being had to the circumstances of that case, in disagreement with that submission.

[32] In that case the Court was concerned with a matter where an accused was in a private prosecution in terms of section 7(1)(a) of the Criminal Procedure Act discharged at the end of the prosecution's case on the grounds thereof that the prosecution had failed to prove that it had a "*substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the offence*" within the meaning of s 7(1)(a) of the Criminal Procedure Act. On appeal by the prosecution the learned Judge sitting on the appeal raised the question whether the issue could not have been more properly raised by way of a plea in terms of section 106(1)(h) of the Criminal Procedure Act, but counsel on behalf of the prosecution declined to rely thereon. It was in this context that the learned Judge expressed himself at ***231i*** in the passage quoted above, but proceeded to deal with the appeal on the basis that a causal connection between the "*injury*" suffered by the private prosecutor and the commission of the offence was a *sine qua non* of the *locus standi* of the prosecutor and held that the private prosecutor failed to establish such a causal connection.

[33] It is accordingly quite clear that the passage relied upon was a mere *obiter* remark, but, apart from the *obiter* nature thereof, there was in the circumstances no need for the learned Judge to consider, as was done in the ***Bonugli case, supra,*** whether or not the private prosecution was unconstitutional.

[34] It was in the end in effect held that the private prosecutor failed to show, as was held by the magistrate, that he had "*some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of*

the commission of the said offence" as envisaged in section 7(1)(a) of the Criminal Procedure Act.

[35] In our view it is in this matter obvious that all the parties proceeded in the trial on the basis that the two counsel concerned were properly authorized or engaged, as is apparent from the documents handed in, to conduct the prosecution until, presumably, they were requested by the magistrate to address him on the principles enunciated in the ***Bonugli's case, supra,*** which are, as we have already indicated distinguishable from the principles involved in this matter.

[36] As between the National Prosecuting Authority and the two counsel, it is also obvious that they all proceeded on the basis that section 38 of the National Prosecuting Authority Act had at all times been complied with and that the prosecution proceeded in the spirit of the agreement prepared by Adv Van Wyk and accordingly in accordance with the objectives and aims of the said section 38.

[37] In view of the aforegoing we are satisfied, bearing in mind that the section contains no indication that such an agreement should be contained in a single document signed by both parties, that at least the combined effect of the agreement prepared, signed and submitted by Adv Van Wyk (which was indeed received in the offices of the Director of Public Prosecutions) and the documents signed by Adv Mpshe SC engaging Advv Van Wyk SC and Kannemeyer as prosecutors in this matter on the terms set out therein, constitutes substantial compliance with the provisions of section 38.

[38] In any event in our opinion the requirement for an agreement as envisaged in section 38 is, upon a proper interpretation of the section, a requirement to ensure certainty between the Director of Public Prosecutions and the counsel concerned which cannot have an effect on the title of those counsel. The power to engage so-called outside prosecutors is a power which confers a discretion on the Director of Public Prosecutions to designate "*persons having suitable qualifications and experience to perform services in specific cases*". The discretion exercised by the Director of Public Prosecutions was not, as was the case in the ***Bonugli case, supra***, challenged in this case. The question whether or not Advv Van Wyk and Kannemeyer are persons having suitable qualifications and experience was never in dispute. We have no reason to draw any inference from the section that the Legislature intended that any shortcomings, if any, in relation to the conclusion of any such agreement would render the prosecution conducted by the counsel concerned to be invalid or unconstitutional or could have such an effect on the proceedings.

In this regard the following passage from the judgment in ***R v Busa 1959 (3) SA 385 (A)*** is informative where at ***390B*** Steyn CJ dealt with this principle as follows:

> "*Die uiteindelike maatstaf vir die geldigheid of ongeldigheid van 'n handeling wat nie volgens wetsvoorskrif verrig is nie, is die bedoeling van die Wetgewer ..... Daar is verskillende aanduidings wat hier ten gunste van 'n ongeldigheidsbedoeling aangevoer kan word. Die eerste is die gebiedende vorm waarin die gebod gestel is deur die gebruik van die woorde 'moet' en 'shall'. ...* ".

[39] It follows that, even if the Respondents are in these circumstances entitled to change their respective pleas at any time during the criminal proceedings, a plea in terms of section 106(1)(h) of the Criminal Procedure Act cannot be, and should not have

been, upheld.

[40] Although our conclusion on this issue disposes of this appeal, we deem it necessary to briefly deal with the other questions posed by the magistrate, namely, (1) the question whether an accused can at any stage during a criminal trial raise a plea in terms of section 106(1)(h) of the Criminal Procedure Act; (2) the question as to the legal consequences of such a plea, if upheld; (3) the question whether it is a requirement that a person appointed under section 38 to comply with the provisions of section 20(5) and (6) of the National Prosecuting Authority Act; and (4) the question whether it is a requirement that a person appointed under section 38 to comply with the provisions of section 32 of that Act.

[41] We deal *seriatim* with each of these questions.

Question whether a plea in terms of section 106(1)(h) of the Criminal Procedure Act can be raised as a general proposition at any stage of criminal proceedings or, if not, whether such a plea can be raised in the circumstances of this case

[42] On this question the magistrate, referring to the decisions in ***S v Mkhuzangewe 1987 (3) SA 248 (O)*** and the ***Philips case, supra,*** held that an accused does not lose the right to raise a plea of this nature merely because it was not raised at the commencement of the trial, and that the Respondents were entitled to raise that plea at that stage of the trial, being at the close of the State's case.

[43] We are unpersuaded that the magistrate's finding is supported by the two decisions on which he relied for coming to his conclusion.

[44] In the ***Mkhuzangewe case, supra,*** the Court was concerned with a situation where the question was considered whether an accused was entitled to change his plea in the course of the trial from not guilty to one of *autrefois acquit* envisaged in section 106(1)(d) of the Criminal Procedure Act. The magistrate refused to allow the accused to so change his plea. On appeal M T Steyn J, upholding the appeal, held at ***255F*** as follows:

> "*Ek meen die landdros het fouteer deur te beslis dat 'n exceptio rei judicatae, of te wel die pleit van vorige vryspraak (of van autrefois acquit soos dit ook vanweë die Engelsregtelike invloed hier bekend staan) waarvoor voorsiening gemaak is by art 106(1)(d) van die Strafproseswet, slegs by die aanvang van 'n verhoor geopper kan word. Die doel van die regspraak is om die aktualiteite van 'n besondere regsaangeleentheid te bepaal en dit daarvolgens te bereg. Dit is heel maklik denkbaar dat 'n geval kan voorkom waarin die bestaan van 'n vorige vryspraak eers in die loop van 'n strafverhoor en nadat die betrokke beskuldigde reeds gepleit het ontdek kan word. (Die onderhawige is trouens 'n baie goeie voorbeeld van daardie soort regsontdekking.) Dit sou in só 'n geval ondenkbaar wees dat blote formalisme sou seëvier en die verhoor verder toegelaat sou word om te verloop sonder dat aan die beskuldigde die geleentheid gegun word om na só 'n ontdekking 'n pleit van vorige vryspraak te opper.*" (Our emphasis).

It is significant that the Court acknowledged that it is easily imaginable ("*maklik denkbaar*") that where the existence of a plea of a previous discharge may only be discovered in the course of a trial and that mere formalism ("*blote formalisme*") should not be allowed to prevail without affording an accused an opportunity to raise such plea after the discovery of a previous acquittal.

The magistrate's reliance on this decision clearly lost sight of the fact that this decision is not support for a general proposition that an accused is allowed to change any plea from one to another at any time during the course of the trial and that such a change in effect depends on the circumstances of the particular case.

[45] In the ***Philips case, supra,*** the Court was, as we have already indicated, concerned with a matter where an accused was in a private prosecution in terms of section 7(1)(a) of the Criminal Procedure Act discharged at the end of the prosecution's case on the grounds thereof that the prosecution had failed to prove that it had a "*substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the offence*" within the meaning of s 7(1)(a) of the Criminal Procedure Act.

Apart from the *obiter* nature of this consideration, the magistrate, in relying on this decision, lost sight of the fact that the learned Judge obviously did not intend to lay down a rule, as a general proposition, that, despite the circumstances of a particular case, an accused is entitled to change his plea under whatever circumstances at any time during criminal proceedings.

[46] Instead of relying blindly on these decisions the magistrate should have considered the particular circumstances of this case.

[47] As we have already indicated, the objections against the authority of the two advocates concerned were directed solely at the alleged procedural shortcomings of

their appointments.

[48] The objections were obviously not directed at the competency and, as in the ***Bonugli's case, supra***, the objectivity of the two counsel and that their appointments were unconstitutional in that they would conduct the prosecution "*without fear, favour or prejudice*".

[49] We are accordingly unpersuaded that this is a case where it can be held that the two counsel acted without fear, favour or prejudice and were in a position to take, as in the circumstances which prevailed in the ***Bonugli's case, supra***, decisions on a daily basis or otherwise that did or could have seriously impact on the rights and interests of the Respondents.

[50] As a matter of fact it would seem -

(a) that the trial proceeded for a period of more than five years without any indication of any objections having been raised against the integrity and objectivity of the two advocates concerned; and

(b) that there is, the Respondents obviously having been aware of all the facts and legal provisions on which their envisaged plea in terms of section 106(1)(h) is based, no reason why this plea had not been raised at the commencement of the trial.

[51] Bearing in mind that had this plea been raised at the commencement of the proceedings as the Respondents should have done, the shortcomings, if any. complained of could easily have been resolved or remedied or other persons could have been appointed or designated to conduct the prosecution.

[52] In having raised this issue at this particularly late stage of the proceedings the State is obviously placed in a position to its extreme prejudice to either institute criminal proceedings afresh against the Respondents in similar circumstances after the alleged shortcomings have been removed or to rather abandon any further steps against the Respondents whilst the Respondents have not suffered or have shown any trial related prejudice.

[53] This is a state of affairs that cannot be regarded to be in the interest of justice.

[54] In this regard it is relevant and of particular importance to refer to the following dictum in ***National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA)*** at ***151f, para [5]***:

> "*There is no such thing as perfect justice .... Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.*".

[55] In so far as the alleged shortcomings may be regarded as an irregularity the following passage from ***Hlantlalala v Dyantyi NO 1999 (2) SACR 541 (SCA)*** at ***545f,***

para [8], [9] and [10], where the Court dealt with a situation where a presiding officer failed to inform an unrepresented accused of his right to legal representation, is in our view informative:

> "*[8] The crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellants' trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction on appeal. ..... ".*

[56] The Respondents' application to have sought a change of their pleas at this late stage seems to smack in all the circumstances of opportunism.

[57] We are satisfied that the magistrate erred in finding that the Respondents were entitled to have changed their respective pleas without considering all the circumstances relevant to the question whether such a plea could have been raised at that late stage of the proceedings.

The question, in the event of a change of a plea from not guilty to one in terms of section 106(1)(h) of the Criminal Procedure Act , as to the legal consequences of such a plea being upheld

[58] The magistrate, apparently having granted the application for amendment of their pleas, upheld the eight Respondents' plea in terms of section 106(1)(h) of the Criminal Procedure Act.

[59] The magistrate, having correctly pointed out that there are no direct authority on this issue, nevertheless held that they are in terms of section 106(4) of the Criminal Procedure Act entitled, because they had already pleaded, to a judgment, and acquitted the Respondents.

[60] There are a number of difficulties in this approach.

[61] In **the first place** a plea in terms of section 106(1)(h) of the Criminal Procedure Act is obviously intended to be raised at the commencement of proceedings in which an accused is charged with some criminal conduct. If such a plea is raised at that stage the proceedings can simply not proceed on the merits of the charges before either a decision can and is reached on the question whether or not the prosecutor concerned has indeed a title to prosecute or another person having such title is appointed or designated to act as prosecutor. By having raised this plea at such a late stage in these proceedings the Respondents have obviously deprived the State, to its extreme prejudice, of such an opportunity.

[62] In **the second place** the question can be raised, as the magistrate did, whether, upon a proper interpretation of section 106(4) of the Criminal Procedure Act, an accused in these circumstances is entitled to be acquitted in terms of that section.

Section 106(4) reads as follows:

> *"An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea*

of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.".

It is not clear whether the magistrate granted the main order claimed by the Respondents that their respective pleas be changed from not guilty to a plea in terms of section 106(1)(h) or whether he granted the alternative prayer claimed that their original plea of not guilty be allowed to stand and that they be allowed to raise the said section 106(1)(h) as an additional plea.

We have, therefore, to accept that the Respondents' main claim was granted.

In having allowed the Respondents to change their pleas from not guilty to a plea in terms of section 106(1)(h), the Respondents' plea of not guilty is in effect no longer on record which raises the question whether they are, upon a proper interpretation of section 106(4), entitled to demand to be acquitted.

The section obviously has as its aim to entitle an accused that has pleaded not guilty or guilty to a charge, depending on whether he or she has pleaded guilty or not guilty, to demand to either be acquitted or convicted.

There question, however, here is whether an accused who raised a plea in terms of section 106(1)(h) is also entitled to demand to be acquitted.

In our view on a practical and realistic approach of the section, the section cannot find application in these circumstances.

.../...

In so far as the magistrate upheld the plea, it follows that the proceedings may have been a nullity calling for an order for it to be so declared in respect of which the magistrate has no power or authority.

[63] In **the third place** the consequences of a plea raised timeously are, however, complicated where an accused is permitted, as *in casu,* to raise such a plea in the course of the proceedings. In our view, assuming that it is in particular circumstances permissible to raise such a plea in the course of a trial, the proceedings up to that date may, if such a plea is upheld, depending if it can, perhaps, be held that the accused's right to a fair trial has been infringed, be a nullity. A magistrate has no authority to declare any proceedings to be a nullity. In such an event an accused in such a matter will be bound to approach the High Court for an order declaring such proceedings to be unlawful.

[64] We are accordingly of the opinion that the magistrate had no authority to apply section 106(4) on the basis of a finding that the proceedings were a nullity being an issue which falls with the jurisdiction of the High Court.

The question whether it is a requirement that a person appointed under section 38 of the National Prosecuting Authority Act to comply with the provisions of section 20(5) and (6) of that Act

[65] In relation to the application of the provisions of section 20(5) and (6) of the National Prosecuting Authority Act the magistrate held, as we have already briefly

pointed out, that a person appointed in terms of section 38 of that Act must over and above such appointment also be authorized to conduct a prosecution by way of a delegation in terms of section 20(6) of that Act which must also comply with provisions of subsection (6) of that section and to take the oath envisaged in section 32 of that Act.

[66] The said section 20(1), (5) and (6) reads as follows:

> *"(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) 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 authorised thereto in writing by the National Director, or by a person designated by the National Director.*
>
> *(6) A written authorisation 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.".*

[67] In interpreting the provisions of this section with a view to the findings of the magistrate, it is significant to note that the expression "*prosecutor*" used in this section means in its defined meaning in section 1 of the Act *"a prosecutor referred to in section*

16 (1)".

[68] It would accordingly appear that it was not the intention that a person appointed under section 38 should over and above such appointment be furthermore authorized to conduct a prosecution.

[69] The obvious reason for that is the fact that, as opposed to appointments in terms of section 16, an appointment in terms of section 38 in effect provides, not only for the engagement, but also with the authority to prosecute.

The question whether its is a requirement that a person appointed under section 38 to comply with the provisions of section 32 of the National Prosecuting Authority Act

[70] Section 32 reads as follows:

> "*(1) (a)* *A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.*
>
> *(b)* *Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.*
>
> *(2)(a)* *A National Director and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of*

.../...

this Act, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely -

'I .....
(full name)

do hereby swear/solemnly affirm that I will in my capacity as National Director/Deputy National Director of Public Prosecutions/Director/Deputy Director of Public Prosecutions/prosecutor, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)'.

(b) Such an oath or affirmation shall -

(i) in the case of the National Director, or a Deputy National Director, Director or Deputy Director, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the National Director, Director or Deputy Director, as the case may be, is situated; or

(ii) in the case of a prosecutor, be taken or made before the Director in whose Office the prosecutor concerned has been appointed or before the most senior judge or magistrate at the court where the prosecutor is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.".

[71] Similarly as in the case of section 20 the expression "*prosecutor*" in this section relates to a prosecutor appointed under section 16.

[72] It would accordingly appear not to have been the intention of the Legislature to prescribe an oath to be taken by a person appointed under section 38.

[73] In any event -

(a) we can find no reason or indication in the National Prosecuting Authority Act as to why the failure to have taken any oath should reflect adversely on the validity of an appointment under section 38;

(b) it is well-known that all advocates are on admission required to take an oath or make an affirmation swearing or affirming that he or she will *"truly and honestly demean"* himself or herself in the practice and to be faithful to the Republic of South Africa (which, although worded differently in the oath or affirmation prescribed in section 32, in effect has the same aim, namely, to uphold and respect the laws of this country, including the aims of the Constitution).

Conclusion

[74] For the reasons set out in this judgment, we are in conclusion of the view -

(a) that, taking into consideration all the circumstances in this matter, Advv Van Wyk and Kannemeyer were duly authorized in terms of section 38 to conduct the prosecution in this matter and that, in any event, there is no indication -

(i) that the Legislature intended that any shortcomings, if any, relating to the conclusion of the agreement envisaged in section 38(1) should give rise to the invalidity or unconstitutionality of proceedings conducted by a

person who was indeed engaged as prosecutor;

(ii) that there are no grounds on which it can be held that the circumstances under which the trial took place had or could have given rise to an unfair trial; and

(b) in relation to the question whether the Respondents were entitled to raise a plea in terms of section 106(1)(h) of the Criminal Procedure Act at any time during the trial, that the Respondents, having been aware of all the facts relevant to their plea, were in the circumstances of this case not entitled to have raised such a plea at any time after the commencement of the trial;

(c) in relation to the question whether Advv Van Wyk and Kannemeyer should, in addition to their "*engagement*" under section 38, have been authorized in terms of section 20(5) and (6) to conduct the prosecution in question, that they were not required to have been so authorized; and

(d) in relation to the question whether they should have taken the oath prescribed under section 32, that they were not required to take such oath.

[75] It follows from the aforegoing that we are of the opinion that a plea in terms of section 106(1)(h) could under the circumstances of this case not have been raised after the trial commenced and could in any event not have been upheld and that, therefore, the application for the amendment of the Respondents' plea of not guilty should not

have been granted and that the concomitant orders or rulings made by the magistrate should accordingly fall away.

Order

[76] In all the circumstances, and for the reasons given, we make the following orders:-

1. **THAT** the appeal be upheld, that the order granted by the magistrate be set aside and replaced with the following order:

> "***THAT*** *the Respondents' application to change their pleas from not guilty to a plea in terms of section 106(1)(h) of the Criminal Procedure Act, 1977, be refused.*".

2. **THAT** the matter be remitted to the magistrate to proceed with the trial in accordance with the law.

E M MAKGOBA
JUDGE OF THE HIGH COURT

P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellant — **ADV P J LOUW**
ADV J M FERREIRA
ADV L FRIESTER

On the instructions of — **DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS**
Church Square 28

.../...

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On behalf of the 6th Respondent	ADV G LOUW
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Date heard	6 June 2013
Judgment delivered	13 June 2013