SOUTH AFRICAN LAW COMMISSION

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PROJECT 68

ACCESS TO POLICE DOCKETS

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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HIERDIE WERKSTUK IS OOK IN AFRIKAANS BESKIKBAAR.

PREFACE

This working paper was prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The working paper is being published in full so as to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that the commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make verbal representations to the Commission should submit a brief summary of his or its proposed representations together with a request to be heard by the Commission, in writing.

It would be appreciated if written comments, representations or requests could reach the Commission by 30 September 1991 at the address that appears on the previous page. Please contact the researcher if you are ubable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, if Mr P G Prinsloo. The project leader is the Honourable Mr Justice P J J Olivier.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR.

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Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa	Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd edition Cape Town: Juta 1979
Jones and Buckle The Civil Practice of the Magistrates'Courts in South Africa	Baker, Erasmus and Farlam Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa 7th edition Cape Town: Juta 1979
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TABLE OF CASES

1. INTRODUCTION

1.1 This investigation was prompted by a letter to the Commission by the Honourable Mr Justice J J Kriek of the Natal Provincial Division of the Supreme Court. In the letter the learned judge states, inter alia, the following:

> As you will probably recall, the parties in a civil suit resulting from a motor accident cannot gain access to the police docket pertaining to that accident unless the investigating officer is subpoenaed duces tecum, and then only on the trial date of the case. Over the years it has been my experience on several occasions that when counsel eventually reads the docket shortly before the commencement of the trial the case falls through or the respondent consents to judgment. ... This type of situation can be prevented if the legal representatives of the parties are able to obtain access to the police docket at an earlier stage ... There can be no objection in principle to the parties in a civil suit resulting from a motor accident obtaining access to the police docket pertaining to that accident as soon as the criminal trial resulting from that accident has been disposed of or the Attorney-General has declined to prosecute. The authorities may perhaps be persuaded to allow it. (Translation.)

1.2 Mr J N W Barkhuizen of the Johannesburg Bar states, inter alia:[1]

> Every morning during the term of the Supreme Court, many police officers sit in the foyer of the Supreme Court in Johannesburg and in almost every Supreme Court foyer in the country. Their attendance is not required, but they attend the court on the strength of a witness subpoena in terms of which the station commander of the police station in question is ordered to have a police docket available at the court on the trial date. ... There are two aspects in this regard that disturb me personally, and they are:
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> 1. The waste of manpower at a time and in a country where almost impossible demands are already made on the South African Police Force.

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1 In a memorandum to the Deputy Minister of Law and Order, a copy of which has been presented to the Commission by the Commissioner of Police.

2. The withholding of information, which results in:-

(a) unnecessary litigation;
(b) unnecessary wasting of legal costs;
(c) judges' time being used unnecessarily for cases that ought to be settled;
(d) the withholding of money due to a plaintiff (and sometimes widows and orphans). ...

(Translation.)

1.3 Mr R P McLaren SC (as he was then) of the Natal Bar outlines the problem as follows:[2]

> Experience has proved that legal representatives who seek access to witness statements contained in police dockets may expect to encounter one of the following attitudes:
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> 1. At the police station in question the investigating officer or station commander will allow the legal representatives free access to the docket, provided of course that no documents are removed from the docket. This attitude enables the legal representatives, at a relative early stage, to form an idea of the cause of the collision in question and it usually contributes to a speedy conclusion of the litigation. I am of the opinion that this attitude is the appropriate one and that it accords with the spirit of the amended rule 38(1)(b) of the uniform rules of court.
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> 2. An investigating officer or his station commander insists on a subpoena duces tecum, but will make the docket available to the legal representatives of the parties at the court. This attitude causes no problems in practice, but the Registrar will issue a subpoena only when the trial date has been allotted. The necessity of subpoenaing the officer concerned as a witness may in certain cases give rise to unnecessary costs.
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> 3. The problem is created by the officer who absolutely refuses to make the docket available to the parties. He invokes the privilege of the State. In such instances the only way to obtain access to the docket is to request the trial judge to order the officer (who is then called supposedly as a witness) to deliver the docket to the Registrar for safe-keeping. The legal representatives of the parties then obtain access to the docket through the Registrar. This procedure is unsatisfactory, and it is questionable whether the trial judge has

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2 In a letter to the South African Law Commission.

such powers. If the witness then claimed privilege, the trial judge would surely not be able to order him to waive it. Usually one finds that the "witness" in the witness box no longer insists on privilege. The party who is thus compelled to call as a witness the investigating officer or the person in possession of the docket may have valid reasons why in normal circumstances he does not wish to call the person in question as a witness. Eventually the contents of the docket are in any event disclosed to all the legal representatives, but after access to the docket has been obtained in this circuitous way a postponement is usually requested in order that the legal representatives may study the contents of the docket and copy the statements contained therein. The whole procedure is actually a farce.

(Translation.)

1.4 The Association of Law Societies of the Republic of South Africa had the following to say on request of the Commission:

1. BACKGROUND

1.1 The inaccessibility of police dockets to civil litigants is a problem that has been receiving the attention of the Association of Law Societies of South Africa for years. Extensive evidence has been given before several commissions of inquiry in order to outline the practical effects of the problem. The problem nevertheless persists.

1.2 Without the information contained in the police docket the respective legal representatives of the plaintiff and the respondent litigate solely on the basis of their clients' versions.

1.3 It goes without saying that an early exchange of evidence between the litigating parties can save a considerable amount of time and legal costs. The legislature has already attempted to implement this principle in MVA claims: MVA regulation 7(2)(b) imposes a duty on the plaintiff to furnish the respondent with all his evidence in respect of the circumstances and cause of the accident within fourteen days of his coming into possession thereof, and when the plaintiff has complied with the requirement the respondent has to furnish the plaintiff with all his evidence on the merits in terms of section 13(3) of the Act (Act No. 84 of 1986).

1.4 However, this duty of exchange does not solve the whole problem, because the parties still do not have access to the contents of the police docket (with certain exceptions

that will be mentioned below) and it is still a common occurrence for a litigant's case to fall through on the morning of the trial once the contents of the police docket have been disclosed to him for the first time, by which time thousands of rands in litigation costs have been wasted.

1.5 At present there is, however, limited access to the contents of the police docket:

(a) A police sketch and report with key are available (only after conclusion of the police investigation) against payment of a specified fee.

(b) Copies of statements made to the police by persons may be requested provided that a letter of authorisation signed by the person concerned accompanies the request, as well as the prescribed fee. (In the letter of authorisation the person concerned must waive any privilege to which he may be entitled in respect of his police statement.)

It goes without saying that a litigant's legal representative will be able to obtain such letters of authorisation only from his own client and witnesses, the result being that he continues to have no access to the statements of his opponent or the latter's evidence. In this way the principle of the exchange of evidence on the merits in effect continues to be emasculated and the litigant must still wait until the commencement of the trial before he learns his opponent's version of the events.

1.6 There can still be no consultation with the investigating officer or other police officers until the persons concerned, having been subpoenaed, arrive at the court on the morning of the trial. The disadvantages of this need no explanation.

1.7 Against the background sketched above, it is ironic to learn that certain Government departments are by no means subject to the same restrictions as other litigants:

1.7.1 When the State Attorney is involved in litigation, he draws the police docket in question without the slightest difficulty and finds himself in the fortunate position of having free access to his opponent's statements.

1.7.2 The MVA fund is in the same position: when a police docket is required in order to give the Fund the full picture of the circumstances of the collision the police docket is simply re-

quested, but the opponent has no such privilege.

(Translation.)

1.5 The above, then, is in short the problem that has to be solved.

2. THE CURRENT LEGAL POSITION

2.1 In a series of cases it was decided that a witness who is not a party to a lawsuit is not obliged to make documents available to the parties in conflict. The party who desires disclosure will have to make use of the subpoena duces tecum in order to effect disclosure.[1]

2.2 In Picked Properties (Pty) Ltd v Northcliff Townships Ltd[2] Nicholas J said the following:

> It may well be that Mr Marx's file contains documents which are relevant to the present case, but in the absence of a Rule of Court or other statutory provision giving a party a right to access to documents in the possession of a person who is not a party to, or a witness in, the litigation concerned, there is no basis, in my view, on which a Court can direct that he should have such access.

2.3 In Bladen and Another v Weston and Another[3] Corbett J said the following:

> If, however, the nature of the document which a witness is required to produce is such that when he does enter the witness-box there is no objection to that document being produced - and I use the word "produce" as distinct from the introduction of that document as evidence before the Court - then I can see little ground on principle why under the procedure presently adopted that document should not be available to all parties to the action.

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1 Benson and Simpson v Controllers of Orenstein Arthur Koppel, Ltd (In Liquidation) 1918 WLD 45 at 46; Hull v Minister of Justice 1932 TPD 139 at 140 and 141; King v Margau 1949 1 SA 661 (W) at 662; Bladen and Another v Weston and Another 1967 4 SA 429 (C) at 431-2; Picked Properties (Pty) Ltd v Northcliff Townships (Pty) Ltd 1972 3 SA 770 (W) at 772. See further Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa at 426; Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa at 234; Schmidt Bewysreg at 237-8.

2 1972 3 SA 770 (W) at 772G.

3 1967 4 SA 429 (C) at 431 E-F.

2.4 In King v Margau[4] Neser J said:

> In my opinion a witness subpoenaed to produce relevant documents is, save in exceptional cases, e.g. where he successfully claims privilege, obliged to come to Court with the documents. Prior to being called as a witness, however, he can refuse to allow either party to inspect the documents.

2.5 In Hull v Minister of Justice[5] Krause J remarked as follows:

> No man is entitled to the benefit of the labours of another unless he has good cause to claim such benefit, and, therefore, if a person is in possession of information which he has himself gathered at his own expense and another person thinks that the information may be of use to him, then unless the person willingly parts with that information there is no remedy in law, so far as I can see, with the exception of a subpoena to compel that individual to disclose what he knows or to produce what he possesses.

2.6 The learned writers of Jones and Buckle The Civil Practice of the Magistrates' Court in South Africa[6] says:-

> There is no procedure whereby a third party, not one of the litigants, can be compelled to disclose documents, however relevant, before the trial. All that the third party can be required to do, by subpoena duces tecum, is to bring the documents to the trial. Such documents cannot even then be inspected as of right until the third party is called as a witness and asked to produce the documents.

2.7 Professor C W H Schmidt[7] states the following:

> When a policeman has investigated a case that results in civil proceedings, the right of the parties to interview him is determined by the internal instructions or "standing orders" under which the police function. In accordance therewith an interview may be held on the day of appearance. In traffic

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4 1949 SA (W) at 662.

5 1932 TPD 139 at 140.

6 At 234.

7 Bewysreg at 237-8.

accident cases the policeman's observations and sketch-plan are made available to both sides after the criminal trial has been concluded or abandoned. (Translation.)

2.8 There has been some improvement since the recent amendment of Court Rule 38(1) of the Supreme Court Rules. This amendment[8] involves the insertion of the following paragraph after paragraph (a) of subrule (1):-

> (b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged. Upon it being handed in to the registrar the parties shall be permitted to inspect that deed, document, writing or tape recording and to make copies thereof whereafter the witness is entitled to restitution.

2.9 Although this Rule of Court has improved the position, the problem remains that access is obtained only at a very late stage. A witness subpoena is issued only after a trial date has been allotted, and a trial date is allotted only after the pleadings have closed and considerable costs have been incurred. It appears from the correspondence received, especially from the law societies, that there are also other practical problems with this system, e.g. the lack of storage space and staff for the handling of police dockets at the offices of the Registrars. Furthermore, no similar provision is made in the rules for the magistrates' courts for the earlier lodging of police dockets.

2.10 As rightly observed by the Attorney-General, Johannesburg,[9] a person on whom a subpoena <u>duces tecum</u> is served may refuse to disclose or make available certain documents by, for instance, claiming one of the legally valid privileges. The relevant privileges are therefore discussed briefly below. First

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8 Government Notice R. 2164 dated 2 October 1987.

9 In a letter to the Divisional Commissioner of the South African Police, Witwatersrand.

the privilege in respect of extra-judicial witness statements is discussed. The privilege is defined as follows:[10]

> The privilege in respect of witness statements is in our opinion an independent and distinctive privilege that has a bearing on the general administration of justice. ... Overlapping with professional legal privilege is in fact possible, but the privilege in respect of witness statements also exists independently of a relation between legal representative and client. It is in our opinion also incorrect to link the privilege in question to the police and to refer to police statements in this context.
>
> The latter type of statement is merely a variant of the privilege. Hiemstra (Suid-Afrikaanse Strafproses 3rd edition Durban Butterworths 1981) summarises the position correctly in saying that the statements made previously by witnesses to their own side, i.e. also statements made by state witnesses to the police, are protected against disclosure.
>
> (Translation.)

2.11 The privilege continues until the conclusion of the law-suit, including any appeal or similar step that may follow on the decision of the court of first instance.[11] With regard to access to police dockets this privilege will therefore no longer be applicable after the conclusion of the criminal trial or after the Attorney-General had declined to prosecute.

2.12 The next privilege to be discussed is the so-called informer's privilege. Like all other privileges, this one is also based on public policy.[12] It is in the public interest that crimes should be prevented and solved, one of the aims of the police force indeed being to prevent crime and to bring criminals before the court. To accomplish this task the police need the co-operation of the members of the community and occasionaly make use of informers to obtain information in connection with crimes.

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10 Van Niekerk et al Privileqies in die Bewysreq at 221.

11 R v Steyn 1954 1 SA 324 (A) at 335A.

12 Schmidt Bewysreq at 561.

2.13 The purpose of this privilege is "... to encourage information as to the commission of crime by placing the informer in a condition of security".[13] In Suliman v Hansa[14] Fannin J quoted the four most important essentials of this privilege from Wigmore on Evidence:

> (1) The communications must originate in a confidence that they will not be disclosed;
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> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
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> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
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> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

2.14 In the words of Chief Justice Stratford in R v Van Schalwyk[15] "... anyone who gives useful information about the commission of a crime and needs protection against those who may suffer from his disclosures, should get that protection so as to encourage these disclosures".

2.15 Van Niekerk et al[16] have the following to say on this privilege:

> In the normal course of events it cannot prejudice an accused at all if he does not know who informed on him. If the informer is however not protected and this results in the police no longer being able to rely on information of this nature, the consequence may be serious. (Translation.)

2.16 From the following citations it is clear that the informer's privilege will seldom be raised in the case of vehicle

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13 Van Niekerk et al Privilegies in die Bewysreg at 259.

14 1971 4 SA 69 (D) at 72A.

15 1938 AD 543 at 548.

16 Privilegies in die Bewysreg at 262.

collisions. In Ex Parte Minister of Justice in re R v Pillay[17] Chief Justice Watermeyer states the following:

> From these considerations it seems to me to follow that the exclusionary rule should not be enforced in respect of all criminal cases, but only where it appears from the circumstances that a disclosure of the State's sources of information may be injurious to the administration of justice and consequently that public policy requires them to be kept secret.

2.17 In Pechey v Lutchman[18] Miller J states:

> While it would be too far-reaching to say that a person involved in a motor accident can never, in any circumstances, be regarded as an informer for purposes of the rule merely because he makes a statement to the police concerning the accident, I am of the opinion that the cases in which such a person would be entitled to protection under the rule would be the exception rather than the norm.

2.18 Van Nierkerk et al[19] have the following to say on this point:

> Before a court can decide whether or not it is going to keep the identity of an alleged informer secret, it must be certain that he is in fact an informer in the true sence of the word. A police or other peace officer may never be regarded as an informer that may claim the said protection of secrecy of identity when he conveys information within the sphere of his work. Likewise, the identity and contents of a statement of an eye-witness to a crime may not be kept secret by virtue of the protection afforded by this privilege. The reason is that his information is not the "cause" of the criminal prosecution and that in any case his identity is already known. The same principle applies to the complainant in a case of theft for instance since his identity is, after all, one of the facts that appear from the charge sheet. (Translation.)

2.19 The last privilege discussed here is that regarding the methods of investigation used by the police. These methods, which

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17 1945 AD 653 at 669.

18 1963 4 SA 112 (D) at 115E.

19 Privileqies in die Bewysreq at 263-4.

are necessary to combat crime, are privileged because the public interest demands that effective combating of crime be promoted and protected by silence on the methods used.

2.20 Regarding this privilege Van Niekerk et al[20] state, inter alia:

> The police - as a branch of the administration of justice in the wide sense of the concept - sometimes also need the protection that can be afforded by a privilege. However, what is at issue here is not so much the protection of the police as such, but more specifically their sources of information and methods of investigation in respect of crime. (Translation.)

2.21 And further -

> Interests should be weighed carefully in accordance with the public opinion. On the one hand the law should ensure that the police do not perform their functions and activities in a secret manner that may prejudice the wider interests of the administration of justice, but on the other hand the law should ensure that they are not so hampered in the execution of their duties that the wider interests of the administration of justice are prejudiced. (Translation.)

2.22 In R v Abelson[21] Solomon J says:

> ... The whole business of crime is conducted in secret and devious ways against the interests of the State, and the work of defeating the operations of criminals must also be conducted, obviously, by similar methods.

2.23 It appears that this privilege will come into play mainly in the case of crimes such as trafficking in narcotics and contraventions of exchange control measures.[22] In these instances the method by which the police succeeded in trapping the offenders would not benefit them during their trial but disclosure might well hamper the police in their task of apprehending

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20 Privileges in die Bewysreg at 271.

21 1933 TPD 227 at 231-2.

22 Van Niekerk et al Privileges in die Bewysreg at 272.

offenders in future and the court would probably uphold the privilege in these instances.

2.24 The decision to claim a privilege lies with the head of the department concerned and not with the policeman concerned.[23]

2.25 With regard to the various privileges at issue here it would, in short, appear that:

(1) The privileges will be claimed by the police in relatively few cases that arise from vehicle collisions (which in fact accords with what the Commission's correspondents state to have happened in the past).

(2) In cases where privilege is claimed it is for the court to decide whether or not disclosure is justified, after consideration of all the circumstances.

(3) In terms of the decision in Van der Linde v Calitz[24] the privilege should be claimed by the head of the department and not by the official who is dealing with the matter, and it may therefore be expected that any claim of privilege will be made only after serious consideration.

2.26 Apart from the above-mentioned privileges there is also a statutory measure that deserves to be mentioned, since it may possibly be relied upon to refuse access to police dockets. We refer here to section 19 of the Civil Proceedings Evidence Act 25 of 1965. The section provides as follows:

> 19(1) No original document in the custody or under the control of any state official by virtue of his office, shall be produced in evidence in any civil proceedings except upon the order of the head of the department in whose custody or under whose control such document is or of any officer in the service of the State authorized by such head.

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23 Van der Linde v Calitz 1967 2 SA 239 (A) at 259C.

24 Supra.

(2) Any such document may be produced in evidence by any person authorized by the person ordering the production thereof.

2.27 In Cremer v Afdelingsraad, Vryburg[25] it was decided that section 19 deals with official documents and that a distinction be made between documents - whether official or not - regarding which privilege may be claimed by reason of their contents and documents where, because they are official, it is in the interest of the State that the originals remain in the possession of the State. It was decided that documents in the police docket relating to a motor accident are not documents the submission of whose originals is barred by section 19 and that the said documents are not official documents within the meaning of section 19. Therefore it appears further that from this quarter there will in general be no objection to access to police dockets, especially in view of the fact that the original will not be removed from the possession of the State.

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25 1974 3 SA 252 (NC).

3. RECOMMENDATIONS BY CORRESPONDENTS

3.1 Various persons and bodies wrote to the Commission in connection with this matter and submitted proposals for the solving of the above-mentioned problem. These proposals are now discussed in brief.

3.2 The Cape Bar Council made the following proposal:

> In our view, a duty should therefore be imposed on the SA Police by way of legislation to make the contents of their dockets available to interested parties immediately after the conclusion of the criminal proceedings concerned. A rule similar to Supreme Court Rule 38(1)(b) should also be introduced in the Magistrates' Courts Rules. In the case of motor accidents, a duty should be imposed on the police to make available at any time to interested parties the information ... . A suitable amendment of Rule 38(1)(a) should also be introduced to make it clear that a party is entitled to issue a subpoena duces tecum, regardless of whether or not he intends to call the person named in the subpoena as a witness at the trial.
>
> Another aspect that deserves attention is, in our view, the keeping of police dockets. It often happens that when a subpoena duces tecum for a particular docket is issued and delivered it emerges that the docket has already been destroyed and thus also important evidence. We recommend that the SA Police should be compelled by suitable legislation to keep all dockets for a period of, say, five years after the conclusion of any criminal proceedings or the date on which it was decided not to institute such proceedings, as the case may be.
>
> (Translation.)

3.3 The Pretoria Bar is also in favour of legal representatives having bona fide access to police dockets after the conclusion of the criminal trial, or their at least being able to obtain copies thereof in matters where this is appropriate. In the Bar's opinion there will certainly be cases where State privilege or public interest will be claimed for the police, and in those cases the courts will have to decide on the objection. In by far the majority of cases where police dockets are needed for purposes of civil proceedings, privilege seems unlikely if criminal proceedings are no longer pending. The Bar submits that

the problem of access before the time can be solved with the new Court Rule 38(1)(b) in the Supreme Court and a similar rule in the Magistrates' Court.

3.4 The Law Society of the Transvaal is of the opinion that the docket should be made available unless the police raise valid objections. It should then be possible to test these objections further in some way as regards their validity or unreasonableness.

3.5 The Association of Law Societies of the Republic of South Africa also proposes that there should be legislation providing for access to be given to the dockets. One of the members of the Association's Standing Committee on Supreme Court Matters, Mr C H P van der Post, recommends the following:

> Provision should be made that in motor accident and third party cases the police report, sketch and key thereto are made available at the request of the legal representatives of the parties involved or the parties themselves, regardless of whether the police have completed their investigation and also regardless of whether or not the criminal proceedings have been concluded.
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> It should further be provided that access to the entire docket be given to any of the litigating parties or their legal representatives, with the right to make copies thereof, as soon as the criminal proceedings have been concluded or the State Prosecutor has declined to prosecute, as the case may be. At the same time the police should be prepared to grant the litigating parties or their legal representatives an interview at the police offices with a view discussing the contents of the docket and obtaining further explanation in this regard.
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> Before destroying the docket, the police should also in all such cases keep the docket for at least five years after the incident in question or for as long as any of the litigating parties may request, whichever period is the longer.
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> (Translation.)

3.6 Mr D P Honey, chairman of the Association's Standing Committee on MVA Matters, supplies, inter alia, excerpts from the findings of various committees and commissions of inquiry that have dealt with this aspect. Some of these excerpts are given below.

3.7 The Commission of Inquiry into Certain Aspects of Compulsory Vehicle Insurance, 1974 ("Wessels Commission"), stated the following:[1]

> The Commission recommends that the Act be amended to provide that after a third party claim has been served on a competent insurer, copies of the police sketch and report as well as statements made to the police with regard to the collision in question be made available to the plaintiff and respondent concerned. (Translation.)

3.8 The Commission of Inquiry into Aspects of Compulsory Vehicle Insurance, 1981 ("Grosskopf Commission"), stated the following:[2]

> Another matter which perhaps goes beyond third party insurance but which is often involved in court cases resulting from it, is the accessibility of police dossiers to litigants. If the dossiers of traffic accidents could be made available to the parties concerned at an early stage, it would probably encourage settlements. In connection with this a letter was addressed to the Commissioner of Police and an answer was received on 3 January 1984. In this letter a number of reasons were mentioned why the SA Police are not prepared to make dossiers concerning traffic accidents accessible to litigants. On the surface, the objections of the SA Police do not seem to be insurmountable. In order not to delay the activities of this Commission any further, we leave the matter there, but would like to suggest that it be taken further by the Standing Advisory Committee to which we refer below. In any case, we feel that there can be no reason why dossiers should be made available to the state corporations suggested in the MVA fund's above-mentioned submission and not to members of the consortium.

3.9 Mr D P Honey's own solution is set forth in paragraph 3 of his letter to the Commission, as quoted below:

> Almost all the Commissions of Inquiry and/or Committees recognised the problem and recommended some or other solution. The problem is that none of these numerous recommendations has ever been implemented.

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1 In paragraph 6.14.2.1.

2 In paragraph 11.2 of its report.

The Association of Law Societies supports the above-quoted recommendation of the Vivier Commission, subject to the proviso that the police docket should be made available at the office of the Registrar (for access and copying by the litigants) unless the police authority concerned indicates in advance that it is going to claim privilege, in which event the matter should be referred to a judge in chambers or, if need be, to a chamber court. Availability at the office of the Registrar however has the advantage that unnecessary counsel fees can be avoided. Such costs may amount to a considerable sum where two, three or even more litigants claim access to police dockets.

There are various reasons why no system has been introduced by which civil litigants may obtain access to police dockets, but as far as is known all these reasons are connected with the attitude of the SA Police. Their objections over the years have varied from a fear of civil lawsuits against the police for breach of privilege to a dearth of manpower. It is respectfully submitted that none of these objections has enough substance in comparison with the tremendous problems of wasted costs and time with which the civil litigation system is faced

(Translation.)

3.10 The Law Society of the Cape has the following proposals:

1. Copies of the police sketch and report should be made available to the practitioners on demand, without waiting for the conclusion of the criminal trial.

2. After the conclusion of the criminal trial or after the decision of the Attorney-General to institute criminal proceedings, the police docket should be kept at the police station in question and be available to practitioners. The arrangements in this regard should be finalised by the practitioners and the station commander or somebody appointed by him. (Translation.)

3.11 The proposals of the Johannesburg Bar Council are as follows:

It is my view that it is desirable and would assist in the litigation process if dockets are made available to civil litigants after any criminal proceedings have been concluded or a decision made by the Attorney-General not to prosecute consequent upon a motor collision. The contents of such dockets should be made available to any party to a civil action on a written request and payment of an appropriate fee.

It is further my view that police officials should not as a general rule be made available for consultations or attend inspections in loco by one or other party to civil action as this might well result in valuable time being taken up by police officials who have important functions to perform. Should the relevant police official be subpoenaed to attend the trial, Counsel or attorney should find that it is sufficient to consult with such police official on the day that he is required to testify as his statement would have been available earlier to either party from the police docket.

3.12 The Society of Advocates (Orange Free State Division) recommends that prior access to dockets should be permitted by virtue of a letter from the Registrar or the Clerk of Court to the commander of the police station where the docket is held, confirming that civil proceedings to which the docket relates are pending.

3.13 The Law Society of South West Africa proposes that consultation should take place between the attorneys and the various Attorneys-General.

3.14 Both the Natal Law Society and the Natal Bar Council are of the opinion that legislation should provide for the availability of police dockets for access to parties to civil proceedings after the criminal prosecution has been concluded or the Attorney-General has declined any prosecution.

3.15 Mr J N W Barkhuizen[3] of the Johannesburg Bar suggests that the problem be solved by an amendment to the current Standing Orders of the Police Force.

3.16 In a recent letter from Messrs Rooth and Wessels, attorneys, reference is also made to difficulties encountered in obtaining a medico-legal post mortem report. When life insurance and the payment of compensation are at issue, brokers and

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3 In a memorandum to the Deputy Minister of Law and Order (a copy of which has been made available to the Commission by the South African Police).

insurance companies would like to obtain this document at an early stage with a view to payment of claims. It then happens that the police refuse to make such a report available before the investigation has been concluded. Beneficiaries are prejudiced because, as a result of this situation, they often have to wait for the payment of benefits for a considerable period of time.

3.17 The above, then, are among the most important proposals to have come to the attention of the Commission so far. It appears from the above that the Commission's correspondents are for the most part in favour of legislation to solve the problem. The various objections against disclosure of police dockets to parties to civil litigation and their legal representatives will now be dealt with.

4. OBJECTIONS AGAINST DISCLOSURE OF POLICE DOCKETS

4.1 The objections raised by the Attorney-General, Johannesburg, are dealt with first. In a memorandum to the Divisional Commissioner of the South African Police, Johannesburg, he discusses the law as it is at present as well as the various privileges that may be involved and then raises the following objections to disclosure:

> It is very clear, particularly with reference to the underlying reasons for the existence of the privileges, namely public interest ... that public opinion as supported also by case law, demands in particular that certain activities of the Police should not be made public because sound administration of justice in the form of crime prevention would suffer.
>
> Suliman v Hansa 1971 (1) SA 69 (D).
>
> I am therefore of the opinion that the making available of police dockets, as mentioned in the said letter, may lead to the undermining of the very guidelines and principles that underlie the privileges and that are demanded by public opinion in the prevention of crime.
>
> The practical implications of the principle ... may be illustrated by the following example:
>
> (1) Informers in so-called hit-and-run accident cases who for some valid reason do not wish their identity to be revealed may be discouraged from giving the information to the police under a system in which case dockets are disclosed as a rule.
>
> (2) The proposed method will have the effect of the methods by the police in investigating certain related offences (e.g. driving under the influence of liquor) being revealed, which may be counter-productive as regards successful investigation and prosecution of crime.
>
> The fact that both parties involved in civil proceedings are permitted to study the docket necessarily results in the adversaries coming into possession of the statements of witnesses and the clients of the other party. This situation cannot be supported, especially in view of the following:
>
> (1) This method, by which adversaries come into possession of the statements of the other party, does not accord with the accusatorial nature of South African law of procedure.
>
> (2) I am of the opinion that this is not compatible with the principles that serve as foundation and justification

for the existence of professional legal privilege between the client and his legal representative.

(3) The proposed method could have the result that potential witnesses in criminal proceedings might, owing to principle of contributory negligence, shrink from giving the police information on the criminal case because such a statement, if it became available later in the civil proceedings, might then put them in an awkward position. This reticence by witnesses gives rise to a situation that is not conducive to the effective combating of crime.

The control over original documents in possession of the State is regulated strictly by legislation.

(1) Criminal cases: Section 234 Act 51 of 1977.

(2) Civil cases: Section 19 and 20 Act 25 of 1965.

Compliance with these provisions would require a very strict and precise procedure if police dockets were made accessible to civil parties. I am of the opinion that this will impose a further administrative burden on the police, a burden which, owing to its dimensions, will impose a heavier burden on the members of the South African Police than at present.

From informal information obtained by this office from members of the side bar, they would appear to be of the opinion that making the docket available would speed up the civil litigation process. It must be conceded that the litigation process will be facilitated, but it is not clear why the process will be accelerated.

I am therefore of the opinion that the disadvantages such as these that have been stated are of such a nature that a procedure whereby dockets are made available cannot be supported, because it will not promote the sound administration of justice.

(Translation.)

4.2 The Divisional Commissioner of the South African Police on the Witwatersrand already raised the following objections in 1987:

This office is of the opinion that access to such dockets is for obvious reasons not desirable. It may also lead to serious irregularity.

Dockets are primarily opened in all cases where state vehicles are involved in accidents, accidents where there are injuries and hit-and-run cases. In other cases only an SAP

352 is completed and when it has been established that both drivers are licensed, it is closed and filed away.

In cases where state vehicles are involved, the state would naturally be seriously prejudiced if legal practitioners had access to such dockets. This might also result in an increase in civil claims; therefore the economic impact and the volume of work involved would be all the greater.

In the case of other accidents private persons and witnesses might be seriously prejudiced by such a step and this might severely undermine the public's confidence in the SA Police.

(Translation.)

4.3 The Commissioner of the South African Police informed[1] the Commission in 1988 that there was no objection in principle to the proposed opportunity of access to police dockets, but suggested the following qualifications in order to ensure practical workability and to prevent abuse:

(1) Disclosure to be restricted to those documents which have a bearing on the point in dispute, which are to be used in the action or which may serve to prove or disprove the case of either of the parties.

(2) Access to be restricted to a party who can prove a clear legal interest in the contents of the docket.

(3) Information gained in this manner to be used only in civil actions that have a bearing on vehicle collisions.

(4) The South African Police to reserve the right to refuse access and/or copies at its own discretion. In this regard the protection of legally valid privileges (e.g. informer's privilege and the privilege in respect of police investigation methods, etc.) is given as justification.

(5) A protective mechanism is also necessitated with regard to cases where claims are instituted against this Department.

(Translation.)

4.4 This Working Paper in draft form, together with a draft bill, was submitted to the South African Police for comment. This

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1 In a letter to the Secretary, dated 26 January 1988.

comment was received by the Commission in October 1990. The comment does not constitute a response to the proposals made in the draft working paper, but the common law position regarding access to police dockets is discussed with respect to the continuance of a privilege and the question whether a criminal docket is protected by professional privilege if it is part of a brief.

4.4.1 With regard to the continuance of a privilege various decided cases[2] are discussed and certain writers[3] referred to. The following conclusion is then made:

> In my opinion the "once privileged, always privileged" rule goes further than Hiemstra's interpretation of the rule. He says:
>
> > "... as long as the proceedings continue, including appeal." (Suid-Afrikaanse Strafproses at 392).
>
> From this citation it seems that Hiemstra is of the opinion that the privilege is founded at the start of civil or criminal proceedings and continues until after the final verdict at the conclusion of the appeal or review; and if there is a final verdict on a specific body of facts, the privilege lapses.
>
> In S v Patrick Mabuya Baleka & Others ... at 13 217 Van Dijkhorst J held:
>
> > "The law is that witness statements made for the purpose of litigation, whether civil or criminal, and therefore privileged, retain that privilege despite the fact that that litigation is finally concluded or abandoned. The witness statements ... are therefore privileged despite

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2 R v Steyn 1954 1 SA 325 (A); Ex Parte Minister van Justisie: in re S v Wagner 1965 4 SA 507 (A); Hobbs v Hobbs & Coussens (1959) 3 ALL ER 827; Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others 1979 1 SA 636 (C); Bank of Lisbon and South Africa Ltd v Fondrien Beleggings (Pty) Ltd and Others 1983 2 SA 626 (W); S v B 1980 2 SA 946 (A); S v Patrick Mabuya Baleka & Others unreported decision of the Transvaal Provincial Division of the Supreme Court (1987); Estate Bliden v Saref 1933 (CPD) 275.

3 Schmidt Bewysreg 19-20; Phipson on Evidence 12th edition par 596 and 13th edition par 15-19; Wills on Evidence (1898) at 202.

the fact that the prosecutor refused to prosecute thereon."

With reference to the authority cited supra it is my submission that the privilege continues to exist after the final appeal or review.

(Translation, except the citation from S v Patrick Mabuya Baleka & Others)

4.4.2 In respect of the professional privilege the following opinion is held:

... together with R v Steyn 1954 1 SA 324 (A) at 335 A and also as cited in Schmidt Bewysreg at 549:

"The privilege also protects the state in a criminal trial."

and Ex Parte Minister van Justisie in re S v Wagner 1965 4 SA 507 (A) at 507:

"... witness statements in the real sense of the word namely statements [made to] legal representatives (including statements to the Police for legal representatives of the State) which form part of the legal representative's brief."

and on 508 A:

"witness statements drawn up by a legal representative or as in the case in question, the Police for the use of the prosecutor, are in the first place privileged documents."

read with S v Patrick Mabuya Baleka & Others supra at 13 213: "... the statements in the litigation originally envisaged by the police ... does not make them any less part of the brief of the prosecutor",

making it clear that the contention of Schmidt Bewysreg at 548

"This (the witness statements in civil or criminal trials) can be regarded as an extension of professional privilege, ..."

in fact means that statements by a complainant and/or witnesses in a criminal case for submission to the public prosecutor and/or Attorney-General (legal representative of the State) for advice, are the equivalent of witness statements submitted by clients to an attorney in civil cases.

Therefore, the State is the privileged party that can claim privilege on the witness statements, as the State is the litigant that has to be protected. However, there is nothing to prevent the police or public prosecutor from claiming the privilege on behalf of the complainant. The witness, however, has no privilege, because the witness is not a party to the suit:

> "The privilege is that of the client ... However, this does not prevent the practitioner as representative of the client from claiming the privilege - in fact, it is normally his duty to uphold it." (Schmidt Bewysreg at 549)

Therefore, there are no grounds on which disclosure of the docket may be requested.

(Translation, except the citation from S v Patrick Mabuya Baleka & Others)

4.4.3 With regard to section 335 of the Criminal Procedure Act 51 of 1977 the following opinion is held:

This section provides that whenever a person has in relation to any matter made to a peace officer a statement in writing or a statement which was reduced to writing and criminal proceedings are thereafter instituted against such person in connection with that matter, the person in possession of such statement shall at the request of the person who made the statement furnish that person with a copy of such statement.

This section gives a right of access to an accused only, and not to a witness. Furthermore, it is clear that the access is restricted to a confession by an accused and does not include access to any other statements. The statement to which the accused is entitled must further relate to the charge put at the criminal proceedings:

> "The basic requirement of a connection between the statement and the ensuing criminal proceedings must be satisfied before a person is entitled to obtain a copy of his statement in terms of S 335." (S v Mpetha 1982 (2) SA 253 (C) at 256G)

Therefore, a witness, whether as plaintiff or respondent in a case other than a case which follows on the charge sheet with a certain case number, is not entitled to his own statement made in the criminal docket, where he is an accused, if it is required for a civil lawsuit.

The statements of the investigating officer(s) as a witness for the state in a docket that deals with a charge arising from a vehicle collision are therefore privileged. The document may not be disclosed to any interested person before the beneficiary has waived the privilege. If it is in fact

disclosed before waiver, the privilege lapses by reason of breach of the confidentiality aspect. (Bank of Lisbon and South Africa Ltd v Fondrien Beleggings (Pty) Ltd and Others 1983 (2) SA 626 (W) at 629 G)

(Translation, except the citation from S v Mpetha.)

4.4.4 The final standpoint of the South African Police, then, is as follows:

> The statement made by a suspect or witness to a police officer is therefore privileged and continues to be privileged until and up to waiver by the beneficiary (in this case the State, with the prosecutor as legal representative in a criminal trial) by one of the standard methods of waiver, regardless of whether the statements are used in the criminal and/or civil proceedings. Access to these dockets by interested persons would be to disregard the common law and statutory principles of evidence and/or criminal procedure regarding privilege. (Translation.)

4.5 In December 1990 the Commission received a further letter from the South African Police in which the following is said:

> In the meantime two recent decisions have come to our notice, which decisions further substantiate our standpoints.
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> In S v Mavela 1990 1 SACR 582(A) Mr Justice Eksteen says the following at 590:
>
> > "The police docket in a criminal trial, containing, as it generally does, the statements of witnesses the prosecution intends to call, notes made by the investigating officer as to the nature and progress of his investigation, and the instructions and advice relating to the investigation inscribed from time to time by some supervisory officer would, in my view, be prima facie privileged. It would seem to be akin to the State's brief to the Attorney-General or the prosecutor that presents the State's case to the Court, and it is a well-recognized principle that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."
>
> and further:
>
> > "In the same way, it seems to me, notes made by the investigating officer in the docket, and the advice and instructions of a checking officer would be privileged as being confidential communications, intended

ultimately for the Attorney-General, and made for the purpose of getting evidence."

In Sasol III v Minister van Wet en Orde en die Landdros van Evander (at present unreported, although this verdict is to be reported) case No. 6449/90 Transvaal Provincial Division Mr Justice van Zyl ruled on 16 November 1990 in a decision based on the history of law and comparative law that privilege of the legal profession is a fundamental right (and not a rule of the law of evidence) and that this fundamental right may not be infringed in any way.

In these two decisions the South African Police finds strong support for the view that dockets and the contents thereof are protected by the privilege of the legal profession.

(Translation, except the citations from S v Mavela.)

5. DISCUSSION AND RECOMENDATIONS FOR A SOLUTION

5.1 Any discussion of this matter should begin with the essence of the problem. This is that at present no method exists whereby a litigant can obtain access to important documents in a police docket at an early stage without the kind co-operation of the police. However, he may at a fairly late stage gain access without the co-operation of the police by using the subpoena duces tecum and Rule of Court 38(1)(b) of the Supreme Court Rules, unless the police can rely successfully on a privilege.

5.2 It is logical that access to a police docket before the conclusion of the criminal trial may have serious disadvantages for the administration of justice. However, there is no reason why civil proceedings cannot be expedited by making available important documents in a police docket when these are no longer required for the purposes of a criminal trial. From the preliminary comment it is clear that most legal practitioners would welcome such a step.

5.3 It appears, however, that there are two documents that legal practitioners would like to have at their disposal as soon as these are ready, namely the sketch of the scene of the accident (with a key and a report by the police officer concerned) in the case of a vehicle collision, and the report of the medico-legal post mortem, especially in instances where life insurance policies are involved. Strictly speaking, both these documents are witness statements. In the case of an inquest in terms of the Inquests Act 58 of 1959 there is the prospect that an interested party may already obtain access to this document at the time of the inquest. When prosecutions take place, or the investigation of the crime is delayed with the result that a decision on prosecution of the crime is delayed or that the eventual criminal trial remains in abeyance, the prospective civil litigant runs the risk that his claim may prescribe and he must perforce have recourse to

litigation without these important documents. It is precisely this situation that lies at the heart of this investigation.

5.4 In principle it cannot be seen why a post mortem report or a police report on the scene of a vehicle collision may not be made available to an interested party as soon as it is ready. Both these documents have to be disclosed to the defence in a criminal trial in any case. Nor can it be seen why the relevant documents in a police docket may not be made available to an interested litigant when such documents are no longer required for the purposes of a criminal trial.

5.5 It would appear that there may be mainly two objections to the disclosure of a docket. The first objection is that the plaintiff in a civil lawsuit may in this way gain access to the evidence of the respondent. To this the legal practitioners have no objections; on the contrary they point out that the State Attorney already enjoys this benefit to the exclusion of other practitioners. The second objection is that access may be gained to police methods and the investigation diary, and that orders and requests to the investigation officer by the prosecutor, attorney-general or superior officer may be disclosed to the detriment of the police. The latter objection may however also be raised against the subpoena duces tecum and the proceedings under Supreme Court Rule 38(1)(b).

5.6 It is submitted that, if placed on the Statute Book, the recommended legislation (Annexure A) will in no way prejudice the position of the South African Police in comparison with the current position. However, the disclosure will be expedited. The advantage of the draft legislation to the South African Police is that dockets may be made available for access at the police station concerned and that the necessity to subpoena a police officer to attend a court merely to make a docket available is eliminated to a large extent.[1]

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1 See the comment by Mr J N W Barkhuizen in paragraph 1.1 above.

5.7 With regard to the proposals of the practitioners[2] the proposed legislation should be adequate if the fact is allowed for that the purpose is to gain early access to the police dockets, and not necessarily to facilitate civil litigation. We refer here to proposals that police officers who carry out investigations at the scenes of accidents be equipped with cameras, that investigating officers be compelled by legislation to be available for consultation at any time, that the police be compelled to make available copies of the contents of dockets, etc. These proposals would certainly facilitate the task of litigants, but that is beside the point here. What is relevant here is early access to police dockets in order to prevent the continuation of lawsuits that should rather be settled or abandoned.[3]

5.8 It cannot be argued that the proposed legislation would seriously impair any privilege. The documents that would now have to be made available at a very early stage are documents that should in any event be made available to the defence in a criminal trial. Documents that would have to be made available after a trial are documents that were originally drafted for a criminal trial; and if the trial has been concluded or will clearly not take place, the reason why those documents were subject to a privilege has lapsed. There is no reason why such documents should then continue to be privileged.

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2 Set forth above in paragraph 4.

3 See in particular the comment by Mr J N W Barkhuizen in paragraph 1.2 above.

ANNEXURE A

PROPOSED CIVIL PROCEEDINGS EVIDENCE ACT, 1965, AMENDMENT BILL

BILL

To amend the Civil Proceedings Evidence Act, 1965, so as to regulate access to police dockets by parties to civil lawsuits; to provide for access to certain documents in police dockets by interested parties; and to provide for matters connected therewith.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Insertion of section 19A in Act 25 of 1965

1. The following section is hereby inserted in the Civil Proceedings Evidence Act, 1965 (Act No. 25 of 1965), after section 19:

"Access to police dockets

19A (1) If he receives a request in writing from a party to civil proceedings or a person who intends to institute civil proceedings, or the legal representative of such a party or person, a station commander of the South African Police shall make a docket under his control available to such applicant at the police station where the docket is kept, and that applicant may on payment of a fee, determined by the Commissioner of Police from time to time, obtain copies of those parts of the docket that he requires: Provided that a station commander may refuse to make a docket available for access if -

(a) any criminal proceedings on which such a document has a bearing, including any appeal or similar procedure which may follow on the decision of the court of first instance has not yet been concluded; or

(b) the attorney-general concerned has not yet decided whether or not criminal proceedings will be instituted.

(2) The proviso to subsection (1) is not applicable to -

(a) a report on the examination contemplated in section 3(2) of the Inquests Act, 1959 (Act No. 58 of 1959); and

(b) a report or sketch of the scene of any offence or alleged offence prepared by a police officer.

(3) The duty on a station commander in terms of subsection (1) shall lapse after a period of five years from the date on which the docket concerned was opened.".

Short title and commencement

2. This Act shall be called the Civil Proceedings Evidence Amendment Act, 19.., and shall come into operation on a date fixed by the State President in the Gazette.