



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Sitting in PRETORIA

CASE NO: GLD SS40/06

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. YES
15 August 2025  SIGNATURE	

THE STATE

v

PORRITT, GARY PATRICK

Accused no. 1

BENNETT, SUSAN HILARY

Accused no. 2

RULING OF 15 AUGUST 2025

**AFFIDAVIT EVIDENCE UNDER THE INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS
ACT NO. 75 OF 1996**

(Mr Mercer and Mr and Mrs Adamczyk)

SPILG, J:

INTRODUCTION

1. The State has sought to introduce certain evidence emanating from Hong Kong without leading a witness who would otherwise be subject to cross examination.

It seeks to do so *inter alia* under the provisions of s 5 of the International Co-operation in Criminal Matters Act no. 75 of 1996 (*“the ICCMA”*).

2. Section 5 of the ICCMA reads:

Admissibility of evidence obtained by letter of request

(1) Evidence obtained by a letter of request shall be deemed to be evidence under oath if it appears that the witness was in terms of the law of the requested State properly warned to tell the truth.

(2) Evidence obtained by a letter of request prior to proceedings being instituted shall be admitted as evidence at any subsequent proceedings and shall form part of the record of such proceedings if-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or

(b) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) any prejudice to any party which the admission of such evidence might entail; and

(v) any other factor which in the opinion of the court should be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(3) The provisions of subsection (2) shall not render admissible any evidence which would be inadmissible, had such evidence been given at the subsequent proceedings by the witness from whom it was obtained.

(4) Evidence obtained by a letter of request after the institution of proceedings shall form part of the record of such proceedings and shall be admitted as evidence by the court or presiding officer which issued the letter of request in so far as it is not inadmissible at such proceedings.

3. Evidence is defined in s 1 to “include all books, documents and objects produced by a witness”.

One’s instinct against receiving affidavit evidence from lay witnesses in criminal cases may cause one to reach out for the *eusdem generis* aid to interpretation.

However it is clear from provisions such as s 2(2) and s 3(2) that the procuring of evidence cannot be limited to obtaining documentary evidence from a person in a foreign jurisdiction (termed the “*requested State*” in the ICCMA).

This is so because section 2(2) allows for the obtaining of “*information*” from a person in the requested State, s 3(2)(a) enables the authority in the requesting State (i.e. the State where the criminal trial is to be held) to submit interrogatories which may be put at the examination of the person required to attend such examination in the requested State.

4. This is also evident from the way the Hong Kong authorities understood their function as a requested State. The Hong Kong jurisdiction’s equivalent of our ICCMA is the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

Although the Hong Kong legislation came into effect in 1997, its understanding of its international responsibility as a requested State appears from ss10(1) which distinguishes between the taking down of evidence and the production of a document (which falls under the category of a “*thing*” for the purposes of the legislation), By contrast, subsection (b) to both sets of legislation is concerned with the production of a *thing*” which “*in the case of a document, may be a copy of the document certified by the magistrate to be a true copy*”.

5. It is evident that legislation of this nature arose by reason of a perceived need to secure international co-operation by way of either bilateral or multilateral reciprocal arrangements between States.

Unlike treaties, mutual legal assistance between countries in respect of crimes is effected by way of an umbrella Statute (such as our ICCMA and CAP 525 in Hong Kong) while specific reciprocal arrangements between individual countries are made by way of delegated legislation. South Africa's specific legislation in relation to co-operation with Hong Kong is currently to be found in the Mutual Legal Assistance in Criminal Matters Treaty Between the Republic of South Africa and the Hong Kong Special Administrative Region of the People's Republic of China under GN 704 of 2012 (Government Gazette 35640 of 30 Aug 2012).

6. This does not mean that other arrangements of reciprocity between countries will not be respected unless contained in a gazetted treaty. This much is clear from s 3(2) of Hong Kong's CAP 525 which provides that:

"This Ordinance shall not operate to prevent or prejudice the generality of the provision or obtaining of assistance in criminal matters between Hong Kong and a place outside Hong Kong otherwise than—

(a) as provided for under this Ordinance; or

(b) pursuant to arrangements for mutual legal assistance."

7. Ultimately the mechanism whereby authorities in one jurisdiction obtain evidence in another is a matter of reciprocity and territorial sovereignty. Issues concerning international relations do not inure to the benefit of the individual; they are solely matters concerning the comity of nations.

Once again CAP 525 explains this succinctly; in terms of s 2 (7):

"For the avoidance of doubt, it is hereby declared that this

Ordinance shall not entitle a private person, or any person acting on behalf of a private person, to—

(a) obtain, suppress or exclude any evidence; or

(b) impede or otherwise prejudice any request under this

Ordinance,

in respect of a criminal matter in Hong Kong or a place outside Hong Kong.

8. The provisions of the ICCMA seek to achieve a number of basic objectives;
9. The first attempts to meet the difficulty in prosecuting cross-border transactions which may have resulted in the commission of a crime in the home country, or the difficulty in following the proceeds of a crime which had been committed there.

These difficulties arise because of the relative ease with which assets, and in particular financial instruments, deposits with financial institution or securities can be transferred or acquired internationally while historically the ability to obtain necessary evidence in the foreign jurisdiction to prosecute such alleged crimes has been impeded by the limitations of territorial sovereignty which can only be ameliorated through bilateral or multinational accords.

10. Secondly the ICCMA is an umbrella statute which provides for the gathering of evidence and the execution of sentences in criminal cases in a foreign jurisdiction as well as the confiscation and transfer of the proceeds of crime between South Africa and foreign States. The statute has regard to the comity of nations, sovereign integrity and the principles of reciprocity, while providing for a more expeditious method of procuring evidence and achieving the other objectives just mentioned as between contracting States in relation to criminal cases or investigations initiated in the one or other country.

11. The third objective is to establish a chain of evidence from the time the evidence is provided or the documents are handed over to the foreign authorities until they are receipted for court purposes in the requesting State. The ICCMA identifies the manner in which a request is to be made, through whom it is effected in both the requesting and requested State, and the authorities through whose hands the evidence is transmitted from the requested to the requesting State .
12. Save for the protection of the rights of an accused it is unnecessary for present purposes to consider other aspects or objectives of the ICCMA.
13. The ICCMA seeks to makes provision for protecting the rights of an accused who has already been charged by allowing him or her (or a legal representative) to appear at the examination and question the witness whose evidence is sought or have the witness submit interrogatories.¹

Where proceedings had not commenced at the time the evidence was obtained from a witness in a foreign jurisdiction pursuant to an LoR under the ICCMA, then such evidence may only be admitted in court provided the party against whom the evidence is to be adduced agrees, failing which the court can admit the evidence if it is of the opinion that it should be admitted in the interests of justice after having regard to the consideration mentioned in s 5(2)(b)(i) to (v).

This makes practical sense. Once an accused has been charged he or she has an election to examine the witness ,either face to face or by way of interrogatories and if the accused chooses not to, then subject to any other requirements the evidence will be admitted. However if evidence is procured at the pre-charge stage then the prosecution has the burden of demonstrating that the requirements of the relevant subsections of s 5(2)(b) have been met before it can be admitted into evidence.

¹ See s 3(1) of eth ICCMA read with s 2(1). In terms of s 3(3)(a) The court may also order that, as a condition of the letter of request, the State pays for the costs of legal representation. Under s 3(3)(b) the court may also order, at the end of the proceedings that the accused to pay the costs of sending the letter or request and of all proceedings which give effect to it if the accused's refusal to admit eth evidence obtained by means of the letter of request was unreasonable and unjustified.

EVIDENCE SOUGHT TO BE INTRODUCED

14. The State indicated that it wished to introduce evidence obtained from five witnesses pursuant to LoRs delivered to the appropriate government body in Hong Kong where they all resided.

The evidence consisted of affidavits deposed to by each and the documents allegedly produced by them and attached to their affidavits, all of which were allegedly received in open court by the presiding Magistrate of the Eastern Magistrates' Court of the Hong Kong Special Administrative Region.

15. The affidavits were either deposed to in the presence of the presiding magistrate or the deponent confirmed under oath before the magistrate that he or she had already deposed to the affidavit concerned².

Each affidavit together with the documents referred to in them and which were produced before the magistrate were then sealed and dispatched to South Africa with the Magistrate's certificate and the minute prepared by him. This was in terms of CAP 525.

It is common cause that the accused through their legal representative were invited to witness the seals being broken when this package of documents was received in South Africa. They expressly declined to do so.

16. The witnesses who deposed to the affidavits and produced the documents pursuant to the letters of request were:

- a. Christopher David Gordon

- b. Michael Lintern Smith

² At the initial hearing of 21 August 2006 the presiding Magistrate was informed by the Senior Government Counsel for that Region, who appeared on behalf of the Government of South Africa, that each witness had been summoned to attend court and that several had already provided draft depositions while others were still to be finalised. The Magistrate was requested to adjourn the proceedings so that the witnesses could then sign the depositions. The Magistrate was agreeable to this. The transcript of the proceedings before the Magistrate in Hong Kong also forms part of the documents provided and is part of the record before this court

- c. Alan Mercer
- d. Jane Adamczyk
- e. Herbert Adamczyk, who is Jane Adamczyk's husband

17. It is common cause that;

- a. Gordon was a partner in Robertsons, a firm of solicitors in Hong Kong which provided company formation and secretarial services including the formation of shelf-companies and, if required, the provision of a company secretary, nominee directors and shareholders and a registered office address. These services had been made available through RD Secretaries (1980) Ltd. Gordon had been involved *inter alia* in procuring the companies which came to be known as Three Oceans Finance & Trading Limited and also Cabali Ltd.
- b. Lintern Smith was also a partner at Robertsons
- c. Mercer had also been a solicitor at Robertsons and came into contact with Mr Porritt during 1985 while still at the firm. Mercer left Hong Kong in 1987 and when he returned in 1989 was employed by in-house counsel for a number of companies including the Peregrine Group.

Mercer had *inter alia* acted as nominee director of Tigon International Holdings Ltd ("TIH") and held one bearer share in trust in that company for the Malta Trust pursuant to a trust document and nominee shareholder agreement dated 22 November 1994.

For a period, Mercer was a non-executive director of Pan Pacific Financial Services ("Pan Pacific"). Pan Pacific was initially a wholly owned subsidiary of Tigon Ltd and later of TIH. He was also a non-executive director of Asia Pacific Sourcing Ltd

- d. Mercer had concluded a series of agreements all on the same date (14 October 1996) on behalf of Pan Pacific with Goldstar Ltd, Cabali Ltd and Three Oceans Finance and Trading Ltd (which were described as the client in each).

The agreements followed the same pattern in terms of which the client (for instance Goldstar) would open an investment account with Pan Pacific with the object of achieving a capital appreciation of the investment through trading on regulated exchanges and over-the-counter markets in emerging market equities and fixed income securities, currencies, commodities and their derivative instruments in order to achieve over a period of twelve months a return on the original amount which exceeds by 10% the increase in the Johannesburg Stock Exchange Industrial Index from its closing levels at the date of the agreement to the anniversary date.

Pan Pacific also guaranteed that should it fail to achieve the agreed return it would pay in any shortfall. In return for performing its obligations and undertaking the risk it would be entitled, as its fee, to retain all returns on the original investment which exceed the guaranteed return on the anniversary date.

- e. It was a specific term of each agreement that Pan Pacific could invest in Tigon shares.
- f. Mrs Adamczyk had signed, as the representative of Goldstar, one of these agreements with Pan Pacific (on 14 October 1996). She had also signed an application on behalf of Goldstar to acquire 1.5 million shares in Tigon Ltd for R12.75 million.
- g. Mr Adamczyk had applied for 35 000 Tigon Ltd shares during October 1996 in an amount of R297 500 as nominee for an entity called the Barrington Trust.

18. It is also common cause that in one way or another each of the witnesses had interacted with Porritt in relation to one or more of the transactions mentioned.

Bennett features to a much lesser extent, but it must be born in mind that the relevant charges against her include allegations of forming an unlawful common purpose with Porritt to defraud.

Accordingly the evidence, if admitted may well advance the prosecution's case against not only Porritt but also Bennett.

19. The prosecution seeks to introduce these depositions and the documents attached to them in relation to the mentioned transactions to support its case in respect of counts 1 to 14 of the indictment.

20. In an earlier decision dealing with the first challenge to the introduction of evidence under s 2(2) of the ICCMA the court recited certain extracts from main count 2 of the indictment which alleged common law fraud. ;:]

21. In order to appreciate the thrust of the evidence sought to be introduced they are repeated.

Count 2 reads:

"During the period October 1996 to 15 April 1997 ..., the accused, in concert with others or otherwise, did unlawfully, falsely and with the intent to defraud, give out and pretend ... that;

136.1 Pan Pacific Financial Services Limited (a subsidiary of Tigon Limited at the time) had entered into, lawful and valid agreements with Goldstar Limited, Cabali Limited, and Three Oceans Finance & Trading Limited, during October 1996. These agreements were titled the "Pan Pacific Client Investment Account Agreements";

136.2 the “Pan Pacific Client Investment Account Agreements” were entered into with the intention to bring about enforceable rights and obligations;

136.3 full payment had been made for shares lawfully acquired in Tigon Limited for Cabali Limited, Goldstar Limited and Three Oceans Finance & Trading Limited with Pan Pacific Financial Services Limited;

136.4 Pan Pacific Financial Services Limited was entitled to a “performance fee” at 31 January 1997, as a result of managing the portfolios of Goldstar Limited, Cabali Limited and Three Oceans Finance & Trading Limited in terms of the “Pan Pacific Client Investment Account Agreements”;

136.5 at Tigon Limited’s balance sheet date (31 January 1997) the transaction in respect of the “performance fee” had reached a stage of completion and could be measured reliably;

136.6 the “performance fee” earned by Pan Pacific Financial Services Limited by virtue of the “Pan Pacific Client Investment Account Agreements”, should be included in Tigon Limited’s group profits;

136.7 Pan Pacific Financial Services Limited was lawfully entitled to purchase Tigon Limited shares, in terms of the “Pan Pacific Client Investment Account Agreements”;

136.8 the transactions between Tigon Limited, the accused, Pan Pacific Financial Services Limited, Goldstar Limited, Cabali Limited and Three Oceans Finance & Trading Limited were at an arms length and not artificial or simulated;

136.9 an amount of R26 250 000-00 could and/or should have been included in Tigon Limited’s group profits for the financial year ending 31 January 1997;

136.10 the “performance fee” could be measured reliably as at 31 January 1997;

136.11 the accounting for the “performance fee” was in accordance with generally accepted accounting practice in South Africa;

136.12 the Tigon group consolidation workings for the year ended 31 January 1997, correctly reflected a profit before tax of R26 250 000-00 in the income statement for Pan Pacific Financial Services Limited;

137. and by means of the said misrepresentations induced ... to act to their prejudice, actual or potential, in that:

.....

138. WHEREAS the accused, when they gave out and pretended as aforesaid, well knew that:

138.1 the agreements that Pan Pacific Financial Services Limited (a subsidiary of Tigon Limited at 31 January 1997) had entered into with Goldstar Limited, Cabali Limited, and Three Oceans Finance & Trading Limited, during October 1996 were neither lawful nor valid and were false and/or simulated;

138.2 the supposed contracting parties had no intention for actual rights and obligations to arise from the “Pan Pacific Client Investment Account Agreements”;

138.3 Cabali Limited, Goldstar Limited and Three Oceans Finance & Trading Limited had not actually provided funds for investment by Pan Pacific Financial Services Limited and full payment had not been made for the Tigon Limited shares which had not been lawfully acquired;

138.4 the “Pan Pacific Client Investment Account Agreements” contravened section 39 of the Companies Act:

138.4.1 the effect of these arrangements was that Tigon Limited directly or indirectly acquired an interest in its own shares and/or;

138.4.2 *Pan Pacific Financial Services Limited acquired an interest in the shares of its holding company, Tigon Limited;*

138.5 *the “Pan Pacific Client Investment Account Agreements” were not entered into with the intention to bring about enforceable rights and obligations but were intended to:*

138.5.1 *support the accused’s assertions that the terms of the agreement provided that, a “performance fee” amounting to R26 million would be recorded in Tigon’s group profits and that the fee was determinable and realisable;*

138.5.2 *manipulate the Tigon share price, by boosting the share price, which in turn increased the “performance fee” earned which was to be included in Tigon group profits. Tigon Limited was therefore in the position to “profit” from the interest acquired in its own shares;*

138.5.3 *create the impression that the shares acquired in terms of the “Pan Pacific Client Investment Account Agreements” formed part of Tigon’s “free float” of shares.*

138.6 *Pan Pacific Financial Services Limited was not entitled to a “performance fee” at 31 January 1997, as it was not a lawful and valid contract. Even if it was a lawful contract (which it was not) the performance fee could not be accounted for in terms of South African generally accepted accounting practice as at 31 January 1997.*

138.7 *the transactions between Tigon Limited, the accused, Pan Pacific Financial Services Limited, Goldstar Limited, Cabali Limited and Three Oceans Finance & Trading Limited were not at arms length and were false and simulated.*

138.8 *the recording and recognition of the “performance fee” was not in accordance with generally accepted accounting practice;*

138.9 the Tigon group consolidation workings for the year ended 31 January 1997 reflected a profit before tax of R26 250 000-00 in the income statement for Pan Pacific Financial Services Limited which was inaccurate and incorrect and amounted to a material overstatement of earnings;

138.10

138.11 these transactions were simulated and/or fictitious.

22. The basic allegations find expression in one form or another in the other offences listed under counts 1 to 14. They are all alleged to have been committed at the same time or subsequently, and involve one or more of the same entities. Furthermore the State alleges that Pan Pacific, Goldstar, Cabali and Three Oceans are all entities registered in the British Virgin Islands, Niue or Hong Kong and, in respect of some, ostensibly managed from Hong Kong.

An element of the case which the State seeks to make is that the controlling mind of all the key entities was Porritt, who it is alleged acted through nominees, proxies or in the case of trusts, were actually controlled by him *inter alia* for his financial benefit.

23. The evidence which the State seeks to introduce under the ICCMA relates to both the statements contained in the affidavits deposed to by the five mentioned persons and also the documents which they produced pursuant to the LoR and which were identified in the body of each affidavit.

24. The affidavits themselves identify the documents produced, give context to how they came to be in the deponent's possession and to a greater or lesser extent explain their purpose and whether the deponent was acting as principal or as a nominee or proxy, and if so for whom.

25. The affidavits were prepared in response to the interrogatories contained in the LoRs and possibly also as a result of additional questions asked prior to their

finalisation. This was so in the case of Mercer. The actual interrogatories as well as the letters of request have been placed before the court.

NATURE OF PROCEEDINGS UNDER s 5(2) OF THE ICCMA

26. Unlike the case where the prosecution introduces evidence to which objection is taken, under s 5(2) of the ICCMA it must effectively satisfy the court that the evidence should be admitted in the interests of justice.

27. This means that the State applies for its introduction, and the accused respond with the State then replying.

In the present case the accused were given great latitude.

ISSUES RAISED BY THE ACCUSED

28. After the State had presented a comprehensive set of heads of argument in February 2021, the accused failed to indicate the basis of their opposition as required in terms of an order of this court.

29. At a subsequent hearing the accused challenged the basis on which the depositions and documents were obtained, contending that an LoR could only have gone out under s 2(1) and this therefore entitled them to be present and question the witness during his or her examination before the Hong Kong Court.

The basis of the argument was that proceedings had already been instituted and the State had held back the prosecution in an attempt to unlawfully or otherwise wrongfully disentitle the accused from attending the Hong Kong proceedings.

30. This issue was dealt with in an earlier decision delivered on 19 March 2021 where the court dismissed the accused's arguments³. In its decision the court did not consider it necessary to engage in the possible further question of whether

³ See *S v Porritt and Bennett* [2021] ZAGPJHC 381

the accused would have to demonstrate that they or their legal representative would have put any questions to the witnesses, bearing in mind that the accused had elected not to exercise their right of being satisfied that the Hong Kong documents were those receipted into South Africa.

31. After hearing further argument the court decided that it would first consider whether the documentary evidence produced by three of the five witnesses before the Hong Kong Court should be admitted under the ICCMA. It will be recalled from the previous decision that the State also relied on other legislation for the introduction of most, if not all, of these documents. In view of the arguments presented at the time, the court directed that it would deal with the documents provided by Gordon, Lintern-Smith and Mercer first, then deal with the contents of their affidavits and after that consider Mrs and Mrs Adamczyk's affidavits and the documents which they had produced.
32. The court first ruled that the documents produced by Gordon, Lintern-Smith and Mercer could be admitted under the provisions of the ICCMA. The documents were those which had been in the possession of the deponents when engaged in the business activities of various entities relevant to the charges against the accused.
33. At the time the accused did not contend that the documents had not formed part of the documentation forwarded by the Hong Kong authorities to South Africa. The accused also had not challenged the authenticity of the documents. Indeed some of them comprise communications which emanated from or were for the attention of Porritt and some others bear Porritt or Bennett's signature. All these documents satisfied the requirements for admissibility under s 5(2).
34. Subsequently during argument concerning the admissibility of either Lintern-Smith or Mercer's affidavit, the accused re-opened the question of the admissibility of the documents because some had become yellowed while others not. The accused however withdrew their challenge after apparently receiving a further set of heads of argument from the prosecution.

35. It has already been mentioned that the accused declined to attend when the documents which had been received from Hong Kong were to be opened by breaking the seal that had been placed by the Hong Kong authorities. These documents were received in South Africa in about 2006.

Fifteen years have passed since then and, unless the accused can demonstrate something concrete, they cannot be entitled to take advantage of their decision not to attend (personally or through the experienced legal representative who represented at least one of them at the time). It would then have been a simple matter of satisfying themselves that the documents which had been sealed in Hong Kong are those now placed before the court.

That was their opportunity to ensure that the chain of evidence was not broken after the seal or seals on the Hong Kong documents were cut.

36. This issue was covered in the court's reasons for admitting the documents produced by Gordon, Lintern-Smith and Mercer into evidence pursuant to the provisions of s 5(2)(b) of the ICCMA and on the terms set out in the order of 22 November 2021.

The order reads:

1. *The documents obtained by the letter of request and identified in the affidavits of Messrs Gordon, Lintern-Smith and Mercer are admissible under s 5(2)(b) of the International Co-operation in Criminal Matters Act, 75 of 1996 (the ICCMA) as being the trade and business records of the entities from whom they were obtained in Hong Kong and only to the extent that that they;*

- a. are the trade and business records of the entity from whom they were obtained;*
- b. are what they purport to be without further proof;*

- c. *were sent and received by the person purporting to have done so as appears from the contents of the document itself on or about the date reflected thereon as the date of either despatch or receipt or approximating such date by reference to the document and any other relevant document that can shed light thereon; or were brought into existence on about the date reflected thereon*

2. *The order in para 1 is;*

- a. *subject to the accused's entitlement to challenge the admissibility of any such document, should the State refer any witness to its contents, on specific grounds relevant to the genuineness of that document or the correctness or otherwise of its contents; and*
- b. *without prejudice to the State;*
 - i. *subsequently relying on any other law identified in its aforesaid Heads of Argument in regard to the admissibility of the documents on the grounds that they are what the purport to be;*
 - ii. *seeking to rely on the truth of content of any document by reference to any other law which has been identified in its various Heads of Argument filed of record; in which event the accused's right to challenge the admissibility of the content of such document for such purpose is preserved.*

37. As appears from the order, the court admitted into evidence as being what they purported to be (but not as to proof of content) all documents which would ordinarily be admissible into evidence on grounds of constituting the business records and documents of the various entities.

38. At that time the court also accepted the admissibility of the Gordon and Lintern-Smith's affidavits. Their affidavits did little more than identify their attached documents.
39. The affidavits of Mercer and the Adamczyks however went beyond only identifying the documents that were attached and which they claimed had come into their possession.
40. This judgment is now concerned with the admissibility of Mercer's affidavit and to Mr and Mrs Adamczyk's affidavits and the documents attached to them.
41. In the judgment of 22 November 2021 the court dealt comprehensively with the requirements to be satisfied for the admissibility of documents, including affidavits, under the provisions of the ICCMA. They are also to be found in the open source law reports.⁴

It is accordingly unnecessary to repeat the basis for admissibility. It is only necessary to apply the ratio of that decision to the admissibility or otherwise of the three sets of affidavits and the documents attached to the Adamczyks' affidavits.

THE CHALLENGE TO THE MERCER AFFIDAVIT AND THE AFFIDAVITS OF THE ADAMCZYKS AND THEIR DOCUMENTATION

42. The State presented a number of sets of written argument dealing with the admissibility of the Hong Kong affidavits and their attached documents while Bennett also presented her own sets of written argument.⁵
43. It will be noted from the footnote to the previous paragraph that the prosecution had submitted their heads of argument in early February 2021, that Porritt had

⁴ *S v Porritt and Bennett* [2021] ZAGPJHC 382; 2022 (1) SACR 88 (GJ)

⁵ The prosecution's first set was on 8 February 2021 (132 pages), the next on 8 March 2021 (20 pages). Then on 5 October 2021 (32 pages) and the last on 28 October 2021 (38 pages). Bennett's first set was on 5 March 2021 (28 pages), followed by one on 25 July and two sets both dated 4 October 2021 (totalling 86 pages) a further set dealing exclusively with the Adamczyks' affidavits (6 pages) and a final set dealing with decisions of the European Court of Human Rights ("ECHR") (6 pages).

not submitted any written argument and that leaving aside Bennett's first set of written argument which dealt with the section 2(2) of ICCMA argument, it was only in early October 2021 that she properly provided written submissions concerning the other grounds for challenging the admissibility of the documents which are the subject matter of this judgment.

44. By 21 July 2021 Porritt had been presenting his submissions orally and Bennett had not attended hearings since about 6 May due to what were described at the time as seizures after which she again raised the issue of her stress levels and mental ability to participate in the proceedings supported by medical practitioner notes from time to time. She had also brought a substantive application for a postponement of the trial in about mid-June 2021 citing, from recollection, her seizures related to court stress and the anxiety of appearing in court.⁶

45. Porritt had abused his right to present argument by engaging in issues which were unrelated to those before the court and by diverting the proceedings with allegations concerning the conduct of correctional services at Johannesburg Central where he was being detained at that time and the medication he was on; all of which he claimed affected his fair trial rights despite the amount of time he had been given to prepare his challenge to the admissibility of the Hong Kong documents.

At that stage Porritt claimed that he was forgetful with the result that he would leave his notes behind and forget what he and Bennett had discussed regarding their challenge to the State's application. He also had effectively told the court that in order to exercise his fair trial rights the trial would take another 10 years.

46. Bennett had in the meanwhile failed to comply with the terms of this court's order of 19 July.

⁶ The courts concern regarding the content of the medical reports and doctors' notes, their potentially indeterminate nature and the court's observations of Bennett's ability to present her own defence are addressed more adequately in other judgments by this court

47. In order to ensure that Bennett would be able to present argument this court had directed that she proceeds to make her submissions in writing with certain contingencies if she is then unable to present oral argument.

48. In order to deal with Porritt's abuse of his fair trial right and ensure that Bennett's anxiety attacks and alleged mental inability to attend court (which were said at the time to relate to attending an open court hearing) the court placed a time limit on Porritt concluding his argument and requiring written submissions from Bennett which would allow her to prepare and forward her argument both in respect of Mercer and Adamczyk from outside the stress of the court environment.

This was provided for in the order made on 27 July 2021 which reads:

1. *The trial is postponed to Wednesday 8 September 2021 at 10h00 ,with Porritt attending virtually at The Chambers, Pretoria and Bennett attending virtually on MS-TEAMS at her residence in Knysna;*
2. *The trial will resume on 8 September 2021 and:*
 - a. *Mr Porritt shall continue his argument opposing the State's application to introduce the affidavit of Mr Mercer into evidence.*
 - b. *Porritt will be afforded no more than two days to conclude his argument and;*
 - i. *Provided there is more than half an hour of engagement with the court while Porritt presents his argument*
 - ii. *Provided Porritt does not engage in any issue unrelated to the issue before the court,*
the court will afford Porritt a further day to complete his argument;
 - c. *The court will then hear Ms Bennett's argument opposing its introduction which shall not take more than two days by reason of the requirement that she is ordered to prepare written argument*

- d. *Thereafter the opposed application to introduce both the affidavits of Mr and Mrs Adamczyk and the documents they have referred which have not already been admitted will be heard. The period of argument by the prosecution and the accused will be determined by the nature and extent of the objections*
- 3. *Due to the failure of Ms Bennett to comply with the terms of the order of 19 July 2021 and pursuant to Mr Porritt's submissions heard on 26 July 2021 and in order to ensure that the matter proceeds fairly and expeditiously when the court resumes on 8 September 2021 for the entire duration it has been set down for, namely from 8 September to 17 September 2021, 4 October to 8 October, 25 October to 29 October 2021 and from 15 November to 3 December 2021;*
 - a. *Bennett's argument opposing the application to introduce the affidavit of Mercer is to be presented in writing and she will also prepare in writing for presentation in her argument a list of the paragraphs of the Adamczyks' affidavits to which she objects and the grounds for her objection as well as the grounds for objecting to any of the documents to which both the Adamczyks' affidavits refer;*
 - b. *Bennett's written argument in respect of opposing the application for the introduction into evidence of Mercer's affidavit in part or in whole is to be delivered by no later than Monday 30 August 2021 at 16h00;*
 - c. *Bennett's written argument in respect of opposing the application to introduce the affidavits of Mr and Mrs Adamczyk and the documents sought to be introduced through their affidavits is to be delivered by no later than two court days after the State has concluded presenting its argument.*
 - d. *Bennett is at liberty to present such oral argument as she wishes in addition to the written argument referred to above subject to the following;*
 - i. *Should she fail to appear on any court date during the course of the hearing in regard to the admissibility of Mercer's affidavit or the Adamczyks' affidavits and documents referred to therein or any other outstanding issue that had already been raised by Porritt regarding Linton-Smith's affidavit (collectively referred to as "the outstanding Hong Kong matters") then the matter will proceed in her temporary absence and the content of subpara (f) will also forthwith apply should*

the reason be her inability to attend court by reason of any physical or mental condition, which includes but is not limited in any respect to a severe depression disorder, convulsion disorder or (according to Dr Olivier) anxiety disorder;

- ii. *Should she fail to present written argument as set out above on due date then the court will immediately establish her failure to do so and consider whether she should be placed under observation in terms of the Criminal Procedure Act, and the terms thereof, and if it decides to do so then the matter will proceed in her temporary absence until such time as her status is determined*
 - iii. *Should there be no valid reason for her non-attendance or failure to present written argument as above the court will then determine whether there has been a contempt of this court's order, in which case the reason for Bennett's failure to comply with the Court's order of 19 July 2021 will also be dealt with;*
- e. *Bennett shall conscientiously follow such advice, treatment and medication regime as may be prescribed or recommended by her treating medical practitioners prior to 7 September and thereafter subject to any court determination*
- f. *Should Bennett at any stage prior to or during the course of any hearing contend that she is unable to proceed then she will be forthwith referred for observation under the provisions of the Criminal Procedure Act, on such terms as the court directs, to determine her ability to stand trial and the trial will proceed in her temporary absence*
- g. *Porritt shall ensure that;*
 - i. *he consults to such extent as is reasonably necessary with Bennett prior to the resumption of the hearings commencing on 8 September 2021;*
 - ii. *he is fully prepared to proceed with the matter in her absence and deal with the outstanding Hong Kong matters should she be absent for any reason.*

- h. Should there be at any stage any impediment to Porritt so consulting with Bennett by way of telephonic communication the onus is on him to forthwith approach Correctional Services, and failing assistance from them, the Investigating Officer to assist in facilitating such communication in good time prior to the commencement date of the hearing on 8 September 2021.*

Furthermore;

- i. should he be unable to do so he shall forthwith prepare written representations to the court and have them delivered by no later than Tuesday 17 August 2021 failing which he shall be barred from raising lack of consultation with Bennett;*
 - ii. the Prosecution is required to ensure that a copy of this order is received by the responsible official at Correctional Services and by the investigating officer, Warrant Officer van Wyk, by no later than this Friday 30 July 2021 with suitable proof that this has been done and that their attention has been directed to the contents of this paragraph;*
- i. Porritt shall prepare a written document setting out in point form the grounds of objecting to the Adamczyk affidavits including which paragraphs or parts of a paragraph there is specific objection to and which specific documents are objected to without the necessity of providing reasons at that stage.*

Furthermore;

- i. In the event that Porritt's objection is not only to the affidavit as a whole, or to all the documents as a whole, but also to specific paragraphs, or parts of a paragraph, and specific documents then he is obliged to identify each such specific paragraph, or part of a paragraph, and each specific document;*
 - ii. In the event that Porritt fails to comply with the terms of the preceding subpara by 8 September 2021 he will be precluded from presenting oral argument beyond the points raised unless good cause is shown on such terms as the court directs.*
- j. Each accused shall ensure that by the time Mr Ramsay gives evidence they will have prepared on the topics on which each intends to cross-examine him.*
- Furthermore;*

- i. *Immediately before Ramsay commences his evidence-in-chief each accused shall present to the Court a written document setting out concisely which documents it does not object to being admitted into evidence through Ramsay, to the extent that they have been made aware of which documents the Prosecution intends introducing into evidence;*
 - ii. *Immediately after Ramsay has completed his evidence in chief the court will adjourn for two court days.*
 - iii. *During those two court days each accused shall then prepare a written document identifying each of the aspects of Ramsay's evidence which they intend to challenge through cross-examination*
 - iv. *Each such document shall be presented to court immediately on resumption and the court will determine the amount of time that each accused will be afforded to cross-examine, which period shall be subject to reconsideration*
 - k. *Porritt shall be examined by Dr Tsitsi by no later than 6 August 2021.*
Furthermore;
 - i. *The prosecution must provide Dr Tsitsi with the relevant portions of the transcript of the hearing of 26 July 2021 in which Porritt set out what took place during his last examination by Dr Tsitsi so as to ensure that the examination to be undertaken will properly inform the court of the period that Porritt should attend court both as to the number of days in the week and as to the hours in the day;*
 - ii. *Dr Tsitsi's report is to be made available to Porritt and to the Court by 6 September 2021*
4. *On 16 September 2021 and irrespective of whether or not the outstanding Hong Kong matters or any other matter is being dealt with, the court will hear any party who contends that the evidence of Mr Ramsay should not be heard in the presence of all the accused and the prosecution at the Johannesburg High Court ("vive voce*

hearing”). In order to facilitate the fair and expeditious determination of such issues as may arise and in particular the accused’s fair trial rights;

- a. Any party who contends that there should not be a vive voce hearing (with all parties present at the Johannesburg High Court) will be afforded not more than one hour to present argument. In such event;*
 - i. The party who does not object to such a vive voce hearing will be afforded 45 minutes to present argument and if there is more than one such party they shall collectively not be afforded more than one hour to present such argument;*
 - ii. Should the issue of the health of any party be raised as a reason for not attending a vive voce hearing that party will be afforded no more than a further half hour to submit why he or she should not be sent forthwith for observation under the provisions of the Criminal Procedure Act, on such terms as the Court directs, and why in his or her temporary absence the trial should not continue;*
 - iii. Any other party who may be affected will be afforded no more than a further half hour to present argument;*

5. A transcript and audio visual copy of the proceedings of 26 July 2021 shall be obtained by the Prosecution and after receipt the court will give reasons as to why the issue of whether;

- a. Porritt is in contempt of court either on the ground of scandalising the court or the judiciary as a whole, whether the conduct of Porritt merits sanction, whether there should be consequences without a further hearing should he repeat such conduct as may be found offensive;*
- b. It is unconstitutional or an otherwise impermissible threat to the independence of the judiciary or the rule of law to proceed with a complaint, or threaten to do so, before the trial is concluded (or after a higher court has declined to entertain leave to appeal an application for the presiding judge’s recusal), with impeachment or other disciplinary proceedings through the Judicial Service Commission generally, or in the specific circumstances of this case and;*

- i. whether Porritt did so threaten;*
- ii. whether such conduct amounts to contempt of court or on its own is sanctionable either in the same manner as a civil or criminal contempt of court and what is required to be established;*
- iii. what an appropriate sanction would be*
should be determined by the presiding judge or be referred to a full court or such number of judges as the Judge President may consider appropriate.

6. Provided Bennett attends on all the above court dates, the warrants for her arrest authorised on 26 July and 27 July 2021 shall lapse;

7. This order is effective forthwith, and in the case of Bennett on delivery to her email address, and notwithstanding that reasons for this order are not furnished on the date of the hearing of 8 September 2021.

49.. This gave both Porritt and Bennett a further month to prepare arguments, in respect of the Hong Kong documents, which should have been ready substantially sooner.

50. It should be added that on 30 August 2021 Bennett claimed to have embodied her heads of argument in a 63 page affidavit. For the most part Bennett contended that the order of 27 July violated her constitutional rights, that the court had otherwise prejudiced her and Porritt's rights, that the State had similarly done so and had also acted in bad faith. The only aspect which constituted a direct challenge to the merits of the admissibility of the Hong Kong documents, concerned the contention that Bennett was entitled to and had been deprived by the prosecution of full details of and copies of all correspondence, discussions and other communications whether directly or indirectly between the State, the South African Revenue Service ("SARS") the police or any of their representatives with Mercer, the Adamczyks or their attorneys.

51. The court is satisfied that the State adequately responded. It stated that save for Mercer, none of the other witnesses had attorneys representing them, that he was not represented by an attorney when the LoR was executed in Hong Kong,

that save for Mercer, who was himself an attorney, no correspondence took place with any of the witnesses prior to them appearing at the court in Hong Kong on the first day. The State also advised that no record was kept of what was said to be very brief discussions held with witnesses at the Hong Kong court to facilitate the obtaining of the statements but that no record was kept or was required to be kept of who specifically spoke to which witness at what time and that these events occurred 15 years ago. The State further supplied the list of questions and issues that were to be raised with Mercer as well as the documentation required to be produced for the purposes of his Hong Kong deposition.

52. What however remains is whether the inability to cross-examine Mercer on these aspects or on matters which, according to the accused may exculpate them or demonstrate that the prosecution had avoided asking Mercer or the Adamczyks, affect their fair trial right or otherwise do not allow the affidavits to pass the just and equitable threshold for their admission into evidence.
53. The affidavit of 30 August was challenged for its admissibility into evidence in a criminal trial for a number of reasons. While *per se* the procedure may not permit an affidavit of this nature, the court struck out all but a number of paragraphs contained in Bennett's affidavits of 30 August and 3 September 2021. It did so because they were not germane to the issue of admissibility but rather to the way the court or the State was depriving them of their fair trial right and were acting unconstitutionally. However there were paragraphs germane to the admissibility issue and these were not struck from the record. They were the last sentence of para 119, and paras 120, 124 to 127 and 133 to 137 of the affidavit of 30 August.⁷
54. These paragraphs dealt with the assertion that Mercer was not close-lipped as an attorney otherwise is, alleging as he does personal detail that was not requested, that the State either threatens or induces to get a witness to make untruthful statements, that during the consultations with Mercer the State must have diverged from the interrogatories permitted in the LoR , that State officials would

⁷ Order of 15 September 2021

have made notes during the consultations and that Mercer had failed to respond to certain questions contained in the interrogatories, it being contended that the State chose to conduct the Hong Kong interrogations in secret. Finally the paragraphs that remain also deal with Bennett's wish to cross-examine Mercer with regard to the circumstances of his consultations, who was present, what was discussed and if he was threatened or induced to provide information which suited the State's agenda, and whether there were any recordings or notes. There also remains the statement that the court and the prosecution have violated the accused's constitutional rights and that they have a constitutional right to cross-examine Mercer prior to his affidavit being admitted.

55. Aside from the challenge that the accused will be deprived of their fair trial right to confront the witnesses and deal with matters which may exculpate them or create sufficient doubt about the truthfulness of the facts set out, they contend that both Mercer and the Adamczyks' affidavits contain gratuitous statements unsupported by any documentation, or personal opinions (which constitute all the more reason why the infringement of their fair trial right is sufficiently prejudiced so as to preclude their admissibility).

The accused identified specific passages in each of the affidavits which were challenged on the basis that they could not be addressed without face-to-face cross-examination. These are dealt with later.

56. The only other substantive argument is that the receipt of an affidavit is an all or nothing affair. If any part of it is problematic then the entire affidavit and the documents attached to it cannot be admitted into evidence.

THE STARTING POINTS

57. The main considerations irrespective of the legislation relied on to introduce any affidavit evidence or to allow the admission of documentary evidence is;

- a. The deprivation of the accused's right to cross-examine the witness who deposed to the affidavit. This is such a fundamental invasion of the accused's right that it automatically impacts on the right to a fair trial
- b. The genuineness of the documents sought to be introduced.

58. In its earlier judgment the court dealt with case law on the constitutionality of s 5(2)(b) by reference to case law. This will not be repeated, save to add that the cases clearly recognise that the fair trial rights of an accused under s 35 are not absolute, that there can be competing rights affected in an application of its provisions and that there are constitutionally sound limitations to the fair trial right by reference to the overall interests of justice as provided for in s 36 of the Constitution.

59. This case has also demonstrated that the application of the ICCMA is not something in the abstract. Section 5(2)(b) says as much. The mere fact that the fair trial right to cross-examine is lost is not of itself determinative. The court is required to balance the prejudice suffered by its deprivation with the other considerations set out in the section to determine what is just and equitable. This is dealt with more fully later when the Strasbourg court decisions raised by Bennett are considered.

60. By way of illustration, if an accused who is fully capable of understanding the proceedings and the implications to his or her case, of not challenging specific facts, accepts such facts then there can be no prejudice. It is an election deliberately made with full knowledge. This occurs daily in the courts when admissions are made as to the admissibility of documents.

61. The Constitutional Court has recognised that legislation may result in an “*overlap between substance and procedure in achieving as just and equitable an outcome*”

as possible” when it is called upon to make decisions requiring it to achieve that objective.⁸

62. The court is satisfied, having been engaged in this matter for some 10 years that the accused, although unrepresented in court are well able to understand the nature of these proceedings and their implications. They have elected only to challenge certain statements made in the affidavits before me as being prejudicial to them and their right to cross-examine. As stated earlier, it is insufficient in an ICCMA related application for an accused to be content with a bald statement that his or her fair trial right has been infringed.

63. The accused were expressly required in the order of 27 July 2021 to identify the paragraphs in the Adamczyk’s affidavits and attachments to which they objected and the grounds for doing so⁹.

While the court was alive to the denial that Porritt was not the controlling mind of all the key entities identified in the relevant charges set out earlier, or that he had otherwise acted through nominees or proxies, save for a few paragraphs there was no objection to the Adamczyks affidavits which allege that they had lent their name, as a favour to Porritt who was their friend and business associate whom they had known since the 1980s, as signatory and director to Goldstar documents and agreements (in the case of Jane) and as nominee for the Barrington Trust (in the case of Herbert) when applying for shares in Tigon Ltd, but could not say who was the controlling mind, or beneficiaries of any entity other than an understanding they had in respect of the beneficiaries in the Barrington Trust.

64. Many reasons can explain why an accused may not want to challenge particular statements made by a friend or business associate. However the failure to do so does not enable an accused to aver that his or her fair trial right to remain silent,

⁸ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 36 and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) at para 337

⁹ See paras 3(a) and 3(i)

as part of the right against self-incrimination, would be violated if required to identify the passages objected to and provide reasons for doing so.

Such an argument would defeat the clear framework of the ICCMA and frustrate the court's responsibility in applying s 5(2)(b) of its provisions. The accused have not contended that s 5(2)(b) is unconstitutional, only that its application could be. Accordingly, it suffices to refer to the fact that the privilege against self-incrimination and the election to exercise the right to remain silent has consequences and that the accused were well aware of this from, at the least, this court's earlier judgment of 26 March 2021 dealing with the ICCMA¹⁰. See also the facts of the case in *S v Boesak* 2001 (1) SA 912 (CC) at paras 21 and 21, and to the statement by Langa DP (at the time) at para 24 that:

*"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial."*¹¹

MERCER'S AFFIDAVIT

65. A consideration of Mercer's affidavit can be divided into;

- a. An introductory portion which provides his identity, and sets out briefly how he came to make the affidavit and how he came into contact with Porritt;
- b. Statements which are to be found in and objectively supported by documentation, and which are one of the common cause facts mentioned earlier

¹⁰ See at paras 6 to 11 citing *Osman and Another v The Attorney - General, Transvaal* 1998 (4) SA 1224 (CC) and *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC)

¹¹ See also *Fakie No v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) *per* Cameron J at para 22

- c. *Res gestae* statements, but confined to those which do no more than give a vanilla context to the circumstances surrounding the existence of a document
- d. Statements simply identifying the contents of the document referred to and providing its cross-reference.
- e. Statements which are supported by the documents and despite having regard to the nature, content and extent of such supporting documents can be readily disproved or doubted by any document which, if it existed, would have been readily available.

An instance of such a statement is that contained in para 20 with regard to Peregrine Investments having no relationship with any of the companies or persons listed in an attached schedule. Another is at para 72

- f. Statements which draw conclusions which are not necessarily unequivocally supported by the referenced document or set of documents
- g. Statements which do not fall under any of the foregoing classifications in respect of which no documentary support is offered or claimed.

66. If regard is had to the qualifications for the admission of documents under s 5(2)(b), the purpose of tendering the statements to which subparas (f) and (g) in the preceding paragraph relate, is to prove that Porritt was the controlling mind of certain entities. The prejudice is clear because there is nothing that Porritt can challenge it with, since he is not in a position to show Mercer any contradicting document or test the conclusion reached by Mercer. The opinion, which is not claimed to be based on incontrovertible documentary fact goes to the heart of the relevant charges and the core of the accused's defences. This is qualitatively different to the Adamczyks who do not claim in their affidavits that Porritt was the controlling mind, rather that they were not.

67. The court is therefore of the view that it is not in the interests of justice to admit the following portions of Mercer's evidence which fall under the two impugned categories mentioned in the previous paragraph:

- a. The first sentence only of para 12. Therefore the words "*I had no financial interest in the company and certainly did not control it*" remain
- b. The entire contents of para 13 save for the words "*An application form, signed by Porritt to open a Swiss bank account (See annexure "M37")*" which shall remain
- c. Only the last six words in para 55, commencing with "*I understand ...*"
- d. Only the words "*on instruction of Porritt or Bennett*" in para 72.

THE ADAMCZYKS' AFFIDAVITS AND ATTACHED ANNEXURES

68. Insofar as the actual contents of Jane Adamczyk's affidavit is concerned, the only challenge by Bennett was her statement at para 1.22 that she had formed an impression that Bennett was clever and had an answer for most problems. The accused contend that this is a gratuitous statement. The fact that it was given as part of her answer to the question of how she came to know Bennett and under what circumstances does not necessarily make it gratuitous. If regard is had to her answers as a whole, from her perspective, subjectively it was not unnecessary. It also does not have any pejorative connotation. It appears that Mrs Adamczyk was impressed with Bennett's ability and intelligence. It does not offend any of the considerations set out in s 5(2)(b).

69. There were a number of challenges to Hebert Adamczyk's affidavit. The first also concerned his impression of Bennett's intelligence. This has been dealt with in the preceding paragraph.

70. The remaining challenges to his affidavit were made by Porritt. In considering these challenges it must be recalled that Porritt and Herbert Adamczyk were friends

71. They included an argument that part of para 4 of Herbert Adamczyk's affidavit was speculative as to who were the beneficiaries of the Barrington Trust. This was repeated in para 4.8. A similar question was asked of Mrs Adamczyk in para 6 of her affidavit. I believe that on a consideration of the s 5(2)(b) requirements it is not in the interests of justice to retain these statements in their affidavits. Accordingly the single paragraph immediately above para 4.1 of his affidavit is objectionable as is para 4.8, and para 6 in Mrs Adamczyk's affidavit.

72. The balance of the challenges to the admissibility of the Adamczyk affidavits are principled ones. The accused contend that;

- a. It is impermissible to adopt a question and answer approach instead of allowing the witness to tell his or her narrative and that the witness cannot depose to an affidavit before the requested country's Magistrate.
- b. The LoR was a disguised attempt to deal with the tax related charges and that para 8.3 of the Hong Kong Ordinance precludes an LoR from being used for an investigation of tax related offences unless the requesting State has an agreement in place with Hong Kong for mutual assistance
- c. It is impermissible for the requested magistrate to accept an affidavit. He or she is required to take down the oral evidence of the witness.

MAGISTRATE'S ABILITY TO TAKE A DEPOSITION AND THE Q&A METHODOLOGY

73. It appears that s 5(1) of the CCMA imposes no restriction in this regard other than that: "*Evidence obtained by a letter of request shall be deemed to be evidence under oath if it appears that the witness was in terms of the law of the requested State properly warned to tell the truth*".

74. Far from it being problematic for the Hong Kong Magistrate to take the witness's *ad jurat* it seems eminently practical that it is done this way.
75. The only objection I can conceive to a question and answer style affidavit is if the questions are not open ended. These were open ended.
76. It is unnecessary to have regard to the prosecution's other submissions in relation to this point.

TAX RELATED MATTERS PRECLUDED FROM LoRs

77. In advancing his point, Porritt referred to the contents of the LoR which was sent to the Hong Kong officials indicating, in para 14.7.4 that the primary purpose of the request was not the assessment or collection of tax.
- 78.. The only clearly discernable response which would be relevant to a tax offence count in respect of which the accused have been charged is Mr Adamczyk's statements regarding their counter-trade transactions in wine.
79. Mr Coetzee argues that this was in reply to an open question about the relationship between Mr Adamczyk and Porritt and how they came to know each other. He also submitted that there was no question directed at a tax issue and that the prosecution will not rely on Adamczyk's affidavit to prove the s 11(b) or 11bis income tax charges.
80. The court must adopt a principled approach. It is concerned that as it stands the s 5(2)(b) considerations weigh against the inclusion of this aspect as not being in the interests of justice. Accordingly the last five paragraphs of para 1.17 of his affidavit (commencing with the reference to Fleur de Lys) should not be admitted into evidence

ORAL EVIDENCE MUST BE PRESENTED: AN AFFIDAVIT IS INADEQUATE

81. This challenge goes beyond the acceptance in s 5(1)(a) that a witness was properly warned to tell the truth. Rather it is focused on the adequacy of allowing an affidavit to be taken or questions answered and then put in a document for the requested State's magistrate to commission.
82. Bennett argues that there must in fact be an examination of the witness before the magistrate.
83. The court does not read the Hong Kong Ordinance in this way. In Article 11.1 it in fact contemplates that ;
- "The requested State shall ... (instead of taking sworn or affirmed testimony) ... otherwise obtain statements of persons or require them to produce items of evidence for transmission to the requesting State"*
84. But there is another string to Bennett's bow. She referred in her final set of heads to the Strasbourg court decisions of *Schenk v Switzerland* ECHR 8/1987/131/182 at para 12, *Solakov v Former Yugoslav Republic of Macedonia* ("FYROM") ECHR 47203/99 at paras 11 to 18, 29 to 32 and 57 to 59; *FCB v Italy* ECHR 1251/86 and *Schatschaschwili v Germany* ECHR 9154/10 (2015) at paras 55 to 131.
85. These cases are not in point. The decision in *Schenk* did not turn on whether a procedure other than the receipt of vive voce evidence was adopted since the interrogatory was conducted by the Parisian police while a Swiss police inspector was also in attendance.
86. In *Solakov* the issue concerned an ongoing trial where the accused's legal representatives were given insufficient time to attend the hearing. In applying the criminal fair trial rights of Article 6 of the European Convention of Human Rights the court qualified the right of an accused to properly and adequately challenge and question a witness , *"either when he makes his statement or at a later*

stage"... " if the conviction is based solely , or in a decisive manner, on the depositions of witnesses whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial."

The admission of the affidavits in the present case does not mean that the court has weighed them. This was dealt with in the earlier judgment. The affidavits would form part of the pool of evidence which the court is obliged to consider, or to put it another way, it is not excluding them from the evidence it should consider at the end of the trial.

The *FCB* case was concerned with the failure to bring an accused to trial resulting in him being tried *in absentia*. This was fully canvassed in the leading case of *Colozza v Italy* (1985) which concerned domestic legislation which allowed a person to be tried *in absentia* if he was deemed to have willfully evaded an arrest warrant even if he had not been properly notified of the trial date.

Finally, *Schatschaschwili* applied the so called Al-Khawaja test to hold that there had been an infringement of the accused's fair trial right to cross examine. The test contains three interrelated steps to determine the fairness of criminal proceedings for the purpose of Article 6 compliance. They are;

- a. Whether there was good reason for the non-attendance of the witness at the trial;
- b. whether the evidence of the absent witness was the sole or decisive basis for the applicant's conviction
- c. whether there were sufficient concept counterbalancing factors to compensate for the handicaps under which the defence laboured

87. It is evident from these ECHR cases that the fair trial right itself contains potentially conflicting elements; in a given situation it may not be possible to satisfy both the litigant's right to be present on the one hand and to effectively access a court or provide an expeditious hearing on the other. Furthermore, jurisprudentially there are additional considerations which either enhance a

litigant's right to a fair trial or may outweigh it. The one is the right of access to justice. The other is the overarching principle of the interests of justice.

This was recognised by our courts and applied in *Legal Aid Board v The State* [2010] ZASCA 112 at paras 40, 43 and 44

The ECHR in *Marcello Viola v Italy* (2006) acknowledged both the competing rights making up the right to a fair trial and the broader public interests which would be implicated¹². English civil court cases and its criminal procedure legislation also consider whether the interests of justice will outweigh any fair trial prejudice occasioned to an accused.¹³

88. Finally on this point, as Mr Coetzee indicated elsewhere in his argument, to hold that no affidavit can pass section 35 fair trial right scrutiny flies in the face of clear authority which permits domestically commissioned affidavits to be admitted into evidence under various of the hearsay related statutes. Moreover the statements contained in such affidavits will be admitted despite not having been taken down via oral interrogation before the person who administered the oath or affirmation.

THE ALL OR NOTHING APPROACH

89. It was also submitted that if any part of the affidavit is excluded then the whole must be.

¹² *Marcello Viola v Italy* ECHR no 45106/04 (2006). Article 6 is the fair hearing provision. The court also engaged Article 13 which affords the right to an effective remedy

¹³ Sections 51 to 56 of the Criminal Justice Act 2003

See the Chief Justice's Office Guidance on Physical (in-Person), Remote and Hybrid Attendance of 6 November 2023 ("*Chief Justice's Attendance Guidance 6 Nov 2023*") which reads:

"This guidance reflects the recognition that there are matters where the interests of justice determine that physical attendance is necessary unless otherwise directed."

In *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 the English Court of Appeal set aside a High Court order which allowed a remote hearing but said at para 3(i) that:

"The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong."

90. This proposition can be tested in a number of ways. Firstly the ICCMA refers to “*evidence obtained*”. Provided the formalities of properly commissioning an affidavit are observed, every paragraph of an affidavit contains evidence which is either admissible or inadmissible. Evidence does not come as a homogenous package. Each statement made is a piece of evidence which either is admissible or inadmissible.

Secondly, if a court is entitled to hear evidence and decide to strike part of it from the record as being inadmissible while the rest is considered as part of the pool of evidence which must be considered in order to make a factual finding, there appears to be no reason in principle why the court must adopt a different approach to affidavit evidence which is sought to be introduced provided it has been properly commissioned.

91. The court is satisfied that it can redact a properly commissioned affidavit, which is sought to be handed in as evidence, by excluding from it any inadmissible evidence.

FURTHER OBSERVATIONS AND CAVEATS

92. The court did not elect to provisionally allow the evidence in and then decide on its admissibility at the end of the trial as case law indicates is also acceptable.

While making an immediate determination before the court has heard a sufficient amount of evidence to appreciate the impact of admitting affidavit evidence under the ICCMA has its own difficulties, and for that reason was a route consciously not followed, in a case of this nature the court considered that in the interests of both the prosecution and the accused they should have certainty regarding the admissibility of the Hong Kong documents before the State closed its case so that they each can make an informed decision as to how to proceed with their respective cases.

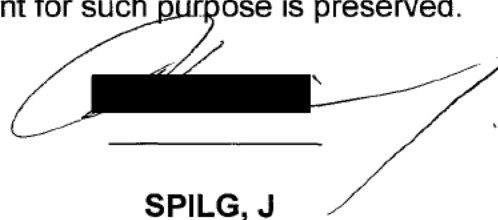
93. Finally, the admission of the affidavits and the documents does not address the weight that they may ultimately carry. I am also satisfied that the documents attached to the Adamczyks affidavits do form part of the business records.

ORDER

94. It is accordingly ordered that

1. The affidavits of Mr and Mrs Adamczyk together with the documents attached to them and the affidavit of Mr Mercer and obtained by the letter of request are admissible under s 5(2)(b) of the International Co-operation in Criminal Matters Act, 75 of 1996 (*“the ICCMA”*) as being the trade and business records of the entities from whom they were obtained in Hong Kong to the extent that that they are what they purport to be without further proof, but subject to the following redactions:
 - a. In the case of the affidavit of Mr Herbert Adamczyk by deleting;
 - i. the single paragraph immediately above para 4.1
 - ii. para 4.8
 - iii. the last five paragraphs of para 1.17 (commencing with the reference to Fleur de Lys)
 - b. In the case of the affidavit of Mr Mercer by deleting;
 - i. The first sentence only of para 12. Therefore the words *“I had no financial interest in the company and certainly did not control it”* remain
 - ii. The entire contents of para 13 save for the words *“An application form, signed by Porritt to open a Swiss bank account (See annexure “M37”)* which shall remain

- iii. Only the last six words in para 55, commencing with "*I understand ...*"
 - iv. Only the words "*on instruction of Porritt or Bennett*" in para 72.
- c. In the case of the affidavit of Mrs Jane Adamczyk by deleting the contents of para 5;
2. The order in para 1 is;
- a. subject to the accused's entitlement to challenge the admissibility of any such document, should the State refer any witness to its contents, on specific grounds relevant to the correctness or otherwise of its contents; and
 - b. without prejudice to the State;
 - i. subsequently relying on any other law identified in its aforesaid Heads of Argument in regard to the admissibility of the documents on the grounds that they are what the purport to be;
 - ii. seeking to rely on the truth of content of any document by reference to any other law which has been identified in its various Heads of Argument filed of record; in which event the accused's right to challenge the admissibility of the content of such document for such purpose is preserved.



SPILG, J

DATE OF JUDGMENT:	15 August 2025
REVISED:	18 August 2025
FOR THE STATE:	Adv. EM Coetzee SC
	Adv. JM Ferreira
FOR ACCUSED ONE AND TWO:	In person