

Schabir Shaik versus the Minister of Justice and Others

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

In June 2002 the applicant, Mr Schabir Shaik, was summonsed by the Investigating Director, under the provisions of the National Prosecuting Authority Act 32 of 1998 (the Act), for questioning. At the time, allegations of corruption in relation to the acquisition of armaments by the Department of Defence were being investigated under the Act. Although a suspect, the applicant had not been charged with any offence covered by the investigation. When the applicant appeared for questioning, he challenged the validity of the proceedings. The enquiry was adjourned to enable the applicant to pursue this challenge in the High Court in Durban.

The High Court held that section 28(6) of the Act violated the applicant's right to silence in terms of section 35(1)(a) of the Constitution. It found, however, that such infringement was justified under section 36(1) of the Constitution, because the Act serves a crucial role in the fight against organized crime and corruption. It further held that the proceedings at an enquiry are not of a judicial or administrative nature and the applicant's demand for an independent arbiter was ill-founded. The application was accordingly dismissed with costs.

The applicant then applied to this Court for leave to appeal. After the application had been lodged, the applicant was charged with certain of the offences that had been the subject of the section 28 enquiry. Argument on appeal was limited to the constitutionality of section 28(6) of the Act because of its alleged incompatibility with the right to a fair trial in particular with the rights of arrested and accused persons to remain silent.

This Court holds that the reference to "any person" in section 28(6) does not apply to accused persons and therefore the applicant can no longer be examined, because he has become an accused in respect of the offences that are the subject of the section 28 examination. Although the issues are effectively moot between the parties, there are persons similarly placed to the applicant before he was charged, who would benefit from a ruling by this Court. As against this, is the fact that the wrong section of the Act has been challenged. It is not subsection 28(6), but subsection 28(8) of the Act that limits an examinee's protection in respect of evidence compelled. It is constitutionally a serious matter for any court to declare legislation invalid and it is therefore essential, in order to ensure fairness to the State and other interested parties, that litigants identify accurately the statutory provisions they are attacking on constitutional grounds. The parties and the High Court moreover restricted the enquiry to the serious offences which formed the subject matter of the section 28 enquiry instead of considering all the offences, some of them substantially less serious, that could be the subject of examination under the section. Accordingly a proper justification enquiry under section 36(1) of the Constitution could not and cannot now be conducted

Viewing all the above factors collectively, the Court concludes that it is not in the interests of justice to grant the application for leave to appeal. The application is dismissed and all the parties are to bear their own costs of this application. The unanimous judgment was delivered by Ackermann J.