CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 93/12
[2013] ZACC 19

In the matter between:

TULIP DIAMONDS FZE	Applicant
and	
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MENZI SIMELANE NO	Second Respondent
STEVEN HOLZEN NO	Third Respondent
DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
BRINKS SOUTHERN AFRICA (PTY) LTD	Fifth Respondent

Heard on : 26 February 2013

Decided on : 13 June 2013

JUDGMENT

VAN DER WESTHUIZEN J (Moseneke DCJ, Froneman J, Khampepe J, Mhlantla AJ and Skweyiya J concurring):

Introduction

[1] Standing is an important element in determining whether a matter is properly before a court. Our law accords generous rules for standing that permit applicants to bring lawsuits either on their own behalf or on behalf of others. But these are not limitless. A methodical and thorough application of the rules of standing is necessary to ensure, amongst other things, that relief is being sought by the appropriate party.

[2] The subject matter of this case is a request for legal assistance from Belgium. In the context of that request, this Court must determine whether the applicant, Tulip Diamonds FZE (Tulip), has standing to challenge the lawfulness of certain decisions taken by South African authorities to carry out the Belgian request. The challenge is brought in terms of the principle of legality and the Promotion of Administrative Justice Act[1] (PAJA). If Tulip fails in this challenge, 18 documents that pertain to it will be disclosed to Belgian authorities. Both the South Gauteng High Court, Johannesburg (High Court) and the Supreme Court of Appeal dismissed Tulip's challenge, finding that it did not have standing to bring the application. Tulip now seeks leave to appeal against the judgment of the Supreme Court of Appeal.

Factual background and litigation history

[3] Tulip is a company incorporated and registered in the United Arab Emirates. It engages in the import and export of rough diamonds, as well as in the purchase and

[1] 3 of 2000.

sale of rough diamonds in Dubai. Tulip is not registered in South Africa and has no physical presence in this country.

[4] Tulip's application is against five respondents: the Minister for Justice and Constitutional Development (Minister); the former Director-General of the Department of Justice and Constitutional Development (Department of Justice), Mr Menzi Simelane (Mr Simelane); a Magistrate at the Kempton Park Magistrate's Court, Mr Steven Holzen (Magistrate); the current Director-General of the Department of Justice, Ms Nonkululeko Sindane; and Brinks Southern Africa (Pty) Ltd (Brinks). Brinks' parent company is a global provider of secure transport and security services. No relief is sought against either the current Director-General of the Department of Justice or Brinks.

[5] This case originates with a request from investigators in Belgium. On 23 December 2008 the Court of First Instance in Antwerp, at the direction of the Public Prosecutor in Antwerp, submitted to South African authorities a Letter of Request (Request) for evidence. The evidence is sought as part of an ongoing investigation by Belgian authorities into potential criminal activity by one entity – Omega Diamonds BVBA (Omega), a Belgian company – and one individual – Mr Sylvain Goldberg (Mr Goldberg), a Belgian national.

[6] The investigation stems from Omega's practice of importing diamonds sourced from the Republic of Angola (Angola) and the Democratic Republic of the Congo

(Congo) through Dubai and into Antwerp. During the transfer, documents were allegedly manipulated which allowed Omega to conceal the origin of the diamonds. Allegedly, by concealing the origin, which had the effect of increasing the value of the diamonds, Omega was able to hide its additional profit from Belgian tax authorities.

[7] Tulip was Omega's intermediary in Dubai. At Omega's direction, Tulip imported diamonds from Angola and Congo, received the shipment in Dubai and then exported the diamonds to Antwerp. Invoices discovered by Belgian authorities during a search of Omega's offices revealed that Tulip had hired Brinks as a courier to transport diamond shipments between Angola and Dubai.

[8] In view of Brinks' involvement, on 23 December 2008 Belgian authorities issued the Request to South African authorities to obtain evidence from Brinks to further the investigation. The Request was made "[i]n view of the good relations between [Belgium and South Africa] and the mutual interest for both States to combat crime on an international level". The Request contains identification information for the two subjects of the investigation, citations to the relevant Belgian criminal provisions and a statement of facts. The Request states unequivocally that investigators do not consider Brinks a possible perpetrator, co-perpetrator or accomplice. It then outlines several demands for information, both documentary and oral, regarding Brinks. Included in these demands is information on Brinks' business activities with other companies. One of those companies is Tulip. The two specific demands concerning Tulip implore the South African authorities—

> "[t]o inspect the administration and bookkeeping of Brinks in South Africa in order to: . . . search and investigate all invoices and diamond transports made for and to the following companies in Dubai (UAE): Tulip Diamonds . . . [and] . . . [t]o gather the judicial antecedents of and all useful information on the South African (citizen) Hawkins Vivien Clare . . . who is a mandatory of the company Tulip Diamonds in Dubai (UAE)."

After detailing additional categories of information, the Request provides assurance that information disclosed pursuant to the Request would be used only for the investigation into Omega and Mr Goldberg.[2]

[9] The Request was forwarded to the Department of Justice. On 5 June 2009 a Deputy Chief State Law Adviser submitted a ministerial memorandum to the Minister, Deputy Minister of Justice and Constitutional Development and to Mr Simelane, who was the Director-General of the Department of Justice at that time. Mr Simelane considered the Request and recommended that the Minister grant it in terms of section 7(4) of the International Co-operation in Criminal Matters Act[3] (Co-operation Act). The Minister considered Mr Simelane's recommendation and approved the request to obtain evidence. On being notified by the Minister of his approval, Mr Simelane caused the Request to be forwarded to an appropriate magistrate. On 1 October 2009 the Magistrate issued a subpoena pursuant to section 205 of the Criminal Procedure Act.[4]

[2] The Request states: "[i]t goes without saying that inquiry results obtained by means of the current Rogatory Request will not be used in any other inquiry than this Rogatory Request."

[3] 75 of 1996.

[4] 51 of 1977.

[10] The subpoena was directed to Jane Hamilton of Brinks and required her to appear for questioning "by the authorised Deputy Director of Public Prosecutions/Public Prosecutor" on 6 November 2009. Alternatively, Ms Hamilton's attendance would be excused if she furnished the requested information to the Magistrate prior to the court date. Like the Request, the subpoena sought an array of information from Brinks relating to its involvement with many companies. Information was sought for the period 1 January 2003 to 3 September 2008. Of the four requests in the subpoena, two implicate Tulip. They ask Ms Hamilton to—

> "[p]rovide copies of all the Brink's (Southern Africa) Pty Ltd invoices regarding the transportation of diamonds to and for [a dozen entities, including Tulip] . . . [and] . . . [p]rovide copies of the relevant work/client files, including invoices, Kimberley Certificates, Packing lists, shipment dockets, documents in relation to insurances taken, instructions, correspondence, coordination of principals/intermediaries, received instructions and meetings and conversations held [of a dozen companies, including Tulip]."

[11] Tulip was not notified by South African authorities that the Request, which specifically named Tulip, had been approved. Nor was it given notice that the subpoena, which also named Tulip, had been issued. Tulip nevertheless got wind of these developments on or about 2 October 2009, soon after the subpoena was issued. Fearing that information pertaining to it would be disclosed, Tulip sprang into action. Its lawyers commenced a discussion with Brinks' lawyers to determine, amongst other things, "whether or not Brinks intended to hand over any documents that contained any details relating to [Tulip . . .] to any third party". Brinks' lawyers refused to provide the information.

[12] On 12 October 2009, in the light of Brinks' position, Tulip launched an urgent application to interdict Brinks from disclosing any documentation or information relating to Tulip and to afford Tulip "an opportunity properly to consider the basis upon which its confidential information might be divulged."[5] On 28 October 2009, the High Court granted an urgent temporary order interdicting Brinks from disclosing information in its possession, knowledge or control relating to Tulip. The temporary order set off extensive negotiations and meetings between lawyers for Tulip and Brinks, and representatives of the National Prosecuting Authority of South Africa, the Department of Justice, the South African Police Service and the State Attorney. The temporary order was extended several times throughout the first half of 2010.

[13] During the course of negotiations, it was agreed that Brinks would compile an index of "all the documents relating to [Tulip] that Brinks intended to make available to the authorities in terms of the subpoena and furnish it to [Tulip's lawyers]." The index identifies a total of 18 documents. They all appear under the heading "List of Brinks' Invoices". In early 2010, Tulip's lawyers received copies of all the documents listed in the index. This collection of documents represents the information about which Tulip is concerned and around which this case revolves. Absent intervention by this Court, only these 18 documents would be turned over to Belgian authorities.

[5] A second company, Aster Diamonds FZCO, which was named in the subpoena, also sought to restrain the disclosure of its documents to Belgian authorities.

[14] Following the High Court's granting of the temporary order, Tulip decided to seek a review of the decisions by South African authorities giving effect to the Request. It launched an application against the respondents on 19 May 2010 and consolidated into it its application against Brinks. The application sought to review and set aside the decisions by the Minister, Mr Simelane and the Magistrate because, Tulip contended, those decisions were unfair, improper and unlawful. In particular, Tulip alleged that multiple procedural irregularities in the respondents' decisions contravened section 7 of the Co-operation Act and Tulip's constitutional right to just administrative action under section 33 of the Constitution, as given effect to by PAJA. To establish that it had standing in the case, Tulip averred:

> "Giving effect to the respondents' decisions will materially impact upon [Tulip's] proprietary rights in its confidential business information, which rights will be immediately infringed on the handing over [of] the documents called for in the subpoena."

[15] The High Court dismissed Tulip's application on the basis that it did not have standing. It relied on section 7(1) of the Constitution[6] to reason that because Tulip had no physical presence in South Africa, it could not invoke constitutional rights in our courts. Although the High Court concluded that Tulip did not have standing to bring its suit, the Court nevertheless proceeded to consider the merits of Tulip's case and the three grounds on which it sought review of the respondents' decisions to give effect to the Request. It rejected all three grounds.

[6] Section 7(1) of the Constitution provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[16] Tulip appealed this decision to the Supreme Court of Appeal. The Supreme Court of Appeal agreed with the High Court's outcome but differed on the reasons as to why Tulip did not have standing.[7] It found that Tulip did not have standing at common law because it could not prove that it had a "direct and substantial interest in the right which is the subject-matter of the litigation".[8] This was because Tulip did not demonstrate that the documents at issue contained confidential information, or that there was any legal basis for ascribing confidential treatment to the documents. The Supreme Court of Appeal declined to consider the merits of Tulip's review application.

Parties' submissions in this Court

[17] Tulip argues that the respondents conceded standing in their High Court papers. The respondents counter that the concession was a qualified one, made in error on a point of law and should not be binding on a court. In the alternative, Tulip contends that its standing flows from its private and confidential interests in the documents. The documents are private because they contain private business information, implicating private business interests; Tulip is the subject of the information and the documents are the sort of documents which are on their face private. The documents are confidential because Brinks affirms that they are confidential. The respondents argue that Tulip does not have standing because this Court is not bound by an

[7] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* [2012] ZASCA 111; 2013 (1) SACR 323 (SCA).

[8] Id at para 13.

incorrect concession concerning a legal question. The respondents aver that the Supreme Court of Appeal was correct in its approach to and finding on standing. Neither Tulip's privacy nor its confidentiality interests are affected.

[18] On the merits, Tulip argues that the decisions to accede to the Request and to issue the subpoena should be reviewed. This is because the Director-General took irrelevant considerations into account when deciding to give effect to the Request and the Request does not provide full and proper disclosure of certain facts about the Belgian investigation. The Request is also over-broad and vague and there is no jurisdictional basis in terms of section 7(2) of the Co-operation Act for acceding to it. Tulip also argues that the Magistrate was not authorised to issue the subpoena in terms of section 205 of the Criminal Procedure Act. Finally, Tulip avers that there was a failure of procedural fairness on the part of the respondents by omitting to notify Tulip of their decisions, and that the Director-General improperly delegated his authority to designate a magistrate. The respondents contest several of these grounds of review and argue that the decisions giving effect to the Request are valid and that the subpoena should not be set aside.

Constitutional and legal framework

[19] Tulip's challenge seeks to review decisions made by the respondents in terms of the Co-operation Act. The purpose of the Co-operation Act is to facilitate South Africa's co-operation with foreign States on issues relating to the execution of sentences in criminal cases, the confiscation and transfer of criminal proceeds and, of

particular import in this case, the provision of evidence.[9] The Co-operation Act governs the provision of evidence in two directions – from South Africa to a foreign State, and from a foreign State to South Africa. A roadmap for the latter appears in section 7.[10] Where a foreign State requires assistance in obtaining evidence in South Africa for use in that foreign State, section 7 provides that a letter of request be submitted to South African authorities. The authorities review the request and designate a magistrate to issue a subpoena to collect the requested evidence. Section 8 addresses the procedures to be followed by a magistrate to examine witnesses.[11]

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[9] The Preamble to the Co-operation Act states its purpose as follows:

> "To facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign States; and to provide for matters connected therewith."

[10] Section 7 of the Co-operation Act provides:

> "(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
>
> (2) Upon receipt of such request the Director-General shall satisfy himself or herself—
>
> (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or
>
> (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.
>
> (3) For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
>
> (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.
>
> (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides."

[11] Section 8 of the Co-operation Act reads:

> "(1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her

[20] In challenging the respondents' decisions taken under the Co-operation Act, Tulip relies on the principle of legality and the constitutional protection of the right to just administrative action,[12] protected legislatively by PAJA.

[21] In this case, the Court of First Instance in Antwerp issued the Request to obtain South Africa's assistance in collecting evidence located here. That evidence is needed to determine whether Omega and Mr Goldberg have committed certain crimes under Belgian law. Because the Request seeks the help of South African authorities in the provision of evidence in a criminal matter arising in a foreign State, it falls well within the language and spirit of the Co-operation Act. It is in this context that we must assess whether the interests that Tulip seeks to rely on for standing are capable of being affected by the respondents' decisions.

> evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause, is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.
>
> (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.
>
> (3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.
>
> (4) If the services of an interpreter were used at the examination of the witness, the interpreter shall certify that he or she has translated truthfully and to the best of his or her ability, and such certificate shall accompany the documents transmitted by the magistrate to the Director-General."

[12] Section 33(1) of the Constitution provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[22] In interpreting the provisions of the Co-operation Act, this Court has sought to adopt an approach that allows the Co-operation Act to co-exist with other domestic legislation.[13] The Co-operation Act has to be implemented alongside related legislation, bearing in mind that the Bill of Rights and constitutional restrictions still exist to safeguard against the abuse of power. Indeed, as we observed in *Falk* and acknowledge in this case, "[i]nternational co-operation in combating crime to protect society is a legitimate constitutional objective."[14]

Leave to appeal

[23] Leave to appeal to this Court requires us to determine whether a constitutional matter is raised and whether it is in the interests of justice to grant leave. Tulip's application implicates the constitutional right to just administrative action under section 33. The case therefore raises a constitutional matter. It is also in the interests of justice to grant leave, as Tulip's arguments deal with the requirements of standing for violations of constitutional rights. Leave should therefore be granted.

Have the respondents conceded standing?

[24] Tulip argues that the respondents conceded standing in their answering affidavit before the High Court and that they should not be permitted to withdraw this concession. The respondents submit that they erroneously conceded standing only so far as the Request extends to the invoices and to diamond transporting. However, they

[13] In *Falk and Another v National Director of Public Prosecutions* [2011] ZACC 26; 2012 (1) SACR 265 (CC); 2011 (11) BCLR 1134 (CC) (*Falk*) at paras 85-92, this Court followed a broad approach to interpreting the Co-operation Act.

[14] Id at para 92.

argue that standing is a legal question. It must be determined by a court and not one of the parties. A concession of this nature should not bind this Court. Tulip responded to this point in oral argument by submitting that standing is not a purely legal question. There are factual dimensions to standing. In this instance, because the respondent conceded standing, Tulip did not have to lay any basis to assert its standing.

[25] I do not agree with Tulip's approach. Courts have stated that it would create an intolerable situation if a court were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point as a result of an error of law on its part.[15] It would be intolerable if this Court were to be bound by an error of law made by a party which that party then, within reasonable time, corrected. There must be exceptionally good reason for a court's assessment of law to be fettered by a party's error.

[26] Prejudice may provide this reason. Tulip had to put facts forward to establish standing in its founding papers. This it purported to do.[16] The respondents withdrew their concession within a reasonable time. Despite this withdrawal, Tulip argued standing before the High Court without asking for leave to adduce further evidence. It could have sought leave on the ground that the initial concession on standing prevented it from presenting its full case on standing. It did not do so. There is thus

[15] See *Paddock Motors (Pty.) Ltd. v Igesund* 1976 (3) SA 16 (A) at 23H, cited in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 31 fn 11. See also *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509H-510A.

[16] See [14] above.

no proper ground to find that Tulip has been prejudiced as a result of the initial incorrect and qualified concession on standing.

Standing

[27] Our law contemplates standing in two ways – at common law and under the Constitution. At common law, an applicant must be able to show a sufficient, personal and direct interest in the case.[17]

[28] Section 38 of the Constitution introduced another framework in which to assess standing. It provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[29] Where an applicant seeks to vindicate a right promised in the Bill of Rights, as Tulip does here, the starting point in the standing analysis is section 38 of the

[17] *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534A-B and *United Watch and Diamond Co (Pty.) Ltd. and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (CPD) at 415B. See also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (*Giant Concerts*) at para 41(a) and Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co, Cape Town 2012) at 488.

Constitution.[18] This is because section 38 is a deliberate and radical departure from common law. Moreover, this approach is precise and efficient. Constitutional standing is broader than traditional common-law standing.

[30] Because Tulip alleges the violation of a constitutional right and acts in its own interest, the proper question before this Court is whether Tulip has established standing under section 38(a). In *Giant Concerts*, this Court dealt comprehensively with own-interest standing under section 38 and PAJA:

> "PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that 'adversely affects the rights of any person and which has a direct, external legal effect'. PAJA provides that 'any person' may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because 'it seems clear that the provisions of section 38 ought to be read into the statute.' This is correct.
>
> The Supreme Court of Appeal has rightly suggested that 'adversely affects' in the definition of administrative action was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that Giant, as an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.
>
> In seeking to assert this right, Giant has never claimed to be acting on behalf of someone else who was incapacitated, or as a member of, or in the interest of, a group or class of persons, or in the public interest, or in the interest of the members of an association. The sole interest it claims to assert is its own, which during argument its

[18] *Giant Concerts* above n 17 at para 28.

Counsel correctly described as commercial. It is that interest we must examine to see whether it affords Giant title to challenge the transaction.

And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

> 'The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset], before the merits are considered.'

The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if 'the right remedy is sought by the right person in the right proceedings'. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

> Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."[19] (Footnotes omitted; emphasis in original.)

[31] Tulip must thus establish that its interests or potential interests are directly affected by the alleged unlawfulness of the actions taken by the respondents. To succeed, Tulip must establish both components of own-interest standing: interest and direct effect.[20] As discussed in *Giant Concerts*, Tulip must demonstrate that its interests are more than hypothetical or academic.[21] It must also show that its interests and the direct effect are not unsubstantiated. Mere allegations, without more, are not sufficient to prove the elements of own-interest standing.[22]

Interest

[32] In its founding papers in the High Court, Tulip stated that "[g]iving effect to the respondents' decisions will materially impact upon [Tulip's] proprietary rights in its confidential business information, which rights will be immediately infringed on the handing over [of] the documents called for in the subpoena."[23]

[33] In written argument before this Court, Tulip sought to extend this to reliance on the right to privacy as well. Tulip describes its interest as "informational privacy", which encompasses a right to "informational self-determination". Tulip claims that it

[19] Id at paras 29-35.

[20] Id at para 43.

[21] Id at para 41(c).

[22] Id at paras 35 and 53.

[23] See [14] above.

is entitled to determine with whom information concerning it is shared because it is the subject of that information. It should therefore be consulted on the information's collection, use or disclosure to other parties.

[34] Tulip also attempts to anchor its privacy interest in the documents by arguing that the documents sought are by their very nature private or give rise to an expectation of privacy.

[35] Tulip's belated reliance on privacy cannot be entertained. Privacy is a "right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."[24] Juristic persons are not the bearers of human dignity and their privacy rights can therefore hardly be as intense as those of human beings.[25] The infringement of human dignity and thus the privacy of human beings are often self-evident. Not so in the case of juristic persons. Here no facts self-evidently point to any infringement of Tulip's privacy, either as subjectively expected by Tulip, or as an objectively reasonable expectation.[26] Tulip does not even assert a subjective expectation in its founding papers. Privacy cannot therefore assist Tulip's arguments on standing.

[24] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 18.

[25] Id.

[26] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 75 and 85.

[36] As to confidentiality, Tulip relies on two bases: Brinks' averments that the documents are confidential and the nature of the business conducted between Brinks and Tulip. According to Tulip, Brinks "stated that [the documents] are confidential and private as between [Tulip] and Brinks." Tulip argues that because Brinks considers these documents confidential, there is no real dispute as to confidentiality. There are a number of problems with this.

[37] A court cannot simply accept that, because a third party claims confidentiality, confidentiality exists. Tulip has not shown a general duty of confidentiality in law between a principal and a courier or a consignor and a consignee to support confidentiality flowing from Brinks' statement. Nor has Tulip demonstrated confidentiality by providing a contract with terms creating a confidentiality obligation as to the documents. Therefore both arguments relating to factual confidentiality are untenable.

[38] I have had the benefit of reading the judgment of my brother Jafta J. He raises a third possible interest, that of ownership of the documents sought. In the circumstances of this case, I cannot agree that this establishes standing.

[39] Tulip's reliance on ownership appears not to be based on the documents themselves, but on their content. It claims infringement of "proprietary rights in its confidential business information".[27] But there is doubt about whether Tulip actually

[27] See [14] above.

owns the content of the documents. It has not laid a basis for its purported ownership over the contents of the 18 documents in the index. And the fact that those documents may mention Tulip does not amount to a claim of ownership. Neither does the fact that the Request and subpoena call for documents that pertain to Tulip. Tulip itself must establish its proprietary rights in the documents.[28] It has failed to do so.

Are Tulip's interests directly affected?

[40] To succeed in establishing constitutional own-interest standing, Tulip must demonstrate that its purported interests – confidentiality or proprietary – are directly affected by the impugned unlawfulness. In a case such as this one, that effect cannot simply be the fact that the challenged decisions are potentially invalid.[29] That would eviscerate the purpose of standing for cases brought under PAJA. Tulip must demonstrate that the decisions it seeks to attack had the capacity to affect its own legal rights or interests.[30]

[41] Tulip has not demonstrated any direct effect to any of its interests. That effect need not be contemplated in the abstract. Each case must be decided on its own facts and pragmatism is needed in the assessment of those facts.[31]

[42] We have the benefit of knowing exactly what will happen if the challenged decisions are permitted to stand. Eighteen documents pertaining to Tulip will be

[28] Compare *Davis v Canada (Attorney General)* (1997) 49 CRR (2d) 114 (BCSC) at 122.

[29] *Giant Concerts* above n 17 at para 33.

[30] Id at para 30.

[31] Id at para 41(f).

turned over to Belgian authorities by Brinks. They will be used only to investigate possible criminal activity by Omega and Mr Goldberg.[32] Assuming that valid interests of ownership or confidentiality may exist, there is nothing to show that ownership of the documents will be lost or that a breach of confidentiality will potentially affect Tulip in some demonstrable way. Tulip has therefore not made out a case that its interests are poised to suffer any direct effect by the disclosure of the 18 documents. The only effect it has alleged is disclosure itself, which alone does not constitute sufficient effect.

[43] In addition, an alleged breach of confidentiality, on the basis of nothing more than one party's purported right to confidentiality, does not necessarily amount to a direct effect in the particular circumstances of this case. There may be remedies for breaches of confidentiality between immediate parties in private law, but that does not translate without more into a legally protectable interest in preventing disclosure of information sought in respect of an investigation of a third person, as is the case here.[33] Legal privilege needs to be demonstrated in one form or another. Commercial confidentiality is not in our law recognised as automatically creating a form of legally protected privilege.[34]

[32] See above n 2.

[33] See *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at para 38, which states that"[i]t is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."

[34] Hoffman and Zeffertt *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 236 state that there is a small class of persons to whom privilege applies. In the circumstances of this case, Tulip has laid no basis for us to conclude that it is a member of that class.

[44] Tulip has thus failed to establish that it has standing to bring this case.

Merits

[45] Because Tulip cannot establish that it has standing under section 38, it necessarily follows that it cannot fall within the more restrictive parameters of the common law. Absent standing, a litigant is not entitled to have the merits of its application heard by a court. Tulip's application shall suffer that same fate, unless, as explained in *Giant Concerts*, there is "a strong indication of fraud or other gross irregularity in the conduct of a public body" and therefore it would be in the interests of justice under the Constitution or the public interest for this Court to consider the merits of Tulip's application.[35] I therefore proceed to examine whether these features exist.

[46] The minority judgment identifies two bases on which the Magistrate's subpoena was improperly issued and therefore invalid, namely that Magistrate Holzen was not the right magistrate to issue the subpoena and that the use of section 205 of the Criminal Procedure Act was impermissible. I do not agree.

Territorial jurisdiction of the Magistrate

[47] The first alleged irregularity concerns the identification of the Magistrate under section 7(5) of the Co-operation Act. Section 7 describes the steps that must be followed by South African authorities upon receipt of a letter of request, such as the

[35] *Giant Concerts* above n 17 at paras 34 and 58.

Request in this case from Belgian authorities.[36] The final step indicates that once a request for evidence has been approved by the Minister, the Director-General must forward it to "the magistrate within whose area of jurisdiction the witness resides."[37]

[48] Both the Request and the subpoena indicate that Brinks was within the territorial jurisdictional of the Kempton Park Magistrate's Court. The Request lists Brinks' address as "PO Box 34, Isando 1600, Johannesburg, South Africa." The subpoena is issued to "Jane Hamilton, Brink's South Africa (Pty) Ltd: 42 Electron Ave, Isando". These documents unambiguously indicate that the addresses for both Brinks and Ms Hamilton are located in Isando, a neighbourhood east of Johannesburg. Isando falls within the jurisdiction of the Kempton Park Magistrate's Court. There is thus no issue with the appropriateness of the Magistrate's territorial jurisdiction, as the correct magistrate was ultimately identified and issued the subpoena. It cannot therefore form the basis of any successful challenge by Tulip, much less constitute "a strong indication of fraud or other gross irregularity" sufficient to overlook Tulip's lack of standing.

Use of section 205

[49] I now turn to the issuing of the subpoena in terms of section 205 of the Criminal Procedure Act. It is clear that the Magistrate deliberately and intentionally relied on section 205. This was no administrative error. However, the question that remains to be answered is the effect of this reliance.

[36] See above n 10.

[37] Section 7(5) of the Co-operation Act.

[50] The empowering provision in this instance is section 8 of the Co-operation Act.[38] This is the prism through which a magistrate's power to issue a subpoena in the context of mutual legal assistance must be viewed. Section 8(1) provides that a magistrate must ensure that a person whose evidence is required appear before him or her under oath. Section 8(2) describes the manner in which that person may be subpoenaed. The focus of this aspect of review proceedings must therefore be section 8(2). This section is not specific about exactly how a magistrate should issue the subpoena. It is silent as to the penalties of non-compliance with a subpoena. One is inclined to think there is an omission in the section. However, the section is specific in stating that such a person must be subpoenaed in the same manner as they would be subpoenaed to appear in a magistrate's court. Therefore this Court must determine whether section 8 is sufficient to independently empower and enable a magistrate to exercise his or her power in issuing a subpoena.

[51] Section 8 is not independently sufficient to allow magistrates to issue subpoenas in instances of mutual legal assistance. The language of section 8(2) is broad. It envisages magistrates using the ordinary mechanisms they employ when issuing subpoenas. Section 205 is such a mechanism. That these mechanisms were never engineered to be used in the general scheme of mutual legal assistance in terms of the Co-operation Act explains the inconsistencies that arise when these mechanisms are used to fulfil an objective in terms of the Co-operation Act. Courts have indeed

[38] See above n 11.

used mechanisms provided by the Criminal Procedure Act to turn the cogs of the mutual assistance scheme under the Co-operation Act.[39] Other jurisdictions also rely on legislation outside of their equivalent to the Co-operation Act to give effect to a request for assistance.[40] There are other mechanisms one can rely on to issue a subpoena. These include section 51 of the Magistrates' Courts Act.[41] However, even had section 51 of the Magistrates' Courts Act been relied upon to issue the subpoena, there would still be inconsistencies between that section and section 8 of the Co-operation Act.[42]

[52] I accept that certain jurisdictional requirements in section 205 were not met. However, in the light of the broad language of section 8(2), the apparent non-compliance with the requirements in section 205 is not impermissible as those are not the requirements that should be the focus of determining the validity of the subpoena. The jurisdictional requirements which must be fulfilled are those found in section 8 of the Co-operation Act. And those requirements were met. To hold otherwise would effectively mean that none of our existing domestic procedural methods to secure the

[39] *Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town, and Others* 2007 (1) SACR 99 (CPD) at 109g-h.

[40] See Murray and Harris *Mutual Assistance in Criminal Matters* (Sweet and Maxwell, London 2000) at 78 for the English perspective.

[41] 32 of 1944. Section 51 empowers magistrates in ordinary proceedings to issue subpoenas in the manner described by the Magistrates' Court Rules.

[42] Section 51, in relevant part, provides:

> "*Any party* to any civil action or other proceeding where the attendance of witnesses is required may procure the attendance of any witness." (Emphasis added.)

This is incongruent with section 7 of the Co-operation Act which empowers only the Director-General to cause the issuing of a subpoena in order to accede to a request.

attendance of witnesses and procure documents could be utilised for the purposes of the Co-operation Act.

[53] The last point is whether the Magistrate's failure to administer an oath whilst issuing a subpoena in terms of section 205, as pointed out by Jafta J, is inconsistent with section 8. It does not seem to be so. The admonishment or oath is envisaged to take place when a party is actually before a magistrate in order to give evidence. This would take place after the subpoena has been issued. This interpretation is supported by the language of the section which states that "upon the appearance of such person the magistrate shall administer an oath".[43] Since Tulip instituted action before any information could be placed before the Magistrate, it cannot be said that section 8(1) was not complied with. This is because the opportunity was not afforded to the Magistrate to administer or fail to administer an oath. Taking the point further would be pure conjecture.

[54] For the sake of completeness I also refer to the other grounds of review.

Irrelevant considerations

[55] Tulip argues that the Director-General took irrelevant considerations into account by regarding concerns about trade in conflict or blood diamonds as "a primary consideration, if not the primary consideration" when deciding to accede to the Request. It submits that because blood diamonds are irrelevant to the alleged offences

[43] Section 8(1) of the Co-operation Act.

in Belgium, any consideration regarding blood diamonds in connection with decisions surrounding the Request was impermissible.

[56] Tulip relies on Mr Simelane's answering affidavit to argue that concern over blood diamonds was a primary consideration informing his recommendation to the Minister to accede to the Request. But a close reading of Mr Simelane's affidavit indicates that his concern over blood diamonds was not a "primary consideration". He devotes only one paragraph to a discussion about blood diamonds, describing how they have fuelled armed conflict and resulted in gross human rights violations. Far from a "primary consideration", the brief focus on blood diamonds was instead only one step in Mr Simelane's explanation of Omega's alleged crimes. He explains how blood diamonds created the need for Kimberley Certificates and how Omega is suspected of having manipulated those certificates. He further details how one such certificate allegedly increased the value of certain diamonds, and that by concealing the origin of those diamonds, profits were kept hidden from Belgian tax authorities. The reference to blood diamonds was therefore an explanatory step in Mr Simelane's demonstration of the link between manipulated Kimberley Certificates and possible tax and fraud violations under Belgian law. It was not an impermissible consideration. Consequently, this ground for review must fail.

Full and proper disclosure

[57] Tulip argues that the Request did not provide a full and proper disclosure to South African authorities. This is based on three grounds. First, Belgian authorities

failed to disclose that they had requested Tulip's assistance prior to issuing the Request to South African authorities. Second, Belgian authorities did not disclose why they had chosen to seek assistance from South Africa instead of requesting assistance from jurisdictions directly associated with the investigation such as the United Arab Emirates, Congo or Angola. Third, the Request failed to disclose the details underlying the search and seizure that Belgian authorities conducted of Omega's premises prior to seeking the assistance of South African authorities.

[58] As to the first ground, Tulip claims that non-disclosure by the Belgian authorities concerning Belgium's initial request for assistance from Tulip is a relevant fact that should have been disclosed. I disagree. Had Tulip perhaps rendered assistance or provided information to the Belgian authorities, then it would have been a relevant fact. This would be so, because Tulip could have simply argued that the Belgian authorities were already privy to the requested information, which would have made the Request as it pertains to Tulip superfluous.

[59] As to the second ground, Belgium's failure to provide reasons as to why it did not approach other jurisdictions is not relevant as I cannot see why Belgium must explain its chosen path to gather evidence. This is a discretion within the purview of the Belgian authorities. Furthermore, it is understandable for the Belgian authorities to review the entire sequence of facts relating to the alleged crimes to determine whether the offences were indeed committed.

[60] Finally, the third ground of review based on non-disclosure must also fail. This is because there is nothing in section 7 of the Co-operation Act to suggest that for a request to be valid there must be disclosure of any measures taken to obtain information in the requesting State. This submission must fail because of the purpose for which information is sought. The Request, in relevant part, asks South African authorities to—

> "inspect the administration and bookkeeping of Brinks in South Africa in order to . . . compare and investigate the nine invoices coming from Brinks South Africa which were found in the office of Omega Diamonds (and which will be in [the] possession of the Police Officers travelling to South Africa)."

[61] Clearly, one of the reasons the Request was issued was to establish the authenticity of the invoices found in Omega's Belgian offices. This, in and of itself, explains why even after the search and seizure was conducted in Belgium it would be necessary, especially in a fraud investigation, to ascertain the authenticity of certain documents by obtaining copies in South Africa as well. Thus, even if additional details about the search and seizure in Belgium were attached to the Request, the practical need for the seizure of documents in South Africa would remain.

Section 7(2) of the Co-operation Act

[62] Tulip argues that certain jurisdictional requirements under section 7(2) of the Co-operation Act were not fulfilled before Mr Simelane recommended to the Minister that he grant the Request. It contends that the representations made by a Deputy Chief State Law Adviser in the ministerial memorandum and by Mr Simelane in his

recommendation to the Minister led to confusion as to the jurisdictional basis relied upon under section 7(2). I disagree.

[63] Section 7(2)[44] sets out three disjunctive jurisdictional prerequisites that must exist for the Director-General to recommend approval of a letter of request from a foreign State. They are that: (i) proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State;[45] (ii) there are reasonable grounds for believing that an offence has been committed in the requesting State and that an investigation in respect thereof is being undertaken in the requesting State;[46] or (iii) it is necessary to determine whether an offence has been committed in the requesting State and an investigation in respect thereof is being undertaken in the requesting State.[47]

[64] There is no confusion about the basis of Mr Simelane's recommendation. In his affidavit, Mr Simelane affirms that he was satisfied that preliminary investigations had started in Belgium and that there were reasonable grounds for believing that an offence had been committed under Belgian law. This determination was based on the ministerial memorandum, which made similar observations. The recommendation fell under the second jurisdictional prerequisite set out above. There is no cause to believe that this power was incorrectly exercised.

[44] See above n 10.

[45] Section 7(2)(a) of the Co-operation Act.

[46] Section 7(2)(b) of the Co-operation Act.

[47] Id.

Unlawful delegation of authority

[65] Section 7(5) of the Co-operation Act provides that the Director-General must forward an approved letter of request to a magistrate. Section 29 allows the Director-General to delegate any functions under the Co-operation Act, including the one in section 7(5), to an official of the Department of Justice.[48] That is what appears to have happened in this case – the Director-General delegated his authority to a Deputy Chief State Law Adviser, who then requested the Chief Magistrate of the Johannesburg Magistrate's Court to designate a magistrate. Tulip argues that the delegation was unlawful because it does not meet the requirements for lawful delegation. But when courts have previously found that such requirements were not met, it was because the delegating body was found not to have the proper substantive delegating authority.[49] No such argument applies in this case. Section 29 of the Co-operation Act grants delegating authority to the Director-General. Moreover, the apparent delegation meets the requirements set out in section 29. It was therefore within the Director-General's authority to delegate his function to a Deputy Chief State Law Adviser, and the delegation was lawful.

[48] Section 29 of the Co-operation Act states:

> "(1) The Director-General may delegate to an official of the Department of Justice any function conferred upon him or her by or under this Act.
>
> (2) A function so delegated, when performed by the delegate, shall be deemed to have been performed by the Director-General.
>
> (3) The delegation of any function under this section shall not prevent the performance of such function by the Director-General himself or herself."

[49] See *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* [2010] ZASCA 68; 2011 (4) SA 149 (SCA) and *Chairman, Board on Tariffs and Trade, and Others v Teltron (Pty) Ltd* [1996] ZASCA 142; 1997 (2) SA 25 (AD).

Over-breadth and vagueness of the Request

[66] Tulip contends that the Request is over-broad and vague. It argues that, amongst other things, the Request fails to explain the offences of which Omega is suspected and the terms of the Request, such as "all relevant documents" and "all invoices and diamond transports", are over-broad. This argument is not persuasive. The Request is sufficiently detailed with regard to the crimes allegedly committed by Omega, the factual background to the allegations and the purpose for which Belgian authorities seek documents from Brinks. Moreover, Tulip's arguments about over-breadth are undercut by the fact that the Request and subpoena yielded only a total of 18 responsive documents. This is hardly a burdensome and unwieldy volume. It does not appear that Brinks had any difficulty ascertaining which documents in its possession were responsive to the subpoena.

Procedural unfairness

[67] Invoking PAJA and section 8 of the Co-operation Act, Tulip argues that the failure by administrators and the Magistrate to give notice or a hearing prior to the taking of any decision to accede to the Request constitutes procedural unfairness. While Tulip concedes that the Co-operation Act does not expressly provide for notice and hearing, it finds such an obligation imposed upon administrative action in section 3(2)(b) of PAJA.

[68] When confronted in oral argument with the fact that, at the time of setting in motion the process and the decision of the Magistrate, Tulip had no presence in this

country and that the authorities could hardly be expected to give hearings to parties, Tulip was hard-pressed to advance this argument further. Nothing further needs to be said about the point.

[69] The alleged defects in the respondents' decisions are primarily formal and procedural in nature. Even if there might have been some substance to the alleged defects (which is not the case), it can hardly be said that they demonstrated fraud or gross irregularity. I therefore do not find this to be a case deserving of any exception to the rule that absent standing, an applicant's case must be dismissed.

Order

[70] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JAFTA J (Nkabinde J and Zondo J concurring):

Introduction

[71] At common law a party may institute proceedings and seek relief if it has *locus standi* (legal standing). Legal standing has two constituent elements. The first is the capacity to sue and be sued. The second is a direct and substantial interest in the outcome of a particular litigation. If the party that institutes proceedings seeks to

enforce a right, it must show its interest in the right sought to be enforced. If it seeks to protect a particular interest, it must establish the nature of the interest and that it is protectable in law at its instance.

[72] This case concerns the second element of legal standing. The issue is whether Tulip Diamonds FZE (Tulip) has interest directly affected by decisions taken by authorities in South Africa, relating to the gathering of evidence needed by authorities in Belgium. Tulip instituted a review application against the Minister for Justice and Constitutional Development (Minister); the Director-General: Department of Justice and Constitutional Development (Director-General); Magistrate Holzen and Brinks (Southern Africa) (Pty) Ltd (Brinks).

Factual background

[73] Tulip is a company incorporated and registered in the United Arab Emirates. It trades in diamonds and operates its business from the free zone area at the Dubai International Airport. Tulip imports diamonds into Dubai from countries like the Republic of Angola (Angola) and the Democratic Republic of the Congo (Congo) and exports them to clients in other countries. For transporting the diamonds to Dubai, Tulip employs Brinks which is an operator of a courier service.

[74] As an importer and exporter of diamonds, Tulip is a holder of various Kimberley Process Certificates issued by countries which are participants in the Kimberley Process Certification Scheme. The object of the scheme is to prevent

trading in conflict diamonds. Conflict diamonds are defined as rough diamonds used by rebel movements and their allies to finance conflict aimed at undermining legitimate governments. These rebel movements and their allies are described in relevant resolutions of the United Nations Security Council.

[75] Participation in the scheme is voluntary and is open to states and regional economic integration organisations. Members of these organisations are sovereign states. Each shipment of diamonds from a participant state must be accompanied by a certificate stating that the shipment in respect of which it was issued does not constitute conflict diamonds. Each certificate issued must meet certain minimum requirements including this endorsement: "The rough diamonds in the shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds". It must also reflect the country of origin of the shipment; date of issuance; date of expiry; the issuing authority; the carat weight of the diamonds; the number of parcels in the shipment; the identification of the exporter and importer; the validation of the certificate by the Exporting Authority; and that the certificate is tamper and forgery resistant.

[76] As a participating state, the United Arab Emirates has issued a number of such certificates to Tulip. These certificates enable Tulip to export diamonds from Dubai to its clients in other countries. On the strength of similar certificates Tulip is also able to import diamonds from Angola and Congo.

[77] One of Tulip's clients is a Belgian company called Omega Diamonds BVBA (Omega). This company was placed under investigation for tax-related transgressions. The Belgian authorities suspected that Omega, under-declared the value of diamonds it imported into Belgium from Dubai amongst other breaches. It was during this investigation that the Belgian authorities stumbled upon invoices issued by Brinks, a South African company. These invoices were found during a search and seizure operation undertaken by the Belgian authorities at the offices of Omega in Belgium. The invoices reflected that Brinks had been transporting diamond shipments for Tulip from Angola to Dubai.

[78] Following the lead to Brinks, the Belgian authorities requested the South African authorities to gather certain evidence from Brinks. The South African authorities accepted and dealt with the request purportedly in terms of the Co-operation in Criminal Matters Act[50] (Co-operation Act). This Act facilitates, among other matters, the gathering of evidence in South Africa at the request of a foreign state, if such evidence is required by authorities in the foreign state for the purposes of investigating crime or of prosecution.[51] In terms of section 7 of the Co-operation Act,

[50] 75 of 1996.

[51] Section 7 of the Co-operation Act provides:

> "(1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
>
> (2) Upon receipt of such request the Director-General shall satisfy himself or herself—
>
> (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or
>
> (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine

a request of this nature must be submitted to the Director-General who must satisfy himself or herself of the existence of certain facts before asking for the Minister's approval. Once the approval is granted, the Director-General must forward the request to the magistrate within whose area of jurisdiction the witness resides.

[79] The magistrate to whom the request is forwarded must issue a subpoena, directing the witness to appear before him or her to give evidence or produce any book, document or object relating to the request. Evidence of this nature should be obtained under oath and, upon completion, the magistrate concerned is obliged to submit a certified copy of such evidence to the Director-General together with the statement of the amount of costs incurred in connection with the process.[52]

[80] In a letter dated 23 December 2008, a Magistrate in Antwerp, Belgium addressed a request for the gathering of specified evidence to the Director-General. The latter sought and obtained ministerial approval before forwarding the request to the Johannesburg Magistrate's Court.

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whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.

(3) For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.

(4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.

(5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides."

[52] This procedure is contained in section 8 of the Co-operation Act. Its provisions are set out in [115] below.

[81] In view of the fact that Tulip's standing is in dispute, it is necessary to set out in greater detail the contents of the request as it applied to Tulip. In relevant part the English translation of the request states:

> "To inspect the administration and bookkeeping of BRINKS in SOUTH AFRICA in order to:
>
> (a) compare and investigate the nine invoices coming from BRINKS SOUTH AFRICA which were found in the office of OMEGA DIAMONDS (and which will be in possession of the Police Officers travelling to South Africa).
>
> (b) search and establish other similar transports made from ANGOLA and CONGO to DUBAI.
>
> (c) search and investigate all invoices and diamond transports made for and to the following companies in DUBAI (UAE): TULIP DIAMONDS, ORCHID, CONDA DIAMONDS, ASTER, and GEM ROUGH DIAMONDS, including IAXHON on the British Virgin Islands.
>
> . . .
>
> At BRINKS SOUTH AFRICA to seize and take copy of all relevant documents (including invoices, Kimberley Certificates, packing lists, shipment dockets, documents in relation to insurances taken, instructions, correspondences, co-ordinates of principals/intermediaries, received instructions, meetings/conversations held, etc.).
>
> To interview the responsible persons of BRINKS on the diamond transports made, invoicing and relationship which they had with the OMEGA DIAMONDS in Antwerp." (Emphasis added.)

[82] Upon receipt of the request, Magistrate Holzen, sitting in Kempton Park Magistrate's Court and purporting to act in terms of the request, issued a subpoena that required Ms Jane Hamilton of Brinks to appear before him in Court at the Kempton Park Magistrate's Court, on 6 November 2009. The subpoena, apart from warning Ms Hamilton that a failure to comply with it would constitute an offence

under the Criminal Procedure Act[53], stated that should she produce an affidavit setting out the required information to the satisfaction of the Deputy Director of Public Prosecutions (DPP) on or before 30 October 2009, her attendance at Court would not be required. The subpoena is dated 1 October 2009. The subpoena was served at the offices of Brinks on the same day and the return of service reflects the contact particulars of the investigating officer and the prosecutor, both of whom were South African officials.

[83] Of importance is the fact that the subpoena described in detail the information which Brinks was required to produce. In addition to invoices issued by Brinks to Omega, the subpoena directed Ms Hamilton to:

> "Provide copies of all the Brink's (Southern Africa) Pty Ltd invoices regarding the transportation of diamonds to and for the entities as described in the attached schedule marked '2'.
> Provide copies of the relevant work/client files, including invoices, Kimberley Certificates, Packing lists, shipment dockets, documents in relation to insurances taken, instructions, correspondence, coordination of principal/intermediaries, received instructions and meetings and conversations held, of the entities as mentioned in schedule '2'.
> Provide an affidavit setting out all the required information as requested."

[84] The entities mentioned in schedule 2 of the subpoena include Tulip. Tracking the information described in the letter of request, the subpoena requires Ms Hamilton to produce various documents belonging to Tulip and other companies. These documents included work files, Kimberley Process Certificates, correspondence,

[53] 51 of 1977.

instructions received from Tulip, its meetings and conversations, which came into existence within the period commencing on 1 January 2003 and ending on 3 September 2008.

Litigation history

[85] In October 2009 Tulip heard about the subpoena served on Brinks. Fearing that its rights would be violated, Tulip approached Brinks and there was an exchange of letters between lawyers representing both parties. Brinks adopted the stance that on the directive of the subpoena it would produce the documents listed in it, even though Brinks conceded that they were confidential. Faced with the threat, Tulip and another company instituted an urgent application for an interdict restraining the production of their documents by Brinks. The South Gauteng High Court, Johannesburg (High Court) granted the interdict pending the finalisation of the application to review decisions taken by the Director-General, the Minister and the Magistrate.

[86] The review application was duly launched in the High Court. Six grounds were asserted in challenging the impugned decisions. They were: (a) the failure by the Director-General to take relevant considerations into account; (b) non-compliance with the jurisdictional requirement that the Director-General had to satisfy himself that Omega had committed an offence; (c) the validity of the Magistrate's appointment; (d) the wrong invocation by the Magistrate of section 205 of the Criminal Procedure Act instead of sections 7 and 8 of the Co-operation Act; (e) non-observance of procedural fairness, in that Tulip was denied an opportunity to be heard

before the impugned decisions were taken; and (f) the over-breadth of the letter of request and the subpoena, demanding information spanning a period in excess of five years.

[87] The High Court held that because Tulip was a foreign company with no presence in South Africa, it lacked standing to institute the application. Nonetheless, the High Court proceeded to consider three of the grounds of review and rejected them as lacking merit. The grounds considered did not include the appointment of the Magistrate and the alleged incorrect use of section 205 of the Criminal Procedure Act in issuing the subpoena. The application was dismissed with costs.

[88] An appeal to the Supreme Court of Appeal suffered a similar fate.[54] However, the Supreme Court of Appeal held that the High Court erred in holding that Tulip's lack of standing stemmed from the fact that it was a foreign company with no presence in this country. Implicitly, the Supreme Court of Appeal held that a foreign litigant, like Tulip, could enforce a protectable interest conferred by the Bill of Rights in our Constitution.

[89] But the Supreme Court of Appeal came to the conclusion that Tulip did not have the necessary legal standing because it failed to prove "confidentiality to which it laid claim in relation to the documents in Brinks' possession".[55] It criticised Tulip for

[54] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* [2012] ZASCA 111; 2013 (1) SACR 323 (SCA) (Supreme Court of Appeal judgment).

[55] Id at para 15.

failing to show which documents contained confidential information, the nature of such information and the legal basis for asserting confidentiality. One need only to have regard to the documents, said the Court, to see that they are by their nature not confidential.[56] In view of its decision on standing, the Supreme Court of Appeal considered it unnecessary to deal with the merits.

Leave to appeal

[90] There can be no doubt that this case raises constitutional issues. Tulip claims that the release of documents held by Brinks would violate its right to privacy. Moreover, on the merits Tulip mounts an attack on the exercise of public power by the Director-General, the Minister and the Magistrate. In addition one of the grounds of review raised is the question of legality.

[91] It is also in the interests of justice that leave be granted. Already the case has been to the Supreme Court of Appeal and Tulip has no other forum to appeal to but this Court. As will be apparent later, prospects of success are good.

Issues

[92] The first issue is whether at common-law Tulip has legal standing in the sense that it has a direct and substantial interest in the documents held by Brinks and which the impugned subpoena directs Brinks to produce. The same requirement extends to decisions taken on the basis of the letter of request which tabulates the documents

[56] Id.

listed in the subpoena. The second is whether Tulip has made out a case for standing in respect of the privacy claim. If Tulip has standing then it becomes necessary to consider the grounds of review mentioned above.

Does Tulip have standing at common law?

[93] In simple terms the purpose of this enquiry is to establish if Tulip is entitled to protect the documents in question against disclosure or from being accessed by anybody without its permission. It is the entitlement to prosecute a claim or enforce a right which clothes a party with standing.[57] The onus falls upon a party like Tulip to show that it has the right to institute proceedings.[58] In other words, Tulip must establish that it has a direct and substantial interest in the outcome of the determination whether the documents in question may be disclosed.

[94] Ordinarily an applicant has to make allegations in the founding affidavit which, if established, would show that it has legal standing.[59] Consistent with this requirement Tulip dealt with the issue of standing in the founding affidavit in the High Court in these terms:

> "In the present matter no criminal proceedings have been instituted or are contemplated against the applicant. Notwithstanding this, a subpoena has been issued at the instance of a foreign state requiring a third party (Brinks) to disclose information and documents which are purportedly relevant to an investigation by Belgian authorities, not into the applicant, but rather a Belgian company (Omega).

[57] *Trakman NO v Livshitz and Others* 1995 (1) SA 282 (A) at 287D-F.

[58] *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575.

[59] *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O) at 1057F-H.

> This is an extraordinary request by any standards. Giving effect to the respondents' decisions will materially impact upon the applicant's proprietary rights in its confidential business information, which rights will be immediately infringed on the handing over [of] the documents called for in the subpoena."

[95] In plain terms Tulip claims that its right of ownership relating to the documents would be violated if those documents are produced by Brinks. The violation will take immediate effect once the disclosure is made. It goes on to describe the documents as containing confidential business information.

[96] Regard to the letter of request and the subpoena, both of which are quoted above, confirms the assertion that some of the documents which Brinks is called upon to produce, belong to Tulip. Ownership of those documents alone suffices to give Tulip the necessary legal standing. The issue of confidentiality is additional to this fact. It serves to illustrate that over and above ownership rights, Tulip's other rights like the right to privacy were threatened. The letter of request and the subpoena forms part of the founding affidavit.

[97] Accordingly, the Supreme Court of Appeal erred in its approach to determining the issue of standing and also in its assessment of the facts. It can never be suggested that the owner of the subject matter of litigation has no standing to protect its rights in such subject matter. The letter of request lists and the subpoena demands that Brinks should produce, amongst other documents, Kimberley Process Certificates, copies of the minutes of meetings, conversations and instructions given by Tulip, without its permission. Therefore, Tulip in its capacity as the owner of the documents has a

direct and substantial interest in the litigation in which decisions relating to their disclosure are challenged. For these reasons, I conclude that Tulip has established standing at common law.

Standing in constitutional claims

[98] In any event it was not appropriate for the Supreme Court of Appeal to approach the issue of standing from the common-law point of view only in the light of the fact that Tulip also asserted a constitutional right to privacy. In so far as claims based on rights in the Bill of Rights are concerned, our law requires a lower standard for standing which is broader than the common-law position. This is so because section 38 of the Constitution lists persons who may institute proceedings in cases where a right in the Bill of Rights is infringed or there is a threat of infringement.[60]

[99] Under the common law, a party who approaches a court for relief must ordinarily show that its rights were violated or threatened. Such party cannot seek relief on the basis that the rights of another person were violated. Section 38 changed all of this when it comes to violation of rights in the Bill of Rights. It expanded the list of persons who may institute proceedings. If the right-holder is unable to approach a competent court, another person may do so on its behalf. Members of a group or class of persons may also initiate proceedings on behalf of or in the interests of the group or class. An association too can commence proceedings on behalf of its

[60] See [28] above for the text of section 38.

members. And anyone with legal capacity can bring proceedings in the public interest provided that they identify the interest on the basis of which they approach the court.[61]

[100] However, where a litigant approaches a court acting in its own interest, it must show the interest directly affected by the impugned decision. This interest may be real or potential but not hypothetical or academic. Recently this Court affirmed this principle in *Giant Concerts.* There this Court said:

> "The own-interest litigant must, therefore, demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned."[62]

[101] In this case, as stated earlier, Tulip has shown that the impugned decisions directly affect its ownership of the documents in question and that compliance with the subpoena threatened its right to privacy. Those decisions, in particular the subpoena, coerce Brinks to hand over documents belonging to Tulip to South African authorities who intend to pass them to the Belgian authorities. The unlawfulness in taking those decisions and the issuance of the subpoena interferes with Tulip's rights of ownership in the documents in question and poses a threat to its privacy. There can be no doubt that Tulip's interest in the unlawfulness of those decisions is real and not potential. It certainly cannot be described as hypothetical or academic. The impugned decisions affect it immediately.

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[61] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 16.

[62] *Giant Concerts* above n 17 at para 43.

[102] It will be recalled that in rejecting the High Court's reasoning for finding that Tulip lacked standing, the Supreme Court of Appeal acknowledged that a party like Tulip may invoke the rights in the Bill of Rights. It was not necessary for such party, so it was held, to be physically in the country. The acknowledgement is, however, at variance with the approach adopted by the Supreme Court of Appeal to Tulip's standing. For Tulip to meet the standing requirements, that Court required it to prove that the documents subject to disclosure were indeed confidential. This is not the correct approach to a claim based on a right in the Bill of Rights. Section 38 of the Constitution decrees that in the case of such claim, the applicant needs only to allege that an infringement or a threat to infringe its right entrenched in the Bill of Rights has occurred.[63]

[103] Consistent with the approach prescribed by section 38, the allegations made by an applicant in its founding papers are taken to be correct when the issue of standing is determined. The Supreme Court of Appeal affirmed this principle in *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others.*[64] In that case the Court said:

> "In the circumstances of this case, it will be recalled, the assertions made by the appellants, whose locus standi is being challenged, have to be accepted as correct. Thus we must assume, for the purposes of considering whether the appellants have locus standi, that their assertion that the loan agreement is invalid is correct. If that is so they must be able to apply to interdict the holding of the meeting before which

[63] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 217.

[64] [2008] ZACSA 158; 2009 (4) SA 89 (SCA).

> materially incorrect information regarding the legal status of the agreement has been put by the directors."[65]

[104] In the circumstances, I hold that Tulip has, by alleging that its right to confidentiality is threatened, established standing even in terms of the constitutional requirements.

Merits

[105] It was the subpoena issued by the Magistrate which triggered the launch of the present proceedings. It is therefore convenient to commence the determination of the merits with the consideration of the grounds of review relevant to the issuance of the subpoena.

[106] The first ground relates to the referral of the request to the Magistrate. It is common cause that the request was forwarded to the Magistrate purportedly in terms of section 7(5) of the Co-operation Act. This section provides that on being notified of the Minister's approval, the Director-General shall forward the request to the magistrate within whose area of jurisdiction the witness resides.

[107] The first difficulty relates to the identification of Magistrate Holzen as the person to whom the request had to be forwarded. The Supreme Court of Appeal described this issue as one of the grounds of review and defined it as the validity of

[65] Id at para 37.

the Magistrate's appointment.[66] The difficulty that arises in this regard is that section 7(5) contemplates that the magistrate to whom the request is forwarded must be a magistrate within whose territorial jurisdiction the witness resides. This requirement identifies the magistrate who, in terms of section 8 of the Co-operation Act, is empowered to issue a subpoena. It is not any magistrate who has the power but a magistrate of the area in which the witness resides.[67]

[108] There is no indication whatsoever in the record that Magistrate Holzen was the right magistrate to issue the subpoena. Advocate Simelane who was the Director-General that forwarded the request does not tell us how the matter ended up with Magistrate Holzen. In his affidavit Advocate Simelane merely states:

> "On being notified by the Minister of his approval, I caused to be forwarded the request to the Johannesburg Magistrate's Court, in whose jurisdiction both Omega and Levidiam are situate, the request as contemplated in section 7(5) of the Co-operation Act, and requiring him to designate a magistrate to conduct the examination, as contemplated in section 8 of the [Co-operation Act]."

[109] It is clear from this statement that the Director-General forwarded the request to the Johannesburg Magistrate's Court for a magistrate to be designated to conduct an examination in terms of section 8. It further appears from the same statement that the reason for forwarding the request to the Johannesburg Magistrate's Court was that "both Omega and Levidiam are situate" there, within the area of jurisdiction of that Court. But none of these persons was a witness required to appear before a magistrate

[66] Supreme Court of Appeal judgment above n 54 at para 5.

[67] Section 7(5) of the Co-operation Act.

for purposes of giving evidence, in compliance with the letter of request. It is not clear why and on what basis the Director-General came to the conclusion that the letter of request should be forwarded to the Magistrate's Court of the area where those two persons were allegedly "situate".

[110] The respondents, including the Director-General himself, asserted that the request they acceded to, sought to investigate Brinks. If that were the case, one would have expected that the request would be forwarded to the magistrate of the area in which Brinks was a resident. In our law, a local company resides in the area where its head office is located or where its principal place of business is.[68] There is no evidence showing that Brinks' head office or its principal place of business falls within the area of jurisdiction of the Johannesburg Magistrate's Court.

[111] But the matter is further complicated by the fact that Magistrate Holzen was not based in the Johannesburg Magistrate's Court when he purportedly exercised the power to issue the subpoena. The subpoena itself indicates unmistakably that it was issued by Mr Holzen in his capacity as a magistrate at the Kempton Park Magistrate's Court. The date stamp on it bears this out. In its body it directs Ms Hamilton to appear before a magistrate in Court E at the Magistrate's Court of Kempton Park. Its title reads: "In the Magistrates' Court for the District of Kempton Park held at Kempton Park."

[68] *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A).

[112] As to how a request that was forwarded to the magistrate in the district of Johannesburg ended up with Magistrate Holzen in Kempton Park, remains a mystery. The mystery deepens when one considers that the record is silent on where Brinks resides. Instead what is clear is the fact that the Director-General had different persons in mind when he determined where to forward the request. On these facts the Director-General did not comply with the provisions of section 7(5) of the Co-operation Act when he forwarded the request. It is also not clear that the request on which Magistrate Holzen acted was forwarded to him by the Director-General as required by section 7(5) or by someone else. Therefore it has not been established that Magistrate Holzen was the right magistrate to exercise the power conferred by section 8 of the Co-operation Act.

Use of section 205

[113] Another serious defect is that instead of acting in terms of section 8 of the Co-operation Act, Magistrate Holzen consciously and deliberately invoked section 205 of the Criminal Procedure Act. The heading of the subpoena he issued reads: "SUBPOENA IN TERMS OF SECTION 205 OF ACT NO 51 OF 1977". Reference to Act 51 of 1977 means the Criminal Procedure Act. In its body the subpoena tells Ms Hamilton that she was required to appear before the magistrate on 6 November 2009 to be examined by the authorised DPP or Public Prosecutor. It goes on to say that should she furnish an affidavit setting out all the required information, to the satisfaction of the DPP or Public Prosecutor, on or before 30 October 2009, her attendance would not be required. The subpoena proceeds to warn her that a failure to

comply with it would result in a warrant for her arrest being issued. It further cautions her that the failure would constitute an offence under the Criminal Procedure Act. It concludes by instructing an authorised official to serve it on her and report back to the DPP or a Public Prosecutor.

[114] All of these are steps mandated by section 205 where a subpoena is issued under that section. In terms of the section a witness that appears before the magistrate must be examined by an authorised DPP or Prosecutor. And if the witness concerned furnished the information sought to the satisfaction of the DPP or Prosecutor before the date of appearance, he or she would be excused from appearing. The subpoena itself is issued upon a request by the DPP or Prosecutor. Accordingly, the whole process is driven by the DPP or Prosecutor.[69] And the request by the DPP is a jurisdictional fact without the existence of which a subpoena cannot be issued.

[115] Yet no DPP or Prosecutor has a role to play in a process mandated by section 8 of the Co-operation Act. This section provides:

[69] Section 205(1) of the Criminal Procedure Act provides:

> "A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorised thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorised thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate."

> "(1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause, is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.
>
> (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.
>
> (3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.
>
> (4) If the services of an interpreter were used at the examination of the witness, the interpreter shall certify that he or she has translated truthfully and to the best of his or her ability, and such certificate shall accompany the documents transmitted by the magistrate to the Director-General."

[116] Section 8 sets out in detail the functions of a magistrate to whom a request has been forwarded in terms of section 7(5). The first issue that is apparent from the reading of the section is that the request must be for obtaining evidence. The section says the magistrate "shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book,

document or object". Upon appearance of the person concerned, the magistrate is required to administer an oath or accept an affirmation from the person before taking evidence from him or her. The evidence must be taken upon interrogatories or following some other method stated in the request.

[117] It is apparent from the text of the section that the manner in which the evidence is taken is determined by the request and that the evidence must be taken by the magistrate himself or herself, with the witness being under oath or affirmation. The section underscores the need for an oath or affirmation by requiring the magistrate to admonish a person "to speak the truth, the whole truth and nothing but the truth" if the magistrate finds the person in question to be unable to understand the nature and import of an oath or affirmation. Upon completion of the examination of the witness, the magistrate taking evidence must submit to the Director-General a certified copy of the record of the evidence. This record may be accompanied by a certificate showing the amount of expenses and costs incurred in connection with the taking of the evidence.

[118] The process authorised by section 8 of the Co-operation Act is materially different from the one permitted by section 205 of the Criminal Procedure Act. Members of the National Prosecuting Authority play no role in a section 8 process. In fact the section does not refer to them at all. In a section 8 process, the examination of the witness is conducted by the magistrate who takes the evidence. At the completion

of the process, the magistrate is obliged to submit to the Director-General a certified copy of the record.

[119] A person subpoenaed under section 8 must appear before the magistrate on the appointed date for the purpose of giving evidence. He or she cannot avoid appearing by submitting an affidavit. He or she has to take an oath or affirmation before the magistrate who takes the evidence which must be tendered orally. Therefore a process mandated by section 205 of the Criminal Procedure Act cannot be equated to the process authorised by section 8 of the Co-operation Act. The two processes are like chalk and cheese. Section 205 of the Criminal Procedure Act does not confer the power to take evidence in terms of a request submitted to a magistrate under section 7(5) of the Co-operation Act.

[120] But counsel for the Minister and the Director-General submitted that the Magistrate had competently used section 205. Relying on *De Lange v Smuts NO and Others*,[70] counsel submitted that because section 205 forms part of the criminal justice system, the Magistrate was entitled to invoke it as one of the mechanisms provided.

[121] The argument has no merit and reliance on *De Lange* is misplaced. That case is no authority for the proposition that where the exercise of power is requested under a particular section, it is open to a magistrate to act in terms of a different provision in a different statute. More precisely, *De Lange* does not say that upon receipt of a request

[70] [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

submitted in terms of section 7(5) of the Co-operation Act, a magistrate is entitled to issue a subpoena by authority of section 205 of the Criminal Procedure Act. The Court in that case could not say so because that was not the issue before it. All that *De Lange* said about section 205 was that it was constitutionally compliant.[71]

[122] If a functionary consciously chooses a particular provision as authority for the function he or she performs and it turns out that the chosen provision does not authorise the performance of the function concerned, the purported exercise of power will be invalid. It cannot be rescued by the claim that the same functionary is granted the power exercised but by a different provision.[72]

[123] The argument that reliance by a public functionary on an incorrect provision, for the exercise of power, does not invalidate the action taken if the same functionary is empowered by another provision to perform the impugned function, was considered by this Court in *Minister of Education v Harris*.[73] In that case the Court said:

> "[T]he applicability of this line of reasoning must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting.
>
> . . .
>
> In this case, there is no suggestion in the affidavits filed by the Minister of an administrative error. On the contrary, the notice in the present matter not only cites section 3(4)(i) of the National Policy Act three times as the source of its authority, it

[71] Id at paras 19-20.

[72] *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A).

[73] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

> identifies itself with the Act by means of its heading. . . . There can be little question then that the provision was deliberately chosen".[74]

[124] Similarly, in the present case there is no indication that Magistrate Holzen erroneously referred to section 205 of the Criminal Procedure Act when he meant to refer to section 8 of the Co-operation Act. The Magistrate elected to abide the decision of the Court and did not file an affidavit in this Court explaining his choice of section 205. But as stated earlier, it is apparent from the subpoena itself that the choice was made deliberately. Reliance on section 205 as the source of power was made in circumstances where this section did not apply. Accordingly, the Magistrate was not authorised to issue the impugned subpoena. Therefore, the subpoena is invalid.

[125] Having reached this conclusion it is not necessary to consider the attack based on the over-breadth and unintelligibility of the subpoena. Nor will any meaningful purpose be served by a determination of the other grounds of review.

[126] For these reasons I would uphold the appeal.

[74] Id at paras 17-8.

For the Applicant:	Advocate G Marcus SC, Advocate A Stein and Advocate I Currie instructed by Edward Nathan Sonnenberg.
For the First and Third Respondents:	Advocate K D Moroka SC and Advocate M Sello instructed by the State Attorney.