THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 86/09

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

DAVID CUNNINGHAM KING Respondent

Neutral citation: *National Director of Public Prosecutions v King* (86/09) [2010] ZASCA 8 (8 March 2010)

Coram: HARMS DP, NUGENT, MLAMBO and MALAN JJA, and MAJIEDT AJA
Heard: 15 FEBRUARY 2010
Delivered: 8 MARCH 2010
Corrected:
Summary: Criminal procedure – right to a fair trial – right to a motivated index of police docket – litigation privilege

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Bosielo J sitting as court of first instance).

1 The appeal is upheld.

2 The order of the court below is substituted with an order dismissing the application.

JUDGMENT

HARMS DP (NUGENT, MLAMBO and MALAN JJA, and MAJIEDT AJA concurring)

INTRODUCTION

[1] Police dockets, forming a prosecutor's brief, consist normally 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.[1] In our law, following English precedent, the general rule is that one is not entitled to see his adversary's brief.[2] This is referred to as litigation privilege, something different from attorney and client privilege.[3] However, as the Constitutional Court has held in *Shabalala,* a 'blanket' docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of Rights.[4] Accordingly, 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.[5] This means that an accused is entitled to the content in the docket 'relevant' for the exercise or protection of that right. The entitlement is not restricted

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[1] *Shabalala & others v Attorney-General of Transvaal & another* 1996 (1) SA 725 (CC) para 10 per Mahomed DP.
[2] *R v Steyn* 1954 (1) SA 324 (A) 332 per Greenberg JA; *S v Alexander & others (1)* 1965 (2) SA 796 (A) 812E-G per Ogilvie Thompson JA; *S v Mavela* 1990 (1) SACR 582 (A) 590g-591a per Eksteen JA.
[3] Richard S Pike 'The English law of legal professional privilege: a guide for American attorneys' (2006) 4 (1) *Loyola University Chicago International Law Review* 51; *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948; [2004] UKHL 48.
[4] *Shabalala* para 72 A2.
[5] *Shabalala* para 72 A3-A5.

to statements of witnesses or exhibits but extends to all documents that might be 'important for an accused to properly 'adduce and challenge evidence' to ensure a fair trial'.[6]

[2] The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of these limitations.[7] Litigation privilege is in essence concerned with what is sometimes called work product[8] and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence.

[3] This much is hardly contentious. What is in contention in this appeal is whether an accused is entitled as of right to a full description of each and every document to which he is denied access – all being documents falling in parts B and C of the docket – with a statement of the precise basis upon which access is denied to any document in order to have a fair trial. In other words, is the accused entitled to a 'motivated index' to satisfy him in advance that the trial will be fair? The court below held in the affirmative and hence this appeal by the National Director of Public Prosecutions (the NDPP).

[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.[9] 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 therein and embraces a concept of substantive fairness that is not to be equated with what might

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[6] *Shabalala* para 57.

[7] *Blank v Canada (Minister of Justice)* [2006] 2 SCR 319 (SCC): the issue in this case was about when the privilege terminated.

[8] *R v Card* 2002 ABQB 537 (Alberta) provides a useful catalogue of case law. See also the explanation in *S v Mavela loc cit* and *Shabalala* para 15; *Secretary of State for Trade and Industry v Baker (No 2)* [1998] Ch 356 364.

[9] *S v Zuma* 1995 (2) SA 642 (CC) para 14 per Kentridge AJ.

have passed muster in the past.[10] 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.[11] 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.[12] Irregularities do not lead necessarily to a failure of justice.[13]

[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.[14] 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.[15] 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.[16] The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems,[17] or to encourage preliminary litigation[18] – 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

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[10] *Zuma* para 16.
[11] *Zuma* para 17.
[12] Compare *Shabalala* para 72 A6.
[13] *S v Shaik* 2008 (2) SA 208 (CC) para 43; *S v Basson* 2007 (3) SA 582 (CC) para 120: an allegation that an interlocutory ruling was wrongly made which may have a material impact on the outcome of the case is not sufficient to demonstrate that the trial was unfair.
[14] *R v O'Connor* [1995] 4 SCR 411 para 193-195.
[15] *Shaik loc cit*.
[16] *Montgomery v HM Advocate General and another* [2003] 1 AC 641 (PC) 673 per Lord Hope of Craighead quoting *Pullar v United Kingdom* 22 EHRR 391.
[17] *Key v Attorney-General, Cape Provincial Division & another* 1996 (4) SA 187 (CC) para 13.
[18] *Zuma v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) paras 65-66.

to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay.'[19] One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.

[6] The respondent, Mr DC King, has been indicted on 322 counts including fraud, tax evasion and evasion of the Exchange Control Regulations, as well as money-laundering and racketeering. The counts relate inter alia to a failure to submit tax returns, fraudulent misrepresentations in his tax returns, and devising and implementing an allegedly fraudulent scheme to 'externalize' his assets to evade income tax and obligations under the regulations, involving amounts in excess of R1 billion. The main complainant, as one could expect, is the SA Revenue Services (SARS). It apparently has a claim of some R3 billion against King flowing from some of the allegations.

[7] The case has a long history. King was arrested in 2002 and the original indictment was served during April 2005. (The last indictment ran to some 800 pages.) The trial was initially set down for 26 July 2005. By then the case was already and has since been conducted by means of correspondence, press interviews, some case management sessions before a judge allocated for that purpose, and interlocutory proceedings in civil courts. One of the issues that had arisen in the correspondence related to King's right to be provided with a copy of the docket free of charge. The NDPP refused on the basis that an accused person is only entitled to free copies if that person cannot pay for copies. King was not ready to proceed with the trial and on the preceding day he launched an application for a declaratory order declaring his entitlement to a copy of the docket free of charge and a review under Uniform r 53 of the decision by the NDPP refusing him a copy free of charge.

[8] It is common cause that King is a very wealthy man and it cannot be gainsaid that the application was cynical and without any merit and was brought purely with a

[19] *Regina v H and others* [2004] UKHL 3 para 22 per Lord Bingham of Cornhill.

view to delay the criminal proceedings. More need not be said about this issue because in the event the court below refused this relief on 11 December 2008. There is no cross-appeal.

THE APPLICATION FOR A MOTIVATED INDEX

[9] On 10 October 2005 King filed an amended notice of motion, adding another prayer. Bosielo J, in the court below, granted an order on 11 December 2008 in its terms despite the fact that King had not asked at the hearing – during October 2007 – for an order in those terms because it was common cause that he was not entitled to the shotgun relief sought. King abandoned much of the order about the time the application for leave to appeal was to be heard in the court below. What remained after redaction was an order directing the NDPP to furnish King with (a) a full description of each document in part B and C of the docket; (b) a full description of each and every document to which King is denied access; and (c) a statement of the precise basis upon which access is denied to any document. This is the 'motivated index' this case is about. Bosielo J granted leave to appeal to this Court. However, King argued that the matter was not appealable, a matter to which I shall revert in due course.

[10] The docket in this case is not a typical police docket. This is due to the nature and complexity of the case. Private practitioners were briefed by the State to conduct the investigation and prosecution, a practice common in countries such as the United Kingdom and, simply relying on institutional memory, known in this country since at least 1950.[20] There are many documents. Part A, at March 2006, consisted of about 200 000 pages and contained all the evidence and documents relevant to the case. King has always had access to them and he now has copies to the extent that he did not have them before. Much of part B consists of electronic records, for example, it consisted at the time of – apart from anything else – about 21 000 emails held by the different persons and entities that had been involved in the case. In addition, the NDPP's attorneys held about 270 lever arch files of

[20] The *Milne and Erleigh* prosecution with many reported cases beginning with *R v Milne and Erleigh* 1950 (4) SA 591 (W).

documents not included in part A. The NDPP has calculated that providing a motivated list of these documents would cost in excess of R1,5m.

[11] The documents in part B and C of the docket fall in these categories:

- investigators' files, including their investigation diary, notes taken during witness interviews, draft witness statements, communications with witnesses, certain tape recordings of meetings with witnesses, communications and notes of discussions with expert witnesses;
- communications between the National Prosecuting Authority (the NPA), its attorneys and counsel, and complainants;
- communications between the NPA and other representatives of the Department of Justice, attorneys and counsel appointed by the NPA, and the investigators, including minutes or notes of meetings, requests and motivations to the NPA for the issue of summonses to witnesses, and progress reports;
- communications between the NPA and other Departments of State such as the Department of Trade and Industry;
- communications within the NPA, between the NPA and outside prosecutors, including attorneys and counsel, and communications between attorneys and counsel briefed in the prosecution;
- communications between the prosecutors and complainants, including their attorneys;
- communications between investigators and complainants;
- communications between the NPA, its counsel and attorneys, and overseas authorities and solicitors;
- internal NPA memoranda;
- internal NPA Status Reports and information contained on the NPA's case management system;
- opinions by prosecutors, notes on legal research, copies of judgments (reported and unreported);
- notes by prosecutors, including notes of telephone calls, notes of matters to

be attended to, and planning memoranda;

- minutes of meetings between the NPA, prosecutors, investigators and complainants.

THE EVIDENCE

(a) The founding affidavit

[12] King's attorney in the supplementary founding affidavit (where the issue of the motivated index arose for the first time) said that 'it is clear that [King] is entitled to have access to all the documents in possession of the State, which are relevant to the charges against him and which are not privileged.' He then quoted a number of provisions of the Constitution, two of which were relied on during argument, namely s 35 (the right to a fair trial) and s 32 (the right to access of information) and proceeded to recite the terms of the relief sought in relation to the motivated index. He in particular did not allege that he had reason to believe that there were any 'relevant' documents in part B and C that were not privileged or falling within the *Shabalala* principle.

(b) The answering affidavit

[13] The then NDPP, Mr Pikoli, in his answering affidavit, after having set out the information about the categories of documents in the two parts, stated that King did not require access to them for a fair trial. He said that the reasons for not disclosing varied from document to document but included the following:

- Many of the documents were irrelevant to the issues in the criminal case.
- None of the documents was exculpatory or prima facie likely to be helpful to the defence in the trial.
- All or most of the documents were privileged from disclosure on a variety of grounds.
- The public interest in preserving confidentiality of some documents outweighed any interest King might have had in their disclosure.

(c) The replying affidavit

[14] King, in reply, merely denied 'the bald claim of privilege'. Importantly, he did not traverse the allegation relating to relevance, or that none of the documents was exculpatory or prima facie likely to be helpful to the defence or the public interest claim. On ordinary principles this means that the allegations in the answering affidavit are deemed to have been admitted or, at least, that he is bound by the answer. Also significant is the fact that King did not attack Pikoli's ability to give this evidence; he did not say that it was hearsay; and he did not object thereto. Whether it was hearsay and whether Pikoli was able to make the allegations was, accordingly, never raised as an issue. I mention this because King's argument before us that we may not or should not (I am not clear what the submission was) have regard to Pikoli's evidence is out of order. Had it been raised at the appropriate time the NDPP could have dealt with it.

[15] Pikoli, while denying that King was entitled to the relief sought, added that the NDPP was in the process of compiling an index of these documents. This, according to King in his replying affidavit, was tantamount to a concession that he was entitled to a copy, a rather disingenuous allegation.

(d) The supplementary answer

[16] A long delay followed while the parties were busy with, primarily, extra-curial shadow boxing. The application was eventually set down for hearing on 29 October 2007. However, a few days before the hearing the NDPP filed a supplementary answering affidavit. The purpose of the new evidence – now sworn to by the acting NDPP, Mr Mpshe – was 'to further elucidate why [King] is not entitled to these particulars and to explain . . . the enormous practical difficulties . . . and the costs that would be incurred' if the order were to be granted. He stated that the process of preparing an index had been stopped because it was found to be an extremely arduous task and would serve no practical purpose. He reiterated that the documents fell within the categories set out earlier in this judgment. And he dealt with the cost involved. He also analysed the wider implications of the order to the criminal justice system to the extent that it would create a development or extension

of the *Shabalala* principles. It is not necessary to detail the facts because it cannot be gainsaid that the application of such a general principle would create another stumbling-block for courts to get to grips with cases and grind an already overburdened criminal justice system to a halt.

[17] It is necessary to quote a paragraph in the Mpshe affidavit in full because it forms the factual foundation for King's argument. It reads as follows:

'Insofar as the demand for a description of "each of the documents in parts B and C of the docket" is concerned, the categories of documents in parts B and C (ie, those documents forming part of the docket which have not been provided to King under section A) have been described in the answering affidavit [referring to the Pikoli affidavit]. As appears from that affidavit these documents constitute internal working documents, memoranda, reports, opinions and correspondence. They have not been disclosed because King does not require access to them for a fair trial. This is because they are either not relevant to the issues in the criminal trial or do not fall within the ambit of the information envisaged as being disclosable by the Constitutional Court in *Shabalala*, or even if relevant and falling within such parameters, are privileged from disclosure on a variety of grounds. The public interest in preserving their confidentiality and the interests of justice outweigh any interest that King might have in their disclosure. There accordingly is no obligation to disclose them.'

[18] King's argument is that Mpshe hereby conceded that there are relevant documents within part B and C of the docket. The submission ignores not only the context of the statement (being a restatement of what Pikoli had said) but also the actual wording of the affidavit ignoring content, context and intent.

(e) The supplementary reply

[19] King filed a subsequent affidavit, said to be a supplementary replying affidavit, but it was in fact much more. To the extent that it amounted to a supplementary replying affidavit he denied the quoted paragraph from the Mpshe affidavit. Importantly, he did not allege that it contained any admission and, as in the case of the Pikoli affidavit, he did not deny Mpshe's ability to give the evidence or alleged

that it was hearsay. My earlier comments about the belated hearsay objection apply. He also denied that he had to make out a prima facie case for the relief sought.

[20] King dealt in detail with the issue of delay, something not relevant to this appeal. The new matter, which had no real antecedent, concerned first the role of SARS in the prosecution and, second, the fruits of certain overseas investigations conducted by the prosecution.

(f) The SARS issue

[21] As far as the SARS issue is concerned, King made the following allegations. He said that the charges against him had arisen out of an investigation conducted by SARS into his tax affairs. SARS was the primary complainant and SARS was pursuing parallel civil litigation against him where the same or similar issues arose. This was suspended pending the finalization of the criminal case. SARS was the sole funder of the prosecution against him and the private practitioners employed by the NDPP as prosecutors have been paid by SARS. He said that SARS took over the financial responsibility of the prosecution because it was not satisfied with the manner in which the NPA had been conducting it. He submitted that SARS viewed the prosecution as a means of extracting payment of the alleged tax debt. The conduct of especially two of the prosecutors, being funded by SARS, gave him cause to suspect that they lack the independence constitutionally demanded of prosecutors. It is not necessary to detail the litany of complaints any further and I turn to his submissions based on these allegations.

[22] He submitted that he was 'entitled to all documents in the possession of the NPA that provide evidence' of contact between the prosecutors and SARS in order to present in full his case for the removal from the prosecution of the private attorneys and counsel who, he believes, lacked the independence that he is entitled to expect under the Constitution. He then submitted that it must be self-evident that there are many such documents within five of the 13 categories of documents mentioned earlier. In addition, he said that he was entitled to 'copies' of all accounts

rendered to the NPA by these practitioners to identify the fees paid and the persons within SARS with whom they had any contact.

(g) The 'foreign' evidence issue

[23] Less need be said about the second issue, namely the evidence obtained by the NDPP overseas. King said that he had 'reason to suspect that at least some of the evidence obtained by means of the overseas investigations [during 2002 and 2003] may have been procured unlawfully' and that he intended to object to the admission of that evidence. To do so he required 'access' (he did not say a motivated index) to the communications between the NPA, its counsel and attorneys and the overseas authorities. It is common cause that this evidence was disclosed as a separate section under part A and the NDPP has stated emphatically that it does not intend to rely on it. This is and was always a non-issue because if the evidence is not tendered King will have nothing to object against.

(h) The 'new' evidence on appeal

[24] King filed an affidavit in this Court on 10 February 2010, two court days before the hearing of the appeal. The explanation proffered was that the documents attached to the application to lead further evidence did not exist when the case was heard in the court below. The documents were supposed to show that the NDPP was able 'to furnish [King] with those parts of the docket or an index to the docket which [King] has sought.' I should immediately say that there is nothing in the latter-day correspondence to justify the second part of the quoted statement, namely that relating to the ability to produce an index. And as appears from this judgment, it does not concern itself with the ability or otherwise of the prosecution to supply a motivated index.

[25] One of the documents relied on by King was a document that King had filed (probably during November 2009) in one of the side shows between the parties in the South Gauteng High Court. It purports to be a draft special plea in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977, which deals with the

prosecutor's 'title to prosecute'. The essence of the special plea is (more or less) that because of the facts recited above in respect of the SARS issue, King has a reasonable apprehension that SARS has interfered improperly with the obligation of the NPA to approach all matters concerning his prosecution in an independent manner and that its continued involvement in his prosecution is unconstitutional and invalid. (Whether this has anything to do with the prosecutor's 'title' is a matter to be left for another court.) In a letter of 8 December 2009 King's attorneys then asked the NDPP for documents relevant to that issue and gave a specified list. The NDPP, after some intervening correspondence, replied on 2 February 2010 that it would in the light of the proposed special plea review all documents in the docket not yet disclosed to determine whether any of them were relevant to the proposed special plea, prima facie helpful to King in asserting this defence, and not privileged. (It has not been suggested in argument or otherwise that the NDPP's undertaking is not bona fide.) King was also asked to apprise the NDPP of any other special plea he intended to raise to enable it to consider disclosure in relation thereto. He has not as yet responded.

[26] For the sake of completion it is necessary to make some reference to the NDPP's affidavit in answer. The deponent, Mr Carter, pointed out with reference to documents in the appeal record that King had asked on a number of occasions during 2005 for information about the role of SARS in the prosecution. The last request was during October 2005. Carter said that all the information requested was given. King, in vague terms, then threatened a special defence since April 2006 but when requested to particularize it he refused to do so, alleging that it was his prerogative to raise the issue when it suited him. Carter also dealt with the list in the letter of 8 December 2009. He pointed out that the documents in the first seven categories had either been supplied or relate to common cause facts. The remaining requests relate to the fee lists of counsel and attorneys, the relevance of which appears to me to be fanciful.

[27] The new matter, whether in the supplementary replying affidavit or the papers filed in this Court relating to the SARS and the foreign evidence had nothing to do with the relief sought or the order granted. King's new case, which he used to bolster his motivated index case, was that he is entitled to 'access' of these documents under the ordinary *Shabalala* principles. He may or he may not be but that is not what the order sought or granted related to, which was a motivated index of 'all' documents in parts B and C of the docket. At the time the application was launched the NDPP had no reason to believe that these issues were issues in the case. As mentioned, King had refused to divulge his special defences or pleas.

KING'S SUBMISSIONS ON FAIR TRIAL

[28] King's case is built on the general submission that one can assume that all the withheld documents are in some or other way relevant to King's prosecution because there would be no other explanation for their inclusion in the docket. For this reliance was placed on a recent Canadian case, namely *R v McNeil.*[21] Counsel took some liberties in interpreting the judgment.

[29] The accused in *McNeil* sought to obtain access to police disciplinary records and criminal investigation files relating to the main police witness. The court used the occasion to reiterate the obligations of the police and prosecution 'to disclose the fruits of the investigation under *R v Stinchcombe*'[22] (at para 14). That case established the prosecution's duty 'to disclose all relevant information in its possession relating to the investigation' and meaning 'not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence' (at para 17). The court pointed out that there are many limitations on the duty to disclose the fruits of the investigation (at para 19). It is in this context that the court stated in the paragraph relied on by King that there are two assumptions in relation to the prosecution's duty to disclose the contents of its file '*under Stinchcombe*':

[21] [2009] 1 SCR 66 para 20.
[22] [1991] 3 SCR 326.

'The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise the Crown would not have obtained possession of it . . . The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule outweigh any residual privacy interest held by third parties in the material.' (Para 20.)

[30] As far as the first assumption is concerned, it dealt with information gathered and not material created. In any event, the second assumption does not apply because the undisputed evidence is that the material referred to in that assumption is in part A of the docket. The last sentence quoted merely restates the *Shabalala* test in slightly different terms. It uses the word 'relevant' in a sense different from that used by counsel for King. As was said in a Canadian case relied heavily on by King, '(r)elevance must be assessed in relation both to the charge itself and to the reasonably possible defences' and that the duty relates to the disclosure of evidence.[23] To explain: a document may be relevant to the prosecution without being relevant to the accused's guilt or defence. For instance, King seeks a motivated list of opinions by prosecutors, notes on legal research, and copies of judgments (reported and unreported). These documents are clearly relevant to the prosecution but they are not relevant 'for the purpose of making full answer and defence'. In other words, as mentioned at the outset of this judgment, most of the material covered by litigation privilege in criminal cases would in any event not be discoverable because the material is not germane to the conduct of the trial, ie, is not relevant in the sense discussed.

[31] The argument proceeded from the assumption that the NDPP had conceded that part B and C of the docket included documents that are relevant to the issues in the case and also documents that are disclosable under *Shabalala.* Because of this, so went the argument, King has no way of considering whether the NPA 'is justified in withholding specific documents at least some of which, on the NPA's own

[23] *R v Taillefer* [2003] 3 SCR 307 paras 59-60. See also *Rowe v United Kingdom* (2000) 30 EHRR 1 para 60.

admission, are relevant to the issues in the criminal trial'. I have already rejected the submission relating to the concession. Further, the *Shabalala* documents are by definition relevant and do not form a separate class of documents. Then, as I have mentioned, it was not in dispute before the supplementary replying affidavit raised the SARS issue that none of the documents was exculpatory or prima facie likely to be helpful to the defence in the trial. And last, the argument kept vacillating between a *Shabalala* duty and the duty to provide a motivated index.

[32] This is fortified by King's concluding submission on the right to a fair trial. The argument, as stated in the heads, was that it flows from *Shabalala* that King is entitled 'to access to all relevant documents in the docket' and that the mere ipse dixit of the NPA is not sufficient to justify the withholding 'of relevant documents' in the docket. In this regard King relied on authorities that deal with the trite proposition that if documents are admittedly relevant they have to be discovered unless the refusal to discover can be justified.[24] But, as I have stated repeatedly, this case is about the right to a motivated index to enable King, without any prima facie facts, to audit part B and C of the docket. Quite clearly, King need not be satisfied with the say-so of the prosecution but the initial decision remains that of the prosecution and if shown to be prima facie wrong during the trial, a court may order more.[25]

THE JUDGMENT A QUO ON FAIR TRIAL

[33] The court below, although emphasizing that the case was not about disclosure but about a motivated index accepted that the same principles applied. The learned judge found the *Shabalala* test too elastic and incapable of precise definition and he preferred to use Canadian tests that say the same – namely that information, whether incriminating or exculpatory must be disclosed unless plainly irrelevant; or that information that can 'reasonably' be used by the accused to advance a defence or making a decision which may affect the conduct of the defence must be disclosed.

[24] *Crown Cork & Seal Co Inc v Rheem SA (Pty) Ltd* 1980 (3) SA 1093 (W); *Air Canada & others v Secretary of Trade & ano* [1983] 1 All ER 910 (HL) 915.

[25] Cf *Her Majesty's Advocate v Murtagh (The High Court of Justiciary Scotland)* [2009] UKPC 36 especially paras 35 and 40.

[34] It will be recalled that Bosielo J ordered more than King had asked for at the hearing. One of the abandoned orders was an order requiring the NDPP to provide a motivated index of part A of the docket. It would appear that this may not have been an error on the part of the learned judge because on more than one occasion he reverted to the facts concerning part A of the docket. And he concluded his judgment on this aspect, after referring to the size of the indictment and the number of files that the NDPP 'relies' on, by saying that King could not be expected to wade through tomes and tomes of documents without knowing what they are (at para 40). One can only wade through documents if one has access to them. I have, unfortunately, to reiterate that this was not King's complaint.

[35] The court also justified its order with reference to the SARS and foreign evidence issues and said that King had a substantial interest in 'seeing' them and that he cannot prepare his defence without having had 'sight' of them. The learned judge in my view misconceived the issue, not only for the preceding reasons but also in the light of what follows. The appeal was heard five years after the application was launched. We know after all these years of only two categories of undisclosed documents which, according to King, he fairly requires for purposes of his defence. His counsel was accordingly invited to identify any other possible category and he did not or could not accept the invitation. Instead, his argument appeared to be, with reference to the rule that when the existence of information has been identified the prosecution must justify the non-disclosure – which has been done.[26] He was also invited to say whether he required an order for the disclosure of the documents relating to these two issues and his answer was in the negative. At the conclusion of his argument he submitted that he was at least entitled to a motivated index under oath of all undisclosed documents that fall within the *Shabalala* formulation. But, as mentioned ad nauseam, the undisputed evidence was that there is none. Although he submitted that he was asking no more than what he would have been entitled to

[26] *R v Chaplin* [1995] 1 SCR 727. Why it was necessary to rely on foreign jurisprudence for a trite proposition is unclear but that is apparently how constitutional cases are argued.

in a civil case, he was mistaken because in civil litigation the documents that fall under the rubric of litigation privilege are not listed in the discovery affidavit.[27]

ACCESS TO INFORMATION

[36] King also relied on the fundamental right of access to any information held by the state contained in s 32(1)(a) of the Bill of Rights. The argument was simple: the fundamental right to information held by the state is unlimited; the whole docket contains information held by the state; ergo, he is entitled to the whole docket. It should be mentioned that the court below did not deal with this issue.

[37] The interim Constitution (s 23) and the transitional arrangements in schedule 6 of the Constitution defined the right in more restrictive terms. The right was qualified by the requirement that an applicant for access had to require the information for the protection of a right. The final Constitution (s 32(2)) in turn provided that national legislation had to be enacted to give effect to the right. The necessary legislation was duly adopted: the Promotion of Access to Information Act 2 of 2000. As with the case of the right to administrative justice, once this Act came into operation an applicant for access to information is obliged to base his case on the Act and may not, except to the extent that the Act is unconstitutional, rely on s 32(1) *simpliciter.* In other words, s 32(1) does not provide a free-standing right to access.

[38] In *Shabalala* (at para 34) the CC had to consider whether the right to access of information in the interim Constitution impacted on the right to information that flowed from the fair trial right. The court said that if an accused is unable to obtain access to information under the fair trial provision it is 'difficult to understand' how the accused could obtain it under the access to information provision. Whether this is the case under the final Constitution need not be decided since the answer to the question has to be sought in the said Act.

[27] Uniform r 35(2).

[39] On a formal level, the Act requires compliance with certain formalities as a pre-condition for access (s 11). In this regard reference may be made to s 40, which contains a mandatory prohibition of disclosure of documents that are privileged from production in legal proceedings, and s 39, which entitled the NDPP to have refused the request on a number of relevant grounds. King did not follow the prescribed route. On a substantive level, s 7 provides that the Act does not apply to a record of a public body or a private body if—

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for *in any other law*.

'Other law' refers in this context to the body of law which includes the rules relating to discovery, disclosure and privilege. In other words, if access to information is requested for the purpose of criminal proceedings the right thereto has to be sought elsewhere. As was said in *Unitas Hospital v Van Wyk and another,*[28] in the context of civil proceedings, 'once court proceedings between the parties have commenced, the rules of discovery take over'. King's counsel accepted the correctness of the statement.

APPEALABILITY

[40] King opposed the grant of leave before Bosielo J on the ground that his decision was not appealable. The issue whether his 'decision' could have been appealed irrespective of the leave granted is a preliminary question in any appeal but it is one that in the context of this case and in the light of my conclusion can conveniently be discussed at this late juncture.

[41] Criminal appeals are governed by the Criminal Procedure Act 51 of 1977 which, in very general terms, permits appeals against conviction and sentence only. Civil appeals, in turn, are governed by s 20 of the Supreme Court Act 59 of 1959 and

[28] 2006 (4) SA 436 (SCA) para 19 per Brand JA.

are permitted against 'judgments or orders', a term that has a technical meaning that has evolved and is still evolving. Then there are intermediate cases that fall under s 21(1) of the latter Act, which gives this Court the additional jurisdiction to hear appeals against any 'decision' of a high court. Although the term 'decision' has been interpreted to be equivalent to 'judgment or order', this Court in *S v Western Areas Ltd & others*[29] has held that a judicial pronouncement that is not a judgment or order – such as an interim ruling during a criminal trial – may be appealable if the interests of justice require it.

[42] The NDPP relied heavily on this judgment, incorrectly in my view. Howie P was careful not to decide that the 'interests of justice' test applied to civil cases – something the present case was as an adjunct to an order for a declaratory order and a review application. This is not the place to reconsider the so-called *Zweni* test in civil litigation and I instead prefer to decide the matter with reference to that test.[30] This means that it is not necessary to consider the argument about the interests of justice. The focussed issue is whether the 'order' was in substance and not in form final in effect. In other words, was it capable of being amended by the trial court?

[43] The order in form appears to be 'interlocutory' and since 'interlocutory' orders are usually not 'judgments or orders' but rulings it is easy to understand why it appears prima facie not to be final in effect. On closer examination it is, however, final in substance. The criminal trial cannot begin without compliance and, in any event, the criminal court will be bound by that 'decision'. King submitted that the NDPP could have approached the court that had made the order for a variation on new facts – but that was a submission without substance because if one asks what new facts are possible one seeks in vain for a sensible answer. Had the court refused the application the position may have been different and King may have been able to raise the matter during his trial. He may eventually argue that his trial was unfair because there was reason to believe that there were undisclosed relevant documents. In this regard one may compare the case to the position with

[29] 2005 (1) SACR 441 (SCA) para 28 per Howie P.
[30] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

exceptions: a dismissed exception is not appealable but an exception that has been upheld is. The reason is that in the case of the former the matter may again be raised by way of a plea or argument during the trial while in the case of the latter the matter has been laid to rest by the order upholding the exception.

[44] Mahomed CJ said in this regard in *Beinash v Wixley*:[31]

'There can be no doubt that the decision of the then Witwatersrand Local Division to set aside the impugned subpoena was a "judgment or order" in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the appellant is constrained to await the outcome of the main proceedings before the decision can be attacked as one of the grounds of appeal - in which event the decision of the court a quo now under discussion would not be a "judgment or order" in the technical sense but a ruling.

> "The question which is generally asked . . . is whether the particular decision is appealable. Usually what is being asked relates to not whether the decision is capable of being corrected by an appeal Court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision may be placed before a Court of appeal in isolation, and before the proceedings have run their full course" (per Nugent J in *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 676 H).

This problem often arises when one or other party seeks to appeal against some preliminary or interlocutory decision, which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. The approach of the court in such circumstances is a flexible approach. In the words of Harms AJA in *Zweni v The Minister of Law and Order* 1993 (1) SA 523 (A) at 531J - 532A:

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[31] 1997 (3) SA 721 (SCA); [1997] 2 All SA 241 (A).

> "The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution."

What the court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such decision anticipates an issue to be determined in the main proceedings. The objective is to ascertain what course would best "bring about the just and expeditious decision of the major substantive dispute between the parties."'

[45] The point may be illustrated with reference to *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd*[32] where this Court held that an order suspending contempt proceedings pending review proceedings was appealable. In that case, as in the present, the court intended the order to be final and not susceptible to amendment as is apparent from the order itself and was confirmed by the learned judge in his judgment on leave to appeal. I do not wish to revisit any detail of the *Clipsal* judgment – its reasoning is applicable to this case – but will limit myself to compare Bosielo J's order with an order for security for costs which is a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants. It is not a procedural step in attack or defence at all but a measure of oblique relief sought by one party against the other on grounds foreign to the main issue. An order determining this collateral dispute is therefore final and definitive. If a party has been prejudiced by the order his prejudice is irremediable.[33] I therefore conclude that Bosielo J was correct in holding that the matter was appealable.[34]

[46] It is, however, necessary to emphasize that the fact that an 'interlocutory' order is appealable does not mean that leave to appeal ought to be granted because

[32] [2009] ZASCA 49, 2009 (3) SA 292 (SCA), [2009] 3 All SA 491 (SCA) per Streicher JA.

[33] Para 33 where Streicher JA relied on *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 at 1042D-E which quoted, with approval, a passage in *Ecker v Dean* 1937 (SWA) 3 at 4.

[34] He relied on *Metlika Trading Ltd v Commissioner SA Revenue Services* [2004] 4 All SA 410, 2005 (3) SA 1 (SCA) para 14.

if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition to the prospects of success, favour a piecemeal consideration of the case before leave is granted. The test is then whether the appeal, if leave were given, would lead to a just and reasonably prompt resolution of the real issue between the parties.[35] Once leave has been granted in relation to a 'judgment or order' the issue of convenience cannot be visited or revisited because it is not a requirement for leave, only a practical consideration that a court should take into account.

[47] I should mention, although somewhat out of context, that King also submitted that Bosielo J had exercised a discretion and that this Court cannot interfere with such an exercise except on very limited grounds. Apart from the fact that the learned judge did not purport to exercise a discretion the position is fairly simple. Fair trial rights are not matters for discretion; nor are discovery and related matters. One either has a right or one does not have one. In any event, as I have indicated, the court below did misdirect itself in a number of material respects, not only in regard to the facts but also because its judgment, as did King's argument, oscillated between the *Shabalala* right to access and the right to a motivated index to documents that do not fall within the *Shabalala* formulation.

CONCLUSION

[48] I have accordingly come to the conclusion that the decision of the court below is appealable. As to the merits of King's application I am satisfied that he does not reasonably require a motivated index of part B and C of the docket to enable him to conduct his defence. This means that the appeal has to succeed and the order of the court falls to be substituted with an order dismissing King's application. Issues of costs did not arise.

ORDER

1 The appeal is upheld.

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[35] *Smith v Kwanonqubela Town Council* [1999] 4 All SA 331 (SCA), 1999 4 SA 947 (SCA) para 16.

2 The order of the court below is substituted with an order dismissing the application.

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L T C Harms

Deputy President

NUGENT JA

NUGENT JA (HARMS DP, MLAMBO and MALAN JJA and MAJIEDT AJA concurring)

[49] I agree with the order that is proposed by my colleague.

[50] There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Association of Africa Ltd v Niselow*[36] (in another court), which was cited with approval by this court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.

[51] In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its proper classification does not seem to me to be material. I pointed out in *Liberty Life* that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more

[36] (1996) 17 ILJ 673 (LAC).

recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle. Even the features that were said in *Zweni v Minister of Law and Order*[37] to be characteristic, in general, of orders that are appealable was later said by this court in *Moch v Nedtravel (Pty) Ltd*[38] not to be exhaustive nor to cast the relevant principles in stone. As appears from the decision in *Moch*, the fact that the order is not 'definitive of the rights about which the parties are contending in the main proceedings' and does not 'dispose of any relief claimed in respect thereof', which was one of the features that was said in *Zweni* to generally identify an appealable order, is far from decisive.

[52] The order that is under appeal in this case, whether or not it might correctly be classified as interlocutory, is final in its effect. If it is indeed capable of being revisited by the court below, as counsel for Mr King submitted that it was, it is nonetheless the product of a reasoned judgment, and the prospect that it might be withdrawn by the court below upon further application can confidently be discounted. Needless to say, once the order has been executed, which must necessarily occur before the trial begins, any appeal will be academic. Yet the order has major implications for the prosecution. It requires a massive exercise to be undertaken by the prosecution at considerable cost. If the order was erroneously granted I have no doubt that this is the time for the error to be corrected, failing which it might just as well never be corrected at all.

[53] I agree with my colleague, for the reasons he has given, that Mr King's reliance upon the right of access to information in s 32(1)(a) of the Bill of Rights is misplaced. That right has been given effect, as required by the Constitution, by the enactment of the Promotion of Access to Information Act 2 of 2000. In the absence of a challenge to the adequacy of the Act to confer the rights that are constitutionally

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[37] 1993 (1) SA 523 (A).
[38] 1996 (3) SA 1 (A) 10F.

guaranteed, Mr King has no claim to a residual constitutional right.[39] I confine myself to his reliance upon the right that he has under s 35(3) to be afforded a fair trial.

[54] The ambit of the duty upon the prosecution to disclose documents to an accused person was authoritatively defined by the Constitutional Court in *Shabalala v Attorney General of Transvaal.*[40] We were referred to numerous decisions in other jurisdictions that have dealt with that topic, which do not seem to me to materially add to or detract from what was held in *Shabalala.* Nor did I understand counsel for Mr King to contend for any extension of the principles laid down in that case so far as they relate to the disclosure of documents. But the principles of *Shabalala*, and the cases like it, are not what is in issue in this case, because this case is not about the disclosure of documents at all, as counsel for Mr King correctly took considerable trouble to remind us.

[55] The case that was advanced on behalf of Mr King in support of the order was not that the prosecution has failed in the duties that are cast upon it by *Shabalala*. As my colleague has pointed out, what was sought by Mr King was a list of all documents in the possession of the prosecution, together with an explanation in respect of each document for why it has not been disclosed. That is a most novel order and counsel for Mr King could refer us to no court in the English speaking world in which a like order has been granted. Nor am I aware of any case in which such an order has even been sought. I think that the reason for that is plain.

[56] Whether a trial is fair is an objective fact. To receive a fair trial Mr King is entitled to the material that is contemplated by *Shabalala.* If he has received all that material, and is then tried, it could hardly be said that his trial was unfair on account of not having had the list that he requires. And if he is tried without having been given that material the proceedings might be set aside if that has denied him a fair trial, even if he has been given the list. No doubt he is not obliged to wait until his

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[39] Compare *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) in relation to the right under s 33 to administrative action that is lawful, reasonable and administratively fair.

[40] 1996 (1) SA 725 (CC).

trial has been concluded before complaining, and might rightly object if he is faced with the prospect of a trial that is destined to be unfair because he has not been furnished with documents to which he is entitled. But I have pointed out that that is not what the case is about.

[57] The only purpose that is served by the production of the list that Mr King requires, and evidently the purpose for which it is required, is to enable Mr King to audit the disclosure that has been made by the prosecution so as to determine whether the prosecution has fulfilled its duty. In effect Mr King wants the prosecution to satisfy him, as a precondition to being tried, that his trial will be fair.

[58] I do not think that s 35(3) goes that far. In its terms it entitles Mr King to be tried fairly in fact. It does not entitle him to be satisfied that the trial will be fair. If he were able to show in advance that his trial will not be fair it might be that a court will grant him appropriate relief. But the prosecution is not called upon to satisfy an accused person that his trial will be fair as a precondition to prosecuting. If that were to be required as a precondition for a trial it seems to me that there might be few criminal trials at all. Criminal proceedings are not a consensual affair.

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R W Nugent

Judge of Appeal

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