

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: P12/2024

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/N
SIGNATURE DATE DATE 4/11/24 SIGNATURE	

In the matter between:

THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: LIMPOPO APPELLANT

and

ZACHRIAS JOHANNES OLIVIER RESPONDENT

JUDGMENT

MULLER J:

[1] This is an appeal in terms of section 310 of the Criminal Procedure Act¹ by the Deputy Director of Public Prosecutions: Limpopo against an order granted by the Magistrate Mankweng on 30 August 2024 on the following questions of law:

"1.1 Whether the provisions of Section 335 of Act 51 of 1977 precludes the State to invoke the provisions of section 60(14) of the Criminal Procedure Act 51 of 1977?

1.2 Whether disclosure of police statement for purposes of bail application is dealt with in terms of Section 335 or Section 60(14) of the Criminal Procedure Act 51 of 1977?"

[2] The facts are simple and straight forward. The Respondent² together with two other accused persons is charged on charges of murder (two counts), attempted murder, unlawful possession of a firearm and unlawful possession of ammunition as well as defeating or obstructing the course of justice.³

[3] The record of the proceedings before the Mankweng Magistrate shows that on 30 August 2024 the matter was called by the Prosecutor who informed the court that the case was adjourned for a bail application. The Respondent was represented by counsel who requested to be informed by the prosecution, before proceeding with the bail application, whether Schedule 6 to the CPA applies to the proceedings, presumably as a result of the provisions of section 60(11)(a) of the CPA which states:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable

¹ Act 51 of 1977. (Hereinafter called "the CPA").

² Accused no 1.

³ The charge sheet which should form part of the proceedings is not included in the papers.

opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release."

[4] The Prosecutor confirmed that the Respondent is *inter alia* charged with premeditated murder. Counsel also informed the court that it came to light that morning that the Respondent has made a statement to the police of which he (the advocate) had no sight with the result that the Respondent is unable and unprepared to proceed to apply for bail as there is a need for proper consultation and preparation of an appropriate affidavit by the Respondent to submit as evidence in the formal bail application. Counsel applied to have access to the statement of the respondent in terms of section 335 of the CPA. Section 335 reads:

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

[5] The application was opposed by the Prosecutor who relied on the provisions of section 60(14) of the CPA. Section 60(14) provides:

"Notwithstanding anything to the contrary contained in any law, no accused shall, for the purpose of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to information, record or document to which he or she may be entitled for purposes of his or her trial."

[6] The prosecution indicated also that the refusal to disclose any information or material contained in the docket and includes the written statement made by the Respondent is based on the fact that the investigation will be compromised and jeopardized since the police were still following up on allegations made by the respondent in his statement.

The Learned Magistrate after having heard argument from both the parties ordered that the Respondent be furnished with a copy of the statement that he has made to the police upon his arrest.⁴

[7] The Appellant, thereupon, requested a stated case from the Magistrate which has been duly filed for consideration by this court. The Magistrate stated that he was not convinced that sufficient reason was provided by the Appellant that the prosecution will be prejudiced if the Respondent is provided with a copy of his statement. The Magistrate concluded that the right of the Respondent to have access to his statement in terms of section 335 will not improperly prejudice the rights of the prosecution protected under section 60(14). The Appellant then lodged a notice of appeal with this Division in terms of section 310(2) of the CPA. Section 310(1) provides that:

"When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law."

⁴ The application of the co-accused for access to the docket was refused. The remainder of the accused play no part in this appeal.

[8] For section 310 to find application, it must be established that a decision was granted in the magistrates' court -

- (a) in favour of the accused;
- (b) in criminal proceedings; and
- (c) on a question of law.

[9] It is common cause that the Magistrate granted an order in favour of the Respondent, who is an accused, on a question of law, namely, that section 60(14) does not preclude the Respondent from applying in terms of section 335 to gain access to the statement made by him during a criminal investigation to enable him to prepare for a bail application where Schedule 6 is applicable.

[10] Although there is no dispute between the parties that bail proceedings are not criminal proceedings, a dispute has arisen between them whether bail proceedings have been instituted and whether the proceedings before the Magistrate were indeed criminal proceedings. Counsel for the Respondent argued that criminal proceedings are instituted only when an accused is required to plead. The argument ran that appearances of an accused in court from arrest until he/she pleads to a specified charge or charges in the lower court are not criminal proceedings. Counsel for the Appellant, on the other hand, submitted that those proceedings are indeed criminal proceedings. Both parties are *ad idem* that bail proceedings have not commenced but are anticipated in future.

[11] The CPA contains no definition of the term 'criminal proceedings' but do state that criminal proceedings include a preparatory examination under Chapter 20. It was held in *S v Swanepoel*⁵ that:

"In art 1 van Wet 51 van 1977 word bepaal dat "strafregtelike verrigtinge" "ook 'n voorlopige ondersoek ingevolge Hoofstuk 20" beteken. Dit is duidelik dat Wet 51 van 1977 nie probeer om 'n omskrywing te gee van die term "strafregtelike verrigtinge" nie behalwe deur te sê dat dit ook 'n voorlopige ondersoek behels. Dit sou onmoontlik wees om 'n presiese omskrywing van die term "strafregtelike verrigtinge" te gee omdat indien na die Wet gekyk word, dié woorde nie net kan slaan op een bepaalde soort strafregtelike verrigting nie maar op verskillende soorte van strafregtelike verrigtinge. In elke geval wanneer die uitdrukking gebesig word, moet daar gekyk word na die aard en opset van die betrokke artikel waarin dit gebesig word as ook die samehang van die artikel in die deel van die Wet waarin die artikel verskyn om te bepaal wat "verrigtinge" presies behels. Die gewone betekenis van die woord "verrigtinge" of "proceedings" toon aan hoe onbepaald en relatief die woord eintlik is."⁶

[12] A person who is in detention following an arrest must be brought before a lower court as soon as reasonably possible but not later than 48 hours after arrest.⁷ It is common cause that the respondent has been charged with murder and other offences together with co-accused persons at their first appearance in the lower court.⁸ In *S v Gumbi*⁹ it was held that:

"Criminal proceedings in a superior court commence with the service of an indictment on the accused and its lodgement with the registrar of the court (s 76)."¹⁰

⁵ 1979 (1) SA 478 (A).

⁶ 488C-H.

⁷ Section 50(1)(c)(ii).

⁸ Section 50(6).

⁹ 2018 (2) SA 676 par 10; In *S v Thomas and Another* 1978 (1) SA 329 (A) 334E it is stated: "The words "criminal proceedings" are defined in sec 1 of the Act as including a preparatory examination and there is no indication in the Act that the words "criminal proceedings" were intended to be limited to proceedings at the trial."

¹⁰ Section 76(1) provides: "Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk

[13] The word 'proceedings' in section 76(1) should be interpreted generously to include 'criminal proceedings' if regard is had to the term 'criminal proceedings' in section 80 which allows the accused to examine the charge(s) set out in the charge sheet (or indictment) at any stage of the relevant 'criminal proceedings' and also to the provisions of section 73(1) and (2) as well as section 73(2A) which provide that:

"(1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal advisor as from the time of his arrest.

(2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question."

Section 73(2A) provides that:

"Every accused shall-

- (a) at the time of his or her arrest;
- (b)
- (c)
- (d)
- (e) at his first appearance in court,

be informed of his or her right to be represented at his or own expense by a legal adviser of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance."

[14] The purpose of section 73 is to realize the constitutional right to legal representation set out in section 35(2)(b) and (c) of the Constitution which affords an accused person legal representation not only from the time of his arrest, but also to representation from his

of the court, and in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned."

his/her first appearance in criminal proceedings instituted against him/her in the lower court. Criminal proceedings, therefore, commenced against the Respondent when he appeared in the lower court for the first time and the charge sheet (J15) is handed to the court to form part of the proceedings.

[15] It is unnecessary for purposes of this judgment to decide whether bail proceedings are criminal proceedings. Suffice it to say that bail proceedings are interlocutory formal court proceedings which are less formal than a criminal trial and which do not dispose of the criminal trial which will be heard in due course when the investigation is completed. It is rightly referred to as a 'unique judicial function'.¹¹

[16] Bail applications take place during pending criminal proceedings. It does not mean that the underlying or pending criminal proceedings in terms of which the accused was arrested, charged and remanded in custody in the lower court, are transformed into something totally different.¹² The accused is in custody in terms of an order issued by the lower court in terms of the pending criminal proceedings.¹³ Bail applications are governed by Chapter 9, the proceedings of which are not criminal proceedings.

[17] The requirements of section 310 have been met in that a decision was made by a lower court in favour of the accused, in criminal proceedings, on a question of law. It follows, therefore, that the appeal is properly before us.

¹¹ *S v Dlamini; Sv Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) par 11; *S v Green* 2006 (1) SACR 603 (SCA) par 23; *Kouwenhoven v Director of Public Prosecutions Western Cape and Others* 2022 (1) SACR 115 (SCA) par 15.

¹² An accused in the bail application remains the accused in the underlying criminal proceedings.

¹³ *Bogaards v S* 2013 (1) SA (CC) par 36-37.

[18] Section 335 comes into operation if a person has made a statement in writing to a peace officer in relation to any matter and criminal proceedings thereafter are instituted against that person in connection with the matter in respect of which he has made the statement. It is common cause that the respondent has made a written statement to a peace officer, who is in possession of the statement, in connection with a matter for which he was arrested and charged in the lower court.

[19] If section 335 is considered in isolation there is no doubt that the respondent is entitled to his statement. In *S v Mpetha and Others (1)*¹⁴ application was made in terms section 335 for copies of statements made by the accused in connection with complaints of assault made by the accused against the police whilst a trial within a trial was in progress in a criminal trial. It was held that the nature and purpose of section 335 is:

"What in essence the new section boils down to is this: that if a person makes a written statement to a peace officer in relation to any matter, and thereafter criminal proceedings are instituted against him in connection with that matter, then he is entitled to a copy of his statement. The basic requirement of a connection between the statement and the ensuing criminal proceedings must be satisfied before a person is entitled to obtain a copy of his statement in terms of s 335."¹⁵

[20] The prosecution in *Mpetha supra* opposed the application on the basis that the statements were privileged statements made by the accused as state witnesses with regard to the allegations of assault against them. The court rejected the proposition and stated:

To my mind it is only fair and just that a person who makes a statement to the police, and who is thereafter prosecuted in connection with some matter referred to in that statement, should be entitled to

¹⁴ 1982 (2) SA 253 (C).

¹⁵ 256G.

see that statement when preparing his defence. The injustice of the law being otherwise is only manifest. That a provision should exist in the law along the lines of s 335 is therefore only reasonable and to be expected.”¹⁶

[21] The *dictum* should be understood against the background of an application made in terms of section 335 in an ongoing trial at a time when section 60(14) was not in existence. The lawgiver, no doubt, was aware of the provisions of section 335 when section 60(14) was enacted. The introductory words of subsection (14) that begin with:

‘Notwithstanding anything to the contrary contained in any law...’

expressly convey that notwithstanding the provisions of section 335 an accused shall not, for the purposes of bail proceedings, have access to any information record or document relating to the offence in question which is contained in the docket or which includes a statement made by the accused, provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his her trial.

[22] It was observed by the Constitutional Court in *S v Dlamini; Sv Dladla and Others; S v Joubert; S v Schietekat supra* that section 60(14) was introduced together with a new section 60(11) to clear up the perception created by *Shabalala and Others v Attorney-General Transvaal and Another*¹⁷ that the defence has extensive rights of access to the information contained in the docket even at bail stage. Important observations were made in relation to the ambit and constitutionality of section 60(14):

“[84] Of course, if possible statutory provisions should be interpreted as being consistent with the Constitution and two subsections of the same statute ought not to be read as being mutually

¹⁶ 257 A-B.

¹⁷ 1995 (2) SA 725 (CC).

contradictory. Therefore, notwithstanding the provisions of ss (14), a prosecutor may have to be ordered by the court, under ss (11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there. Subsection (14) can therefore not be read as sanctioning a flat refusal on the part of the prosecution to divulge any information relating to the pending charge(s) against arrestee, even where the information is necessary to give effect to the 'reasonable opportunity' requirement of ss (11). And there is a ready - and less absolute - interpretation of ss (14) which is both consistent with its language and in harmony with ss (11). The words 'have access to' in ss (14) are to be interpreted as barring physical access to the contents of the docket in the sense of having sight of perusing such contents.

[85] In the result ss (14), read restrictively as indicated, does no more than make plain that, whatever access to the police docket an accused may have to be afforded in order to protect the right to a fair trial guaranteed by the Constitution, there is no correspondingly general right at the bail stage. And in order to make that intention completely plain, the proviso to the subsection expressly excludes access required for trial purposes from its prohibitory ambit. It follows that there is no constitutional fault to be found with the subsection."

[23] It is clear that that the court did not regard section 60(14) as sanctioning an absolute (blanket) denial of access to the information in the docket. The court also did not find that there is a general right to the contents of the docket for purposes of an application for bail.¹⁸ An accused, who is charged with an offence mentioned in Schedule 6, is to be given a reasonable opportunity to appraise him/her of the case he/her faces to enable the accused a reasonable opportunity due to the heavy *onus* placed on the accused to adduce evidence to show that exceptional circumstances exist which in the interest of justice permit his or her release from custody if the interests of justice permit. If the accused is unreasonably denied access by the prosecution he/she may apply to the court in terms of section 60(11)

¹⁸ Section 335 as a provision that establishes a general right to access the statement made by the accused was not considered.

which provides the means to access the relevant information in the docket to realize the right contained in section 35(1)(f) of the Constitution and to secure fair bail hearing. It was pointed out in *S v Josephs*¹⁹ that the provisions of section 60(14):

“...afford no basis to distort these most basic tenets of justice. The provisions of section 60(14) vest a discretion in the prosecutor to disclose information or material in the docket. It is not an unfettered discretion. In the event of the prosecutor deploying information or material in the docket in a certain way in bail proceedings, he must be aware that a duty may be incurred thereby to disclose and make available the information or material to the applicant for bail.”²⁰

[24] The right of an accused to his statement in terms of section 335 is curtailed by the provisions of section 60(14) only in relation to bail applications and not in relation to trials. To hold otherwise would render section 60(14) nugatory and the two provisions contradictory. The conflict cannot be resolved by giving full force and effect to both provisions. Application of the maxim *generalalia specialibus non derogant* brings about the conclusion that the special provisions of section 60(14) have specifically ousted the general provision of section 335 with specific reference to access to information in the docket pertaining to bail applications.²¹ It matters not that the general provision is the earlier and the special provision the later whereas the purpose of the maxim is to resolve conflict between the two provisions.²²

[25] An accused who is in detention and the offence(s) subject to Schedule 6 who wishes to obtain his statement for bail purposes must invoke section 60(11) to obtain his statement. In the premises the questions of law are answered as follows:

¹⁹ 2001 (1) SACR 659 (C).

²⁰ 664c-d.

²¹ *R v Gwantshu* 1931 ELD 31-32; *S v Coulter* 1971 (1) SA 162 (RA) 163D-G;

²² *Khumalo v Director-General of Co-operation and Development* 1991(1) SA 158 (A).

1.1 The provisions of section 335 of Act 51 of 1977 do not preclude the State from invoking section 60(14) of Act 51 of 1977.

1.2 The disclosure of police statements for purposes of bail is not dealt with section 60(14).

[26] There are several reasons why the statement of an accused is needed for purposes of his bail application.²³ In the present case access was refused by the prosecution on the basis that the police need to follow up on information provided in the statement. It is not proper for this court to make any pronouncement in relation to the propriety of the refusal by the prosecution to grant the respondent access to his statement. It is prudent to refer the matter back to the magistrate Mankweng to enable the respondent to continue before a different magistrate in the light of the questions of law referred to *supra*.

ORDER

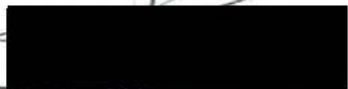
- 1. The appeal is upheld.**
- 2. The order of the Magistrate is set aside.**
- 3. The application for bail is referred back to the Magistrate Mankweng to be heard by another Magistrate.**

²³ Van der Merwe SE "Artikels 60(14) en 335 van die strafproseswet; het 'n borgapplikant 'n reg van toegang tot sy eie verklaring in die polisiedossier" (2001) South African Journal of Criminal Justice 297, Also Schwikkard PJ *et al Principles of Evidence* 4th ed (2016) 191.



G.C Muller
Judge of the High Court
Limpopo Division, Polokwane

I, agree



M. Monene
Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES:

HEARD ON :

JUDGMENT DELIVERED ON :

23 October 2024. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **04 November 2024 at 10:00**

FOR THE APPLICANT :

Adv L. Mashiane

INSTRUCTED BY :

DPP, Polokwane

FOR THE RESPONDENT :

Adv J.J Venter

INSTRUCTED BY :

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