



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 18554/23

In the matter between

LUCA REGGIO

1st APPLICANT

MICHELA MORONI

2nd APPLICANT

AND

REGIONAL MAGISTRATE, BELLVILLE
RESPONDENT

1st

DIRECTOR OF PUBLIC PROSECUTIONS, WC
RESPONDENT

2nd

CORAM: THULARE J; MTHIMUNYE AJ

Date of Hearing : 09 October 2025

Date of Delivering : 20 November 2025

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

THULARE J**ORDER**

(a) The application for leave to appeal is dismissed.

[1] This is an opposed application for leave to appeal against the judgment of this court which dismissed a review application brought by the applicants against a judgment of the 1st respondent. The applicants face criminal charges before the 1st respondent instituted by the 2nd respondent. The applicants served a notice requesting further particulars in terms of section 87 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA). The 2nd respondent responded to the request. According to the applicants, they received incorrect and incomplete documents. The 2nd respondents answer was that the complainant company files were kept by the first applicant and that after diligent search of the complainant company premises after the 1st applicant left, the company was unable to find the documents sought by the applicants. On other documents sought, the response was that 1st applicant did not provide the company with the description of his monthly expenses, was responsible and handled the general ledger and the complainant company did not find any other documentation or general ledger after he left.

[2] It was the provision of further information sought by the applicants, including those documents, which occasioned postponements and upon which the applicants brought the section 342A of the CPA application. The applicants submit that they would be unable to defend themselves as the 2nd respondent failed to comply with

their section 87 notice by providing further and better particulars essential for their defence and that as a result the applicants were left completely empty-handed and had no means to mount a defence.

[3] The matter before us was a review and not an appeal. Section 87 is an intervention for more particulars concerning the offence that the State intends to prove against an accused as will be necessary for a thorough preparation of their defence [*R v Moyage & Others* 1958 (3) SA 400 (A) at 413B]. The purpose is to inform the accused of the case against them [*R v Mokgoetsi* 1943 AD 622 at 627]. At this stage, and on review, it is impossible to determine whether the absence of the particulars sought, against the background of the explanation provided by the 2nd respondent, are prejudicial to the accused such that they would cause a failure of justice which would result in them not receiving a fair trial [*Jaca v Minister of Justice & Others*, an unreported judgment GNP case no A405/13 delivered on 11 November 2013].

[4] The prosecution cannot be expected to provide particulars which they do not have [*S v Alexander & Others* 1964 (1) SA 249 (C) at 252C; *S v Nghixulifa & Others* 2016 (2) NR 356 (HC) at para 5]. South Africa may be alive with opportunities, but it would be bad jurisprudence if for instance, the facts were to establish that an accounting officer simply did not keep records, or walked away with or disposed of records showing criminality on their part when they were caught out, and could avoid prosecution at the instance of a judge, by demanding that the prosecution provide records he did not keep, walked away with or disposed of in anticipation of a criminal prosecution. In this matter, the State did not deny

the applicants the further particulars sought. The State alleged that it cannot provide the further particulars sought. The information sought was not available to the State. Adv. Seroto, on behalf of the prosecution, held the view that the State was ready to try the accused. Whether it was true that the complainant company had documents, correspondence and evidence that could prove the applicant's innocence, which was deliberately being withheld from the applicants, as Adv. King SC argued, cannot be determined from the papers. Upon review of the docket contents and analysis of the evidentiary material in comparison to the charge sheet Adv. King SC held the view that the matter was not properly investigated. These disputes and arguments cannot be resolved in review and on papers, without the benefit of evidential material. The applicants may favour Adv. King SC and celebrate him as of superior logic to Adv Seroto, but that is how far they can take it. For a court to accept his opinion, the court must consider the facts.

[5] The allegations include those that relate to the first applicant's role as managing director of the complainant during the period in which he stood accused. The allegations against the accused include pocketing too much salary at own instance and claiming travel expenses that they were not entitled to. They were summarily dismissed and barred further access to the complainant company resources. What is also clear is that the information sought by the accused in this matter was not particulars sought and which were necessary to inform the accused about the case against him. What is sought is evidence that may be led to prove or disprove the commission of the offence [*S v Alexander* at 251H]. The State has an obligation to provide particulars of material facts which it intends to prove and no obligation rests on the State to disclose the evidence by means of which such material facts are to be proved [*S v Boekhoud* 2011 (2) SACR 124 (SCA) at para 61]. In *Key v*

Attorney-General, Cape Provincial Division and Another 1996 (4) SA 187 at para 13 it was said:

[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime or its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. ...

[6] I understand the law differently to the applicants legal representatives, including Adv. King SC. At para 110 of their note on this application for leave to appeal, the following was said:

110. Furthermore, in *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA), the Supreme Court of Appeal, when referring to the South African Code of Conduct for members of the National Prosecuting Authority regarding criminal discovery, affirmed that prosecutors should, as soon as reasonably possible, disclose to the accused all relevant information, whether prejudicial or beneficial, in accordance with the law and the requirements of a fair trial. In the light of the foregoing, it is insufficient for the Second Respondent to merely assert that they do not possess the documents sought by the appellants. The law imposes an obligation on the Second Respondent to act fairly and to uphold the principles of trial fairness. In this instance, this duty requires the Second Respondent to obtain the relevant documents from the Complainant and to disclose them to the Appellants.

The SCA in *Van der Westhuizen*, in dealing with the concept of the impartiality of the prosecutor in criminal proceedings, emphasized that the concept was not used in the sense of not acting adversarial, but in the sense of acting even-handedly, including avoiding discrimination but to also act without fear, favour or prejudice [para 10]. The court said it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence for the very purpose of obtaining a conviction [at para 11].

[7] I am unable to trace the law upon which the duty which the applicants argue exists in our law, which requires the prosecution to obtain documents from the complainant, which the complainant said they do not have in their possession, and to disclose those unavailable documents to an accused. The legal position, to my understanding, is that the request for further particulars will clearly not be interpreted to contemplate that information which is unknown and/or which is unavailable to the party against whom it is directed and which it is impossible for them to furnish, must be furnished on pain of facing serious consequences. Impossibility of complying with the request is an answer to the request. A party to whom the request was made, may in response answer that the information sought is unavailable or unknown to them [*Houtlands Investments Ltd v Traverso Construction Ltd* 1976 (2) SA 261 (C) at 265-266]. A request for further particulars must be interpreted to mean that the requestor was entitled to particulars referred to in the request, to the extent that the prospective supplier was able to furnish them [*Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* 1971 (3) SA 455 (T) at

462FE-F]. The word deliver in section 87 can mean no more than bring and hand over to the requestor. One cannot deliver what one did not have.

[8] The principle to be applied on the question whether the relief sought by the applicants should be granted is that a court will make the order if the applicant is likely to be prejudiced by the refusal. When the question of particulars is considered what must be determined is whether the charge sufficiently informs the accused person of what the case is that he must meet. [*Behrman v Regional Magistrate, S. Tvl & Another* 1956 (1) SA 318 (T) at 319-320]. An accused is entitled to be told the facts which the prosecution proposes to prove, and not the evidence by which those facts will be proved. He is entitled to all the necessary information to be able to instruct his attorneys and counsel and to prepare his defence [*Behrman* 320-321]. The ordinary principle is that an accused person must be given such particulars as he properly requires for the purpose of preparing his case before he is called upon to plead and enter upon his defence. It seems to me that there may be instances, like the present, where the availability of such evidence and the ability of the prosecution to furnish the particulars asked for, and the prejudice by reason of the absence of the particulars may not clearly appear at the time that the application is made and the relief to pressure furnishing thereof is pursued. In these instances, in my view, the proper approach would be to allow the accused to renew his application in the course of the trial if it could be established that he would in fact be prejudiced by reason of the absence of the available particulars [*Green v Assistant Magistrate, Johannesburg* 1954 (4) SA 580 (T) at 584; *Behrman* at 321; *S v Du Plessis* 1963 (3) SA 168 (O)]. I remain persuaded that the Magistrate exercised her discretion judicially on the matter before her, and on our decision on review. For these reasons I was not of the opinion that the appeal

would have a reasonable prospect of success or that there was some compelling reason why the appeal should be heard, and the order was accordingly made. For these reasons I was not of the opinion that the appeal would have a reasonable prospect of success or that there was some compelling reason why the appeal should be heard, and the order was accordingly made.

DM THULARE
JUDGE OF THE HIGH COURT

I agree

S MTHIMUNYE
ACTING JUDGE OF THE HIGH COURT