



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case no: SS26/2014

Date: 2014-05-14

DELETE WHICHEVER IS NOT APPLICABLE:

1. REPORTABLE YES/NO
2. OF INTEREST TO OTHER JUDGES YES/NO
3. REVISED YES/NO

DATE

SIGNATURE

In the matter between

THE STATE

And

**RADOVAN KREJCIR
LUPHONDO DESAI
SAMEUL MARUPING**

Accused 1
Accused 2
Accused 3

JEFF NTHONARE

Accused 4

SIBONISO MIYA

Accused 5

LEFU MOFOKENG

Accused 6

Date of Ruling:

14 May 2014

RULING

Lamont J

In this matter the six accused brought an application to be allowed to inspect certain portions of two dockets to which they previously were excluded.

During the course of argument the State accepted that it would be able to and would in fact produce the contents of the first docket, namely CAS-303/6/2013, and has since the application was launched handed the entirety of that docket to the accused for inspection.

The current application needs a decision insofar as the documents contained within CAS-212/10/2013 are concerned. In that docket there are a variety of documents including witness statements and other documents which form part of what is known as section B and section C.

The witness statements in the docket comprise the section A portion. The section A, namely the witness documents, were discovered and produced for the accused.

The State declines to produce the documents and the inscriptions on the file which relate to section B and the section C (hereafter “the documents”).

For the purpose of the present application, the accused have accepted for the moment that the State may have the right to claim a privilege in respect of the documents. The State claims this privilege in its totality without identifying the particular inscription or the particular document in respect of which the privilege is claimed. In a blanket denial the State simply refuses to produce the documentation.

The right of an accused to documents is dealt with in *Shabalala and Others vs Attorney General of Transvaal and Another* 1995 (2) SACR 761 (CC) at 764 G in the following terms:

- “1. The blanket docket privilege expressed in *R v Steyn* was inconsistent with the Constitution to the extent to which it protected from disclosure of all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure was justified for the purposes of enabling the accused properly to exercise his rights to a fair trial in terms of s 25(3).
2. The claim of the accused for access to documents in the police docket cannot be defeated merely on the grounds that such contents are protected by a blanket privilege in terms of the decision in Steyn’s case.
3. Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are prima facie likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purpose of a fair trial.

4. Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such contents of a police docket as are relevant in order to enable an accused person properly to exercise the right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purpose of a fair trial. This would depend on the circumstances of each case.
5. The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused to properly exercise his or her right to a fair trial or on the grounds that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or of State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
6. Even where the State has satisfied the court that the denial of access to the relevant documents is justified on the grounds set out in paragraph 5 hereof, it does not follow that access to such statements, either then or subsequently, must necessarily be denied to the accused. The court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudice consequences for the proper ends of justice referred to in paragraph 5 (if such access is permitted). A ruling by

the court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of circumstances disclosed by the further course of the trial.”

In *National Director of Public Prosecutions v King* 2010 (2) SACR 146 held at page 151:

“[4] It is well to remind oneself at the outset of a number of basic principles in approaching the matter. Constitutions call for a generous interpretation in order to give full effect to the fundamental rights and freedoms that they create. The right to a fair trial is, by virtue of the introductory words to s 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee herein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past. This does not mean that all existing principles of law have to be jettisoned, nor does it mean that one can attach to the concept of a ‘fair trial’ any meaning, whatever one wishes it to mean. The question remains whether the right asserted is a right that is reasonably required for a fair trial. A generous approach is called for. This is a question for the trial judge and there is in general not an a priori answer to the question whether a trial will be fair or not. Potential prejudice may be rectified during the course of the trial and the court may make preliminary rulings depending on how the case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice.

[5] There is no such thing as perfect justice – a system where an accused person should be shown every scintilla of information that might be useful

to his defence – and discovery in criminal cases must always be a compromise. Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charges, of attacking the prosecution."

It is apparent from the foregoing that the State may well have a right to refuse to disclose documentation. In the present matter the State indicated that there was a reason for it to refuse to disclose the documents.

The reasons included legal professional privilege, that disclosure might result in a threat to any person whose name were referred to in the documents and that informers might be identified.

It was apparent from the statements from the State that there might be justification in the claims made by it that it is entitled to refuse information contained on the file and documents therein.

For present purposes the accused persons accept that position. They however raised an issue that they are unable without more details concerning the documents to determine whether or not the claims made by the State are justified.

There is in the criminal law as far as I am aware no specific mechanism by which discovery is made.

There is a reference by Southwood J to the fact that an appropriate mechanism may be to use the Promotion of Access to Information Act 2 of 2000. In *Kerkhoff v Minister of Justice and Constitutional Development and Others* 2011 (2) SACR 109 (GNP) at p 111, Southwood J held that:

“Furthermore, in asserting his right of access to the documents, the applicant had relied on s 32 of the Constitution of the Republic of South Africa, 1996, ignoring the provisions of the Promotion of Access to Information Act 2 of 2000 (‘PAIA’). PAIA had subsumed s 32 of the Constitution and now regulated the right of access to information; parties had to assert the right via PAIA, and not via s 32. The applicant has thus been bound to seek access to the annexure ‘A’ documents by way of PAIA; since he had not done so, he had failed to demonstrate a right of access to the documents concerned, and his application must therefore be refused”.

This procedure is unavailable in criminal and civil proceedings if the Rules apply to discovery. See: *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC).

By reason of the state of advancement of the current trial and the manner in which it has proceeded, it is apparent that that mechanism is not a mechanism which would be convenient for the accused to use.

Accordingly the question is how at present the State can best be directed, in a convenient manner with proper protection of all the rights set out above, to make reference to the documents and identify its claims of privilege in such a manner that the accused are able to assess whether or not the State justly claims privilege.

In the civil law the concept of discovery and the mechanism by which discovery is made is well known. In *Ferreira v Endley* 1966 (3) SA 618 (E) at p 620 it was held:

“The form of discovery required by the Rules is one which should indicate in the affidavit the existence of documents in respect of which privilege is claimed, and the grounds on which privilege is claimed must be stated sufficiently clearly for the court, if called upon, to decide whether the documents are in fact privileged from production or not. The mere claim of privilege is certainly no reason for omitting all reference to the document in the discovery affidavit”.

Those words must be construed in the current situation to mean that the State should identify sufficiently clearly for the accused and the court to know what the documents are, what the inscription is and why the particular document or inscription is privilege.

I have a wide discretion in relation to the mechanism which I use to require production of documents and must make an appropriate order which protects the rights of all. I am guided by the considerations in the case of *Crown Cork and Seal Company Incorporated and Another v Rheem South African Propriety Limited and Others* 1980 (3) SA 1093 (W).

The object of discovery is thus admirably summed up by STEPHENSON LJ in *Church of Scientology of California v Department of Health and Social Security* (1979) 1 WLR 723 (CA) at 733 CE:

“The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponent’s case and decide how to carry on his proceedings or whether to carry them on at all... Another object is to enable each party to put before the court all relevant documentary evidence, and it may be oral evidence indicated by documents...

“Moreover, the public interest demands that the truth be discovered. As was stated by Lord DENNING MR in *Riddick v Thames Board Mills Ltd* (1977) 3 ALL ER 677 (CA) at 687:

“The reason for compelling discovery of documents in this case lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes

down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure.”

Our courts have discretion in enforcing Rule 35(7). The crux of the matter is the reasons which underlie the practice. No less in South Africa than in England does the conflict arise between the need to protect a man’s property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halts. And, although the approach of a court ordinarily be that there is a full right of inspection and copying, I am of the view that our courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant’s right to a fair trial, of which the discovery procedures often form an important part. I trust that by holding as I have, I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. Practitioners would do well to remember that the normal rule is full inspection.”

See also: *Democratic Alliance v Acting Director of Public Prosecutions and Others* [2013] JOL 30675 (GNP).

The Crown Cork case is not directly in point; however, it is indicative of the extent of the discretion exercised by the court when considering appropriate orders. In my view in the present case the State may well have raised legitimate reasons why it is entitled not to produce the documentation and that it does in fact have a privilege it is exercising

lawfully. It must, however, be put on terms to make such disclosures as are necessary to enable the accused to make a proper informed decision as to whether or not they want to further bring any application to direct further and better discovery and the actual production of documents withheld or whether they accept that the State has correctly claimed a privilege.

I proposed a mechanism to counsel by which this could be achieved in respect of the production of the notation and documents contained within the second docket, namely CAS-212/10/2013.

The proposal which I made was that counsel would inspect the documentation but would be under an obligation not to reveal what was disclosed to any person until such time as further orders had been made by this court (after argument) concerning whether or not in fact the documents were discoverable.

The right of access to the documents accordingly was to be made only to counsel and only with a view to counsel deciding whether or not they proposed to bring further applications in respect of particular notations and particular documents contained within the docket. That is a decision which at that stage they would be able to make. The accused themselves would be excluded from any viewing of the documents and inspections. Counsel would be required to keep the contents of what they had seen to themselves.

If such an order were made it would have the benefit of allowing the State to withhold information fairly without publication to persons who might be able to abuse the

information. It would also enable the accused counsel fairly to assess their position *vis-à-vis* their rights to further discovery.

I expressly do not deal in the present matter with submissions which were made concerning the right to the documents. This is not an issue to be decided now. The only issue I decide now concerns the mechanism by which the accused become able to deal with the justification of the claims of privilege.

The counsel for the State and the counsel for the accused indicated that they would be prepared to adopt the procedure I proposed if ordered to do so and would consider themselves bound not to make disclosure of the documents and notation that they had seen if same were disclosed to them.

The State notwithstanding the foregoing indicated that it was not prepared to allow any inspections of its document in section B and section C unless an order was made directing it to do so.

In my view a fair solution to the problem which allows a proper ventilation of the issues before me would be to allow the accused inspection on the basis to which they have agreed and to order the State to produce the docket CAS-212/10/2013 to the counsel of the accused on that basis. I accordingly make the following order.

1. The State is to provide the counsel of the accused the docket of CAS-212/10/2013 including the entirety of its notation and the documents contained within the B and C sections therein as well as such documents in the A section as have not been given to the accused.

In addition I record that:

The counsel of the accused undertake not to disclose the contents of any information they discover in consequence of their perusal of the documents and notation contained within the said docket until further argument is addressed and orders made in respect thereof.

Counsel for the State : Adv. Mashiane

Counsel for Accused 1 : Adv. A Van Den Heever

Adv. L Morland (with permission of the
Bar Council)

Counsel for Accused 2 : Mr. Steenkamp

Counsel for Accused 3, 4 and 6 : Adv. Gessing

Counsel for Accused 5 : Mr. Grové