



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GQEBERHA)**

**OF INTEREST**

Case no: 16/2022

In the matter between:

**DONOVAN WOLF**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

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**RULING**

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**Govindjee J**

**Background**

[1] A police docket ordinarily consists of three sections. Section 'A' contains statements of witnesses, expert reports and documentary evidence. Section 'B' contains internal reports and memoranda, and section 'C' the investigation diary.

Following *Shabalala and Others v Attorney-General of Transvaal & Another*,<sup>1</sup> ('*Shabalala*') it is trite that a 'blanket' docket privilege in criminal cases conflicts with the constitutional right to a fair trial. The resultant position, also elucidated in *National Director of Public Prosecutions v King*<sup>2</sup> ('*King*'), is nuanced: litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the defence, barring rare cases where the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.<sup>3</sup> The effect is that an accused person is generally entitled to such of the contents of the police docket as are prima facie 'relevant' for the exercise or protection of that right.<sup>4</sup> The entitlement is not restricted to statements of witnesses or exhibits, but extends to all documents that might be 'important for an accused to properly "adduce and challenge evidence", in ensuring a fair trial.'<sup>5</sup>

[2] The applicant has pleaded not guilty to a charge of murder. Relying on the SCA's decision in *King*, he claims entitlement to access to sections 'B' and 'C' of the police docket on the basis that it is 'likely to be helpful to the defence', important for purposes of 'adducing and challenging' evidence to ensure a fair trial and 'relevant' for the exercise or protection of that right.

[3] There are three broad grounds advanced for access. The first relates to alleged pressure brought to bear on state witnesses to change or adapt their versions of events in deposing to supplementary affidavits pertaining to the alleged planting of a knife(s) at the scene. The second is based on the relationships between the first state witness called to testify and both the initial prosecutor, as well as with the wife of the current investigating officer, who was close to the deceased. The third is an intended future application in terms of s 317(1) of the Criminal Procedure Act, 1977<sup>6</sup> for special entries.

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<sup>1</sup> *Shabalala & Others v Attorney-General of Transvaal & Another* 1996 (1) SA 725 (CC) ('*Shabalala*').

<sup>2</sup> *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) ('*King*').

<sup>3</sup> *Shabalala* above n 1 para 72, A3.

<sup>4</sup> *Shabalala* above n 1 para 72, A4. Again, 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 purposes of a fair trial, depending on the circumstances.

<sup>5</sup> *Shabalala* above n 1 para 57; *King* above n 2 at para 1.

<sup>6</sup> Act 51 of 1977.

[4] The respondent's opposition to the application is supported by answering affidavits filed by the Deputy Director of Public Prosecutions ('the DDPP') and by the Head Control Prosecutor at the Humansdorp Magistrate's Court, Ms Mentz, to which the applicant replied.<sup>7</sup>

## Facts

[5] The applicant's defence is that the deceased attacked him with a knife and that he shot him in self-defence. He was initially also charged with defeating or obstructing the course of justice in that he, together with another individual or other individuals, acting in concert and in the execution of a common purpose, placed a knife in the hand of the deceased and / or placed a second knife in close proximity of the deceased ('Count 2'). This to create the impression that the deceased was armed at the time of the shooting and to support the claim of self-defence.

[6] The State responded to a request for better further particulars to that charge, which has since been withdrawn. Four state witnesses had deposed to various witness statements prior to the commencement of the trial on 3 October 2023. All four have since deposed to supplementary witness statements. The crux of the first basis for the application is that all four witnesses have, in their supplementary affidavits, changed or adapted their versions to align with the allegation of a knife having been 'planted' either at the scene and / or in the right hand of the deceased. To take one example, one Breytenbach initially deposed to an affidavit stating, 'My eye caught a glare and a knife was found about 2 metres from the suspect'. Breytenbach's supplementary affidavit now states, inter alia:

'The Okapi knife I do not know anything about. The tactical knife is mine. I also planted that knife on the scene...'

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<sup>7</sup> The State initially opposed this court hearing the application but abandoned that position prior to argument. See the judgment of Davis AJ in *S v Murphy* [2022] ZAWCHC 278 paras 14-16. Also see, in general, *Van der Merwe v National Director of Public Prosecutions and Others* 2011 (1) SACR 94 (SCA) paras 31, 32. Cf *S v Rowand and Another* 2009 (2) SACR 450 (W) paras 12 and following.

[7] The further submission is that these witnesses must have been 'prevailed upon', that is, pressurised to do so, following the application to compel the state to provide better particulars to the second charge. This on the basis that the initial reply to the request for further particulars demonstrated a lack of evidence to support the Count 2 allegations at that point in time. The applicant argues that the inescapable inference to be drawn is that the State witnesses were belatedly and improperly induced to depose to supplementary witness statements in the terms in which they did. The applicant seeks to pursue this dimension in preparing and conducting his defence, necessitating the present application.

[8] Ms Lucretia Stuurman has been the only witness to testify to date in the trial. Her evidence was that she had previously worked as a clerk of the criminal court at the Humansdorp Magistrate's Court, and was on friendly terms with Ms Vicki Rossouw, a prosecutor at that court. It was Ms Rossouw that appeared on behalf of the State at the applicant's first appearance in the magistrate's court after his arrest. In addition, Ms Stuurman testified that she had a close relationship with an 'aunt Selma', who was the wife of Captain Scott, the investigating officer who had taken over from Warrant Officer Rispel in investigating the case. Ms Stuurman's evidence further described a close relationship between Aunt Selma and the deceased.

[9] The applicant relies on the evidence of Ms Stuurman to question the objectivity and impartiality of Captain Scott as investigating officer, averring that this has compromised the State's case. The applicant adds that the deceased was, to his knowledge, good friends with Captain Scott's grandson and that the resulting conflict of interest may have influenced his decisions and conduct in investigating the case, to the applicant's detriment.

[10] The same averments are made in respect of Ms Rossouw's prosecution and investigation of the case. The applicant relies on Ms Rossouw's conduct during the hearing of a bail application, including reference to alleged racial motivation for the incident, to suggest that she did not remain objective and became personally involved in the investigation of the case. It may be added that the conduct of the Office of the Director of Public Prosecutions ('the DPP') in aspects of the proceedings leading up to a bail appeal has been subjected to trenchant judicial criticism placed before this

court. Van Zyl DJP, in granting bail on appeal, raised concern about the issue of a s 60(11A) certificate, as well as the district prosecutor's reliance on the issue of race in arguing the bail proceedings before a magistrate, seemingly absent any underpinning evidence. The use of the statement of the deceased's sister in opposing bail was criticised as lacking relevance and prejudicial to the applicant so that it should not have been used. The prosecutor was specifically criticised for seeking to advance the State's case beyond what could be proved with the aid of the available evidence.

[11] Linked to the above, the applicant hopes to glean the following information from access to sections 'B' and / or 'C' of the docket:

- i) When Captain Scott became the investigating officer in the case;
- ii) Why and under whose direction Warrant Officer Rispel was removed from the case as the investigating officer;
- iii) Captain Scott's exact role played in the investigation of the case;
- iv) When the relevant State witnesses were interviewed by the police, whether they were asked about the alleged 'planting' of a knife or knives at the scene and their initial responses to this;
- v) Ms Rossouw's role in the investigation of the case;
- vi) The instructions given by Ms Rossouw and / or Mr Stander and / or the DDPP to the police in connection with the investigation of the allegation that a knife was 'planted' at the scene; and
- vii) Whether there were any irregularities in the manner in which the case was investigated given the alleged irregular involvement of Ms Rossouw and Captain Scott.

[12] As for the State's opposition, Ms Mentz's answering affidavit explains that all of the Humansdorp prosecutors would have been in a similar position as Ms Rossouw, as Ms Stuurman was known to all of them. It further indicates, with reference to the National Prosecuting Authority Policy Manual, that Ms Rossouw's consultation with the paramedics, as prospective witnesses, was not unusual as part of the prosecutorial decision-making process.

[13] The DDPP's answering affidavit highlighted selected aspects of Ms Stuurman's testimony during cross-examination, notably that she had not discussed the case with Ms Rossouw prior to its enrolment and her lack of knowledge as to the reason for Warrant Officer Rispel's replacement. It emphasised that the supplementary affidavits obtained had resulted in the withdrawal of Count 2, and authority from this Division pertaining to the realities of the interaction between prosecutors and members of the community who supply evidence. The State averred that Ms Rossouw had played no further part in dealing with the matter once the case docket was submitted to the DDPP's office on 13 April 2021. There was nothing untoward in her consultation with the relatives of the deceased in a murder matter, or in her consultation with the paramedics, which was in line with her mandate at the time.

[14] The DDPP's affidavit also explains the contents of section 'B' of the case docket. It contains:

- i) The SAPS 328 form completed upon the initial release of the applicant on 11 February 2021;
- ii) The application for J50 warrant of arrest for the applicant dated 26 February 2021;
- iii) Internal police status reports;
- iv) Internal police memorandums;
- v) Clips of newspaper articles;
- vi) Correspondence, covering sheets and 'nodal print records' between various stakeholders in the SAPS;
- vii) Copies of digital images included in section 'A' of the case docket, to which the applicant has access;
- viii) Correspondence between the office of the DDPP and the investigating officer.

[15] The State argues that this documentation is neither exculpatory nor inculpatory and, prima facie, does not favour the applicant so that access is unjustified, also being irrelevant to the applicant's guilt or defence and unnecessary for purposes of preparation of a defence. The last-mentioned correspondence between the DDPP and the investigating officer is specifically, and vigorously, resisted on the basis of litigation

privilege, it being averred that correspondence with evidential value has already been made available as part of section 'A' of the docket.

[16] Little is said about the specificities of section 'C' of the docket, other than that it contains a record of events with reference to documents filed in the case docket. It is apparent from *Panayiotou v The State* ('*Panayiotou*') that it may serve as a reference in court should any aspect of an investigation process be questioned.<sup>8</sup> The application is opposed, in general, on the basis that it is premature and constitutes a fishing expedition,<sup>9</sup> and that the information contained in those sections of the case docket are typically not of the kind that requires their production in court. As for the first and second grounds for the application, the State highlights that the witnesses and investigating officers will be subjected to cross-examination, or made available to the defence, and that the applicant's version of events would be put to them in due course.

[17] An additional matter also emerged from the DDPP's answering affidavit, somewhat out of the blue:

'On Friday 13 October 2023 it was brought to my attention that a police official enquired why he received no subpoena to testify in this matter. When informed that there is no affidavit contained in the case docket and no reference is made of him the witness furnished the investigating officer, Warrant Officer Scott, with an affidavit, a photo album together with a CD containing certain images. This information will be disclosed soonest.'

[18] The applicant's reply takes the issue further. The police official referenced is one Warrant Officer Opperman ('Opperman'). His affidavit is dated 11 October 2023. Some 39 images were only provided to the defence on 17 October 2023. The contents of Opperman's affidavit and the images together constitute, in the words of the defence 'potentially critical inculpatory evidence which the Defence should have been made aware of prior to the commencement of the trial'. Without traversing the details, considering the contents of Opperman's affidavit, as well as the summary of substantial facts and reply to the request for further particulars, that assessment is

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<sup>8</sup> *Panayiotou v The State and Others* 2017 (1) SACR 354 (ECP) ('*Panayiotou*') para 33.

<sup>9</sup> This is not the first occasion that an application of this nature has been met with this pejorative analogy: see *R v McNeil* (2009 SCC 3) para 28.

seemingly appropriate. That being the case, it begs the question as to the circumstances that resulted in the belated awareness of a potentially important State witness. This in circumstances where the erstwhile investigating officer, Warrant Officer Rispel, engaged with Opperman on the scene, ostensibly while the images now disclosed were captured by a Constable in attendance. The applicant argues that this is a further basis for the application to be granted, as sections 'B' and / or 'C' of the police docket may shed light on what is, at best, an oversight and, at worst, evidence intentionally concealed by the respondent.

### **The law**

[19] The application concerns access to parts of the docket as an element of the constitutional right to a fair trial.<sup>10</sup> This issue cannot be addressed in abstract, and must be determined having regard to the particular circumstances of each case. In other words, what a fair trial might require in a particular case depends on the circumstances, as Mahomed DP held in *Shabalala*:<sup>11</sup>

'The accused may, however, be entitled to have access to the relevant parts of the police docket even in cases where the particularity furnished might be sufficient to enable the accused to understand the charge against him or her but, in the special circumstances of a particular case, it might not enable the defence to prepare its own case sufficiently, or to properly exercise its right "to adduce and challenge the evidence"; or to identify witnesses able to contradict the assertions made by the State witnesses; or to obtain evidence which might sufficiently impact upon the credibility and motives of the State witnesses during cross-examination; ... or to focus properly on significant matters omitted by the State witnesses in their depositions; or to properly deal with the significance of matters deposed to by such witnesses in one statement and not in another or deposed to in a statement and not repeated in evidence ... The fair trial requirement is fundamental. The court in each case would have to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice.'

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<sup>10</sup> *Shabalala* above n 1 paras 29, 36.

<sup>11</sup> *Shabalala* above n 1 paras 37, 52.

[20] In attempting to strike the appropriate balance, various rights and principles require reiteration. As indicated, the starting point is that every accused person has a right to a fair trial, including the right to ‘make full answer and defence’<sup>12</sup> and to adduce and challenge evidence.<sup>13</sup> The issue at hand is a ‘fair-trial question’ and the right is not unqualified. When interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.<sup>14</sup> The following considerations, drawn from the Canadian Supreme Court decision in *Stinchcombe*,<sup>15</sup> were summarised by Ponnann JA in *Du Toit v The Magistrate and Others*:<sup>16</sup>

- ‘(a) Justice is better served by the elimination of surprise ...
- (b) The fruits of the investigation in possession of the [prosecution] are not the property of the [prosecution] but of the public to ensure that justice is done.
- (c) The defence has no obligation to assist the prosecution and is entitled to be adversarial.
- (d) The search for the truth is advanced by disclosure of all relevant material.
- (e) The prosecution must retain a degree of discretion in respect of these matters.
- (f) The exercise of the [prosecution’s] discretion should be subject to review by the Court.
- ...
- (h) There is a general principle that disclosure is not to be withheld if there is a reasonable possibility that failure to disclose may impede or may impair the accused’s right to make full answer and defence which is a principle of fundamental justice protected under [the Constitution].

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<sup>12</sup> See *Du Toit v The Magistrate and Others* 2016 (2) SACR 112 (SCA) para 9.

<sup>13</sup> S 35(3)(i) of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

<sup>14</sup> S 39 (1) of the Constitution.

<sup>15</sup> *R v Stinchcombe* (1992) 68 CCC (3d) 1 ([1991] 3 SCR 326; [1992] SCC 1; [1992] LRC (Crim) 68; 18 CRR (2d) 210; 8 CR (4 th) 277).

<sup>16</sup> *Du Toit v The Magistrate and Others* 2016 (2) SACR 112 (SCA) para 8.

- (i) Anything less than full disclosure by the [prosecution] falls short of decency and fair play.
- (j) It is neither possible nor appropriate to lay down precise rules here and disclosure should be worked out in the context of concrete situations.'

[21] Following *Shabalala*,<sup>17</sup> '... in each instance, it [is] for the court to exercise a proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What is essentially required is a judicial assessment of the balance of risk ...'

[22] That judgment noted that, generally, 'the search for truth is advanced rather than retarded by disclosure of all relevant material'.<sup>18</sup> Nonetheless, discovery in criminal cases remains something of a matter of compromise, and courts are expected to remain alive to a range of dynamics. This is apparent from the following oft-cited dicta of Harms DP in *King*:<sup>19</sup>

'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 ... 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

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<sup>17</sup> *Shabalala* above n 1 para 55(g). The concept of a court 'discretion' in such matters has been criticised on the basis that it is rather an application of a legal rule: see S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act (RS57)* (2016) ch23-p42R-6.

<sup>18</sup> *Shabalala* above n 1 para 46. On the relationship between the prosecution's duty to disclose and the enhancement of a legal culture of accountability and transparency, see M Watney 'The prosecution's duty to disclose: More reason to litigate?' (2012) *TSAR* 320 at 330.

<sup>19</sup> *King* above n 2 para 5; Watney above n 18 at 330.

capable of exploitation to obstruct and delay”. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.’

[23] It may be noted that while *King* was in fact not about the disclosure of documents at all, the principles emerging from the decision remain relevant to an application for access to sections ‘B’ and ‘C’ of the docket.<sup>20</sup> In that matter, Harms DP explained that the defence was not entitled to ‘every bit of information in the hands of the prosecution’ as of right, a point made by Mr *Stander*, for the State, in these proceedings.

[24] What remains a challenge is to resolve situations, such as the present, where access to documents is based on their perceived helpfulness, or relevance, to the defence. A useful exposition of the applicable principles is contained in the judgment of Goosen J in this Division in *Panayiotou*.<sup>21</sup> That case also considered the implications of both *Shabalala* and *King* for access to the ‘B’ and ‘C’ sections of the case docket. The learned judge applied what may be reformulated as the following test, which I intend to apply in determining the matter:<sup>22</sup>

- i) Has the applicant established prima facie facts which point to the contents of sections ‘B’ and ‘C’ of the case docket as being relevant in the sense required by the *King* matter?
  - a. If not, access to the documents should be refused.
- ii) If so, is there a justified ground for non-disclosure raised by the State?
  - a. If not, access to the documents should be ordered.

[25] With reference to the first leg, it is apparent that the notion of litigation privilege in criminal cases, notwithstanding its limitation by *Shabalala*, still extends to irrelevant

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<sup>20</sup> *King* above n 2 paras 3, 54. See *Panayiotou* above n 8 para 24.

<sup>21</sup> *Panayiotou* above n 8 paras 18 – 35.

<sup>22</sup> *Panayiotou* above n 8 paras 32, 34. As to the onus of proof in constitutional matters in general, see Terblanche above n 17 ch23-p42R-6.

documents or information.<sup>23</sup> It is so that the initial decision as to what parts of sections 'B' and 'C' of the docket are to be made available to an accused person is that of the prosecution. But the applicant need not be satisfied with the say-so of the prosecution and, if the initial decision of the prosecution is shown to be *prima facie* wrong during the trial, a court may order more.<sup>24</sup> *Prima facie* facts and their relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. A document may be relevant to the prosecution without being relevant to the accused's guilt or defence 'for the purpose of making full answer and defence'.<sup>25</sup>

[26] As to the second leg, *Shabalala* provides pointed guidance when the State alludes to risks in disclosure of documentation: what the prosecution is obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to, *inter alia*, the impediment of the proper ends of justice. This is an objective test and it is insufficient to demonstrate that the belief is held *bona fide*. It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief, based on what emerges from the papers. It follows that if the State is unable to justify its opposition to the disclosure of the relevant information on these grounds, a claim that there is a justifiable reason to refuse access to the relevant documents should fail.<sup>26</sup>

## Analysis

[27] The circumstances of this case are unusual. Firstly, and with reference to the issue of a knife / knives at the scene, possible material changes or additions in the versions of State witnesses are reflected in the papers. This bearing in mind that the summary of substantial facts makes reference to the planting of knives, and where the applicant's defence, from as early as 2 March 2021, has been one of self-defence.

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<sup>23</sup> *King* above n 2 para 2.

<sup>24</sup> *King* above n 2 para 32. Cf *S v Rowand and Another* 2009 (2) SACR 450 (W) para 17, holding that the State cannot decide what is relevant and what not, as far as the defence case is concerned. For academic analysis in support of this decision, see N Whitear-Nel 'The right of an accused to access to evidence in the possession of the state before trial: A discussion of *S v Rowand* 2009 (2) SACR 450 (W)' (2010) SACJ 263 at 264, 267.

<sup>25</sup> *King* above n 2 para 30.

<sup>26</sup> *Shabalala* above n 1 para 55(d) and (e). Also see *S v Rowand and Another* above n 24 para 14.

[28] Secondly, the first State witness to testify had previously worked as a clerk of the criminal court at the Humansdorp Magistrate's Court. The circumstances are such that she had developed friendly relations with both a prosecutor at that court, who was involved with the case docket prior to 13 April 2021, as well as with the wife of the investigating officer, who took over from another investigating officer. I hasten to add that there may well be nothing untoward in any of this. The point, for present purposes, is to highlight the distinguishing features of the matter.

[29] To that must be added, thirdly, the events that resulted in the need for a senior judge of this Division to express himself, in a bail appeal judgment, as to the conduct of the DPP's office in issuing a section 60(11A) certificate absent evidence of a planned or premeditated murder, and in an application to place further evidence before a Magistrate on that issue, in circumstances where the available evidence took the matter no further. The conduct of the prosecutor in the district court, Ms Rossouw, was subjected to condemnation 'in the strongest terms', notably because she had placed into evidence a statement by the deceased's sister that lacked any evidential value, and added an unnecessary racial dimension to proceedings.

[30] Fourthly, there is the spectre of Opperman, who a week ago belatedly alerted the DDPP as to his importance as a State witness, and introduced a photo album together with a CD containing images. As already indicated, his evidence is *prima facie* of relevance, and the delayed airing of its contents questionable.

[31] Cumulatively, these factors raise questions that gnaw at both the investigative and prosecutorial dimensions of the State's handling of the case thus far, as argued by Mr *Daubermann*. The applicant has specifically identified various resulting aspects that are of concern to the preparation of his defence to the remaining charge of murder. These matters must impact on my finding in respect of the first leg of the test to be applied in respect of both sections 'B' and 'C' of the docket.

[32] It is convenient to consider section 'C' access first. In *Panayiotou*, the court granted access to that section of the docket (the so-called investigation diary) on the basis that the applicant had signalled an intention to bring into question aspects of the

police investigation. As Goosen J noted in that case, the merits of such a challenge are a separate matter. Following that reasoning, and the principles in *Shabalala*, I am of the view that the applicant has advanced at least a prima facie entitlement to access to section 'C' along similar lines. Absent any justified grounds for non-disclosure raised by the State, disclosure must be ordered.

[33] For similar reasons, the contents of section 'B' of the docket, barring clips of newspaper articles and copies of digital images already provided to the applicant, are prima facie likely to be helpful to the defence. Here, the significant difference between the facts supporting the application in *Panayiotou* and those involved in the present matter explains the divergent outcome. Specifically included in this determination is correspondence between the office of the DDPP and the investigating officers, which in present circumstances is prima facie relevant to the applicant's ability to adduce and challenge evidence, including by way of properly prepared and tailored cross-examination, as part of his right to a fair trial. That being the case, and bearing in mind that the trial has already commenced, the application cannot be criticised as premature. On my assessment, there is a sufficient prima facie factual underpinning to gainsay the claim of an unwarranted foray for information. Precisely what assistance the applicant might obtain through docket access need not be demonstrated: in the special circumstances of this case, it has been established that it is prima facie likely to be helpful.

[34] The State has again failed to demonstrate reasonable grounds for believing that disclosure of section 'B' information carries risks that may realistically impede the proper ends of justice. To the extent that *Shabalala* may be interpreted to hold that the enquiry boils down to a judicial assessment of the balance of risk, the outcome is readily apparent on the papers in respect of both sections 'B' and 'C'. While I accept the State's bona fides in opposing the application, there is no objective basis made out on the papers to justify opposition to disclosure in these circumstances.

[35] There is accordingly no need to canvas the third basis for the application. The overall outcome finds additional support in various quarters. Drawing again from the constitutional dispensation and the decision in *Shabalala*, the SCA in *Crossberg* has confirmed that there is an 'overwhelming balance in favour of an accused person's

right to disclosure in those circumstances where there [was] no reasonable risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to intimidation or obstruction of the proper ends of justice'.<sup>27</sup> Absent any demonstratable risks of this sort, there is little to balance the applicant's claim for docket access.

[36] A similar point is made in *Du Toit: Commentary on the Criminal Procedure Act*.<sup>28</sup>

'It would be artificial to consider each of these privileges separately, dismissing one, here, and engaging another, there, when the situation calls for a simple weighing up of their cumulative force against the constant counterweight represented by the value of ventilating all relevant evidence in the service of accurate fact-finding together with all its attendant benefits in the hands of an accused person seeking to make a proper defence.'

[37] Finally, it has been said that issues that are apparently extraneous may ultimately be crucial to determine the guilt or innocence of an accused.<sup>29</sup> Granting such access also contributes to a sense of equality at arms between the State and the accused, particularly considering the history of the matter in the light of the constitutional promise of a fair trial.

## Order

[38] The following order is issued:

1. The respondent is ordered to provide the applicant with a copy of sections 'B' and 'C' of the investigation docket, excluding clips of newspaper articles and copies of digital images to which the applicant already has access, within 10 days of the date of this order.

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<sup>27</sup> See *S v Crossberg* 2008 (2) SACR 317 (SCA) para 74. The case also provides an illustration of the dangers of conviction in circumstances there are investigatory irregularities.

<sup>28</sup> Terblanche above n 17 ch23-p42R-5.

<sup>29</sup> *Shabalala* above n 1 paras 57, 48. See RP Mosteller 'Exculpatory evidence, ethics and the road to disbarment of Mike Nifong: The critical importance of full open-file discovery' (Winter 2008) 15 *George Mason Law Review* 257 at 318 as cited in Whittear-Nel above n 24 at 268.

2. In the event that any documentation is only available in hard copy, the respondent is to provide copies to the applicant against tender of payment of the reasonable photocopying charges in respect thereto.

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**A GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:** 18 October 2023

**Delivered:** 20 October 2023

Appearances:

For the Applicant:

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