REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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....

DATE 20/9/24 SIGNATURE [redacted]

CASE NO: BA25/2024

Praktiseer Case No: A291/2024

In the matter between:

RUI MANUEL DE FARIA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MULLER J:

[1] This appeal is against the refusal to admit the appellant to bail on two occasions by the magistrate sitting at Praktiseer. It came about in this way. The appellant is charged with murder read with the provisions of section 51(1) of Act 105 of 1997 which is an offence mentioned in Schedule 6 of the Criminal Procedure Act.[1] It is not disputed that the appellant shot and killed the deceased. The appellant alleges that he acted in self-defence after he discovered his wife in a compromising position in the company of the deceased. He shot the deceased when he was attacked by the deceased. The wife of the appellant is the only eye witness to the events leading to and the shooting itself.

[2] The first application for bail was refused on the basis that no exceptional circumstances exist, which in the interest of justice permit the release of the appellant.[2] It is important to note that no appeal was noted when the first order was made. Instead, a fresh application for bail on new facts was launched days after the dismissal of the first bail application.[3] The second application was also unsuccessful.[4] Hence the present appeal which is aimed against both the first and the second refusal of bail. The appeal came before this court a week ago but was removed from the roll due to an incomplete record of the proceedings having being filed off record. The complete record consisting of both applications has now been filed and is before court.

[1] Act 51 of 1977 (Hereinafter "the CPA").
[2] On 4 April 2024.
[3] On 7 May 2024.
[4] The application on new facts was dismissed on 5 June 2024.

The parties were granted the opportunity to file supplementary heads of argument after conclusion of the arguments. They availed themselves of the opportunity.

[3] The new facts relied upon by the appellant in support of his application emerged mainly from an affidavit deposed to by the wife in which she has indicated that she has no objection to him being released on bail provided that certain conditions are imposed.

[4] The affidavit deposed to by the wife came about two days after the first application was dismissed when the wife addressed an email to the attorney of the appellant eliciting his assistance to draft and formulate an affidavit in support of bail being fixed for the appellant. The attorney obliged and drafted a *pro forma* affidavit that was forwarded to her under cover of an email for her approval. She was cautioned by the attorney to:

> "Please respond to us in writing with any query or question so that we may avoid any allegation raised later that we communicated with you.
>
> It should be best for ourselves to communicate in writing regarding the matter."

[5] Several emails followed between them until the wife was satisfied with the wording of the affidavit which she approved and deposed to. The legal representative of the appellant presented the said affidavit together with certain emails, purportedly exchanged between the attorney and the wife together with an affidavit deposed to by the appellant, as evidence on new facts.

[6] The investigating officer was called by the prosecution in opposition of the application. She and the prosecutor were clearly caught by surprise by the contents

of the affidavit. She mentioned that the attorney for the appellant informed her on a previous occasion at court that he is in possession of an affidavit deposed to by the wife. She was never given a copy of the affidavit nor was she afforded sight thereof prior to the application. The investigating officer also insinuated during cross-examination that the change in the attitude of the wife within two days after the first application was dismissed can be attributed to a visit paid to the wife by the attorney. The allegation was denied by the attorney.

[7] The legal representative on behalf of the appellant was requested to address the court on the question whether a gross irregularity has been committed as a result of the consultation with a state witness without the knowledge or the consent of the prosecutor to draft an affidavit for her in support of a bail application by the appellant, on new facts.

[8] It was contended that communication was initiated by the wife and that there was no consultation with her. Apart from this contention, it was argued on behalf of the appellant with reliance on *Shabalala and Others v Attorney-General of Transvaal and Others*[5] that an attorney has a right to consult with a state witness without the consent of the prosecutor and that he/she is also entitled to be placed in possession of all the information contained in the docket due to the onus on an accused person by virtue of the provisions of section 60(11) of the CPA which requires from an accused person to prove exceptional circumstances.

[9] It was a long standing and firmly embedded rule in our criminal justice system that a legal representative who acts on behalf of an accused person in criminal

[5] 1996 (1) SA 725 (CC).

proceedings has an ethical duty not to consult with a state witness without the permission of the prosecutor or the relevant Director of Public Prosecutions. In *S v Shabalala and Others v Attorney-General of Transvaal and Others*[6] the constitutional court was called upon to decide whether the applicable ethical rule at that time, can constitute a denial of the right to a fair trial. The court stated:

> "Whatever be the origin of the rule that an accused person may not consult State witnesses save with the permission of the Attorney-General or the prosecutor, it subsequently became entrenched in practice and now forms such a basic part of our system of criminal justice as to make it effectively impossible for an accused person to get his or her legal representative to consult with such a witness without the permission of the prosecuting authority. Any legal practitioner who does so would be guilty of unprofessional and unethical practice. Moreover, a breach of an ethical rule has been held to be capable of constituting an irregularity in the trial.[7]

[10] After discussing the need to consult on the one hand and the need to protect a state witness on the other, the following conclusion was reached:

> "It follows from these conclusions that the blanket rule which prohibits an accused person from consulting with a State witness without the permission of the prosecuting authority in all cases and regardless of the circumstances is too wide and is not protected by s 33 of the Constitution. However, the claim to consult State witnesses without the prior permission of the prosecuting authority can only be justified in circumstances where the right of the accused to a fair trial would in the special circumstances of the case be impaired if the defence is denied the opportunity to have such consultations."[8]

[11] The court held that:

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[6] *Supra.*
[7] Par 62.
[8] Par 69.

"B1. Insofar and to the extent that the rule of practice pertaining to the right of an accused or his legal representative to consult with witnesses for the State prohibits such consultation without the permission of the prosecuting authority, in all cases and regardless of the circumstances, it is not consistent with the Constitution.

An accused person has a right to consult a State witness without prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired if, on the special facts of a particular case, the accused cannot properly obtain a fair trial without such a consultation.

The accused or his or her legal representative should in such circumstances approach the Attorney-General or an official authorized by the Attorney-General for consent to hold such consultation. If such consent is granted the Attorney-General or such official shall be entitled to be present at such consultation and to record what transpires during the consultation. If the consent of the Attorney-General is refused the accused shall be entitled to approach the Court for such permission to consult with the relevant witnesses.

The right referred to in para 2 does not entitle an accused person to compel such consultation with a State witness:-

(a) if such State witness declines to be so consulted; or

(b) if it is established on behalf of the State that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with his or her evidence or that it might lead to a disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

Even in the circumstances referred to in para 4*(b)*, the Court may, in the circumstances of a particular case, exercise a discretion to permit such consultation in the interest of justice subject to suitable safeguards." [9]

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[9] 757I-758E.

[12] An accused person may consult with state witnesses if the consultation is justified in order to ensure a fair trial. The consent of the prosecuting authority should be obtained, but, if consent is refused then the court may on application grant permission. An accused does not have complete freedom to consult with state witnesses with or without their consent. There might conceivably be differences in opinion whether a consultation with a state witness is necessary for a fair trial. It seems that the appellant is under the impression that it falls solely within the discretion of an accused or his legal representative in all cases to decide whether a consultation with state witnesses is called for in the interest of a fair trial.

[13] No doubt exists that the attorney was aware of this ethical obligation when he commenced communication with the wife. He should immediately have informed the prosecutor that he was approached by the wife to have the appellant released on bail and that he needed to consult with the wife in connection therewith prior to exchanging emails with her on the topic. The attorney, in my view, acted improperly.

[14] It matters not that he communicated by means of emails. There is no difference between communication by telephone or other digital methods of communication, such as emails or remote audiovisual communication on the one hand, and a face to face consultation in the presence of the wife, on the other.

[15] The attorney was aware that the wife is a crucial eye witness who was present during the shooting incident. His continued engagement with the wife without informing her or the prosecution until an acceptable affidavit was formulated is a gross irregularity and a breach of his ethical duty. James JP remarked in *S v*

Hassim,[10] where counsel unbeknown by the prosecution obtained statements from state witnesses after they had testified in a trial:

> "I have no doubt in doing so he committed a serious error of the professional judgment which the court is entitled to expect from an advocate and that his conduct fell far short of what courts have right to expect from one of its officers."

[16] What the effect the ethical breach will be on the trial itself is impossible to say at this stage of the proceedings. It will be recalled that the investigating officer stated that the attorney paid a visit to the wife. It might only become apparent at the trial when the wife is called upon to testify what was said. What was said or not said in communications between them which are not included in the record might become relevant at the trial.

[17] In *S v Dintwe and Another*[11] a trial was held to be unfair where a legal representative who appeared for two accused persons failed to withdraw from the case when a conflict of interest developed between the accused persons during the trial. The court held that making use of the information received from the one accused is a breach of attorney-client confidentiality relationship.

[18] In *S v Moseli en 'n Ander (2)*[12] proceedings were declared void by Erasmus J where there was a gross breach of privilege between counsel and his client when counsel called the interpreter to give evidence as what the accused person had told him in consultation.

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[10] 1972 (1) SA 200 (N) 203G-H.
[11] 1985 (4) SA 539 (BGD).
[12] 1969 (1) SA 650 (O).

In *S v Mushimba en Andere*[13] a member of the staff of the firm of attorneys who acted on behalf of the accused persons had given copies of their statements and other confidential information to the police. It was held that the breach of confidentiality affected the fairness of the entire trial. All these matters dealt with privileged information irregularly made available to the prosecution that resulted in the trials being unfair. It must be emphasized that a bail application is not a criminal trial but is nevertheless criminal proceedings. Bail proceedings implicate the right to a fair criminal trial as entrenched in section 35(3) of the Constitution.

[19] Although section 35 seeks to protect the right of an accused to a fair trial the prosecution by necessary must by implication also be afforded the right to a fair trial. Public policy demands that the prosecution also be treated fairly. Evidence irregularly obtained from a state witnesses may well be detrimental to the state case and the administration of justice. The evidence irregularly obtained from the state witness which was tendered in support of the efforts by the appellant to obtain bail compromised the state witness and the fairness of the bail proceedings. The investigating officer, was unaware of the extent of the information provided by the wife to the attorney and what the circumstances were that lead to the consultation despite the explanation proffered by the attorney that he was approached by the wife.

[20] Section 60(14) of the CPA provides that an accused person for purposes of bail proceedings has no right of access to any information, record or document relating to the offence for which he/she is charged which is contained in the police docket

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[13] 1977 (2) SA 829 (A).

including any other information which is held by the investigating officer unless the prosecutor otherwise direct. Such information for purposes of an application for bail is privileged and cannot be waived by the wife without the consent of the prosecutor.

[21] The consultation with the wife in terms whereof she has made an affidavit and has set out the circumstances and conditions for the appellant to be admitted to bail without the knowledge of the prosecutor falls within the prohibition provided for by the provisions of section 60(14).

[22] As pointed out elsewhere, it was contended that the ethical rule is not applicable to applications for bail in respect of offences mentioned in schedule 6.

[23] I cannot agree with the submission. There are competing interests between the State who has the duty to ensure that the rules of criminal law are enforced and that the fundamental rights of an accused person who applies for bail under the burden that section 60(11)(a) read with schedule 6 of the CPA placed on such an accused person, are respected.

[24] The importance of witnesses in the criminal justice system can hardly be overemphasized. Untrammeled access to state witnesses by accused persons in serious cases may allow for intimidation, undue influence and undue pressure being exerted on them not to testify or to change their evidence to assist or exonerate accused persons. Such access will not only undermine the protection of the witnesses against influence and intimidation but will totally destroy public confidence in the administration of justice which is of vital importance for the proper functioning of the criminal justice system. It strikes at the very heart and effectiveness of the

administration of justice and the right to a fair trial. A bail application is a precursor to the trial. Evidence presented at bail proceedings is admissible at the eventual trial and may play a very important role.[14] The witness statement of the wife will be made available to the appellant before the trial. He is, therefore, able to be fully appraised of the evidence of the wife, before the trial commences.

[25] If the respondent had been informed by the attorney when she contacted him of her changed attitude towards the appellant, bail may not have been opposed. The improper consultation to obtain an affidavit from the wife without the knowledge of the prosecution constituted a gross irregularity that resulted in an unfair bail hearing, on new facts. The irregularity was of such a nature that the administration of justice and the fair trial right of the prosecution was compromised. The outcome of the bail proceedings cannot undo the irregularity and the consequences. This court has inherent jurisdiction to restrain illegalities in lower courts by way review, interdict or *mandamus* and may correct proceedings in lower courts.[15]

[26] I now turn to the notice of appeal which is directed at refusal of the first bail application as well as the refusal of bail based on new facts. To note an appeal against the first refusal of bail and simultaneously noting an appeal against refusal to admit the appellant to bail on new facts, is irregular. Section 65(1) of the CPA envisage an appeal against a refusal of bail prior to an application for bail on new facts. When an accused person exercised the right to apply for bail on new facts instead of noting an appeal against the first order he/she exercised an election to accept the outcome of the first application and to forgo the right to appeal the first

[14] s 60(11B)(c) of the CPA.
[15] *Wahlhaus and Others v Additional Magistrate Johannesburg and Another* 1959 (3) SA 113 (A) 119H.

order. It is an acquiescence of the first order. If the appellant was dissatisfied with the result of the first application he should have noted an appeal against that order. It cannot be countenanced that an appeal against the first order be entertained at the same time as an appeal against the second order. The noting of an appeal against the first order after the application for bail on new facts was dismissed, is a irregularity and an abuse of the process of court.

[27] A letter was addressed to the Polokwane High Court which was emailed to the secretary of the presiding judge, the Chief Justice and the Legal Practice Council, by the attorney on behalf of the appellant on the same day the appeal was argued, referring *inter alia* to "**DIM VIEW OF HONOURABLE JUDGE MULLER WILL BE CURED BY READING CONTENTS HEREUNDER**".[16] Paragraph 7 to 10[17] says:

"7. This is the reason, this letter is being dispatched within several hours of the date of hearing above.

8. Readers hereof are respectfully referred to the case *Shabalala v Attorneys General 1996(1) SA725 CC*. On page 64 order B 2, the Constitutional Court found:-

"An accused person has the right to consult a state witness without the prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired..."

9. The special (peculiar) circumstances of the aforesaid case are the following:-

(a) The accused's wife to whom he remains married is the only (single) witness.

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[16] There is no indication that the letter was also forwarded to the respondent.
[17] Paragraphs 1-6 are introductory remarks with reference to the "Dim View" taken.

(b) The state single witness is competent but not compellable, she has already expressed hesitancy against testifying against the accused who remains her husband.

(c) There are 2 children born from the marriage.

(d) the couple's daughter is a medical student studying at Wits.

(e) Their son manages a business in Burgersfort.

(f) the family, together with the accused's mother-in-law are living together in one house.

(g) The lawyers attached to Zehir Omar Attorney's deny having elicited a consultation with the accused wife.

(h) The aforesaid authority substantiates the view that the special circumstances of this case permitted the accused / his lawyer to consult with the state witness.

10. We hope that the contents of this letter will cure the DIM View of Judge Muller."

[28] The letter was obviously meant for the presiding judge to read and consider. Mr Omar, who assisted Me Omar in court during argument, was also afforded an opportunity to address the court when he requested an audience. At the conclusion of the arguments the parties were again invited to file supplementary heads of argument in connection with the matters raised during the argument. The issues mentioned in the letter could and should have been raised in the heads of argument. It is wholly inappropriate to address such a letter to the judge seized with the appeal after judgment was reserved. Be that what it may, in paragraph 9(b) of the said letter it is averred that the wife has already expressed hesitancy against testifying against

the appellant. Such hesitancy to testify at the trial was neither expressed by the wife in her emails exchanged between the attorney and her, nor stated in her affidavit presented at the bail hearing.

[29] Counsel who appeared on behalf of the State argued that the affidavit of the wife should have been disallowed in terms of section 35(5) of the Constitution. It was contended by the appellant that the bail hearing was conducted on the basis that the affidavit contained sufficient evidence to warrant a hearing on new evidence and that the particular issue was never raised by the prosecution at the hearing. I agree. The issue cannot be raised for the first time by the respondent on appeal.

[30] The matter did not end there. The appellant filed together with a reply to the supplementary heads of argument filed by the respondent, on 12 September 2024 an application to lead further evidence on appeal in terms of section 19(b) of the Superior Court Act.[18] The application was opposed by the respondent. The parties again appeared in court on 13 September 2024 to present argument in respect of the application to receive evidence on appeal.

[31] The test to be applied in an application to present evidence on appeal was set out by the Supreme Court of Appeal in *Staatspresident en 'n Ander v Lefuo* as:[19]

> "Alhoewel in die formulering van die vereistes nie altyd dieselfde woorde gebruik is nie, kom dit op die volgende neer. Eerstens moet die applikant 'n redelike annvaarbare verduideliking verskaf waarom die getuienis nie by die verhoor van die saak gelei is nie; tweedens moet die betrokke getuienis van wesentlike belang in die saak wees en derdens moet dit waarskynlik die uitslag van die saak verander (Die *Weimers*-saak op 514H-515F). In die *Colman*-saak is

[18] Act 10 of 2013.
[19] 1990 (2) SA 679 (SCA).

> 'n vierde vereiste gestel, naamlik dat die aansoek nie toegestaan sal word indien die omstandighede so verander het dat die ander party benadeel sal word nie (op162). In die *De Beer*-saak is dit egter beklemtoon (op 748) dat elke aansoek op sy eie meriete beslis moet word en in *S v De Jager* (*supra*) het Holmes AR op 613E-F daarop gewys dat, hoewel die aansoek vir die lei van verdere getuienis gewoonlik geweier sal word indien enige van bogemelde basiese vereistes nie aanwesig is nie, die Hof wel in 'n seldsame geval op een of ander buitengewone grond die aansoek mag toestaan."[20]

[32] A *prima facie* view expressed by the presiding judge during oral argument has given rise to the birth of this application. Family members made affidavits to explain what prompted the wife to freely and voluntarily depose to the affidavit produced at the bail hearing in support of the appellant. The importance of their evidence only came about upon reflection by the attorney of the "Dim View" remark made during argument.

[33] The respondent filed no answering affidavit but simply filed an affidavit deposed to by the wife in opposition to the application. There is no counter-application to receive her affidavit as evidence in the appeal by the respondent. Her affidavit cannot be considered as evidence in the appeal.

[34] The family members were available at all relevant times and could have deposed to the affidavits to confirm all the averments made by the wife in support of the bail application and that she made the statement freely and voluntarily. That being the position the appellant has failed to meet the first requirement of the test namely to explain why the evidence was not adduced at the bail hearing to confirm and support her evidence. There are, moreover, no special or extraordinary

[20] 692A-D.

circumstances present in this matter. Circumstances are such that the respondent will be prejudiced. Their evidence may very well be relevant and material in a future bail application, on new fact. In the premises the application falls to be dismissed.

[35] Once again the attorney for the appellant forwarded a document to the registrar of this court with the heading "APPELLANTS REASONS AS TO WHY THIS HONOURABLE COURT SHOULD NOT REMIT THE CASE TO THE LOWER COURT" to place further argument before the court after judgment was reserved. The court allowed the respondent the opportunity to respond to the new submissions. The respondent filed a reply.

[36] It is contended by the appellant that a remittal may only be made if the record does not contain sufficient evidence or information for determining the appeal and if the court is of the opinion that further evidence is necessary. An additional submission is put up that the matter should not remitted to the magistrate because the road from Gauteng to Praktiseer, where the court is situated, is bad and that the costs involved having regard to the court having adjourned the appeal hearing on three occasions are "PROHIBITIVE," to use the words of the attorney.

[37] The removal of the appeal from the role on the first occasion was occasioned by the legal representatives of the appellant who filed an incomplete record of the bail proceedings on new facts. The appeal hearing took place on the second occasion after the complete record was filed. The third appearance was again occasioned by the legal representatives who filed an application to lead further evidence on appeal. The appeal was always treated with the required urgency and the hearings were held on each occasion in the very same week that the papers were filed.

This court has a measure of sympathy with the legal representatives of the appellant who has to travel to court.

[38] A copy of this judgment must be furnished to the Legal Practice Council: Polokwane for consideration.

ORDER

1. The application to receive further evidence on appeal in terms of section 19 (1) (b) of Act 10 of 2013 is dismissed.

2. The appeal against the order dated 4 April 2024 in Praktiseer Case no A291/2024 is struck from the roll.

3. The proceedings conducted on 5 June 2024 in the bail application on new facts by the appellant are set aside.

4. The application for bail on new facts is referred back to the magistrate Praktiseer for hearing before another magistrate.

5. The registrar is directed to forward a copy of this judgment to the Legal Practice Council: Polokwane.

[redacted]

G.C MULLER

JUDGE OF THE HIGH COURT, POLOKWANE: LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT	: Ms Y OMAR Mr Z OMAR
INSTRUCTED BY	: ZEHIR OMAR ATTORNEYS
FOR THE RESPONDENT	: Adv M RATSHIBVUMO
INSTRUCTED BY	: DPP, POLOKWANE
DATE OF HEARING	: 06 SEPTEMBER 2024 and 13 SEPTEMBER 2024
DATE OF JUDGMENT	: 20 September 2024