

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: A110/25

Regional Court case no: SH31/21

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

(4) Date: 14 November 2025

Signature:

**THE DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION, PRETORIA**

APPLICANT

AND

REGIONAL MAGISTRATE WILLEMSE NO

1ST RESPONDENT

**MINISTER OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT**

2ND RESPONDENT

N.MOHAMMED

3RD RESPONDENT

JUDGEMENT

1. The Applicant brought a review application in terms of Uniform Rule 53, read with Rule 6(12), to review and set aside the decision of the First Respondent dated 28 March 2025, under case number SH31/2021, granting an application to bar the State from calling Mr Morne du Plessis as a witness in the case against the Third Respondent.

2. All the Respondents did not oppose the application and elected to abide by the decision of the court.
3. The application was heard on 18 November 2025. I was advised during the hearing that the Regional Court had remanded the matter to 20 November 2025 pending the outcome of the review proceedings.
4. The order sought by the Applicant was granted, and I undertook to furnish the undermentioned reasons at a later stage.
5. The Third Respondent is appearing in the Vereeniging Regional Court, charged with four counts of contravening section 2(1) of the Counterfeit Goods Act 37 of 1997, read with the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978. He is represented in the proceedings by Mr Van Heerden.
6. The trial commenced on 23 November 2023, and the State has not yet closed its case.
7. On 28 March 2025, Mr Van Heerden brought an application to bar Mr Du Plessis, a witness the State intended to call, from testifying.
8. During the hearing of the application, Mr Van Heerden requested the Court not to allow the witness to be called and submitted that:
 - 8.1 The Third Respondent's right to a fair trial in terms of section 35 of the Constitution would be violated if the witness were permitted to testify. The defence was furnished with the witness's statement on 5 December 2024, a year and twelve days after the trial commenced and a month after the statement was commissioned. He argued that the State was conducting a "trial by ambush."
 - 8.2 There was no explanation from the State as to why the witness's statement had not been obtained earlier, or where the witness had been, and he only became available four years after the alleged date of commission of the offence.

8.3 He further submitted that “the value of this evidence is so tainted at this stage because who knows where this witness is from. He could have, for all we know, been sitting in the court the whole day, listening to the evidence, and now comes and closes the case.”

9. Advocate Mathambo, appearing for the Applicant, opposed the application and made the following submissions:

9.1 One of the State witnesses, Constable Mazibuko, testified that when he arrived at the scene of the alleged crime, he found a person who had blocked the Third Respondent from leaving. He could not remember the name of that person but was informed that he was acting on the instructions of a Mr Strauss.

9.2 The State was unable to establish the identity of the person referred to by Constable Mazibuko because Mr Strauss passed away before Advocate Mathambo took over the case from the late Advocate Makhubela in February 2022. Mr Strauss’s security company, Jo Mart Security Services, where the witness had been employed, had been non-operational since 2020.

9.3 The investigating officer traced the witness in 2024, and he confirmed that he was the person sent by the late Mr Strauss to the premises on 29 December 2020.

The Trial Court’s Ruling on the Application

10. The First Respondent ruled that allowing the State to call the witness would violate the Third Respondent’s right to a fair trial and would amount to a trial by ambush. She held that the evidence led up to that stage raised a problem regarding the identity of the Third Respondent.

10.1 The State sought to call a witness whose identity was unknown to the witnesses who had testified about him, who had been only described, and who was also unknown to the Third Respondent’s counsel.

10.2 If the witness were allowed to testify, the Court would only be able to evaluate his evidential value if all the previous witnesses were recalled. This would have cost implications for the Third Respondent and would further violate his right to a speedy trial.

11. The question I had to consider in this review application was whether the Third Respondent's right to a fair trial would have been violated by allowing Mr Du Plessis to testify. The First Respondent focused on the alleged violation of the right to a speedy trial and the right of the accused to be informed of the charge with sufficient detail.
12. It is well established that the foundation of a criminal trial is the accused's right to a fair trial as set out in section 35(3) of the Constitution, with specific reference to section 35(3)(a), which provides that an accused person has the right to be informed of a charge with sufficient detail to answer it (*S v Tshoga*).
13. Equally relevant is the principle stated in *Rex v Hepworth*, which emphasises that a criminal trial is not a game in which one party may take advantage of the omissions or mistakes of the other, and that a judicial officer must ensure that justice is done between the prosecution and the accused.
14. The evidence led at the trial regarding the unidentified witness—whom the Applicant submits is Mr Du Plessis—was given by Constable Mazibuko. He testified that he visited Kliprivier Country Club twice on 29 December 2020 with his colleague, Constable Khanyile.
15. He testified that at approximately 17h00, he and Constable Khanyile were instructed by Captain Harmse to return to the premises. They found three individuals present, one being the Third Respondent and another an unidentified male. The two were engaged in a verbal altercation. He took the unidentified man aside, who informed him that the Third Respondent was the person they were looking for. He repeated what Mr Strauss had previously told them, namely that the Third Respondent was "the owner of the bogus spice factory."
16. While waiting for Mr Strauss and additional police officers, Constable Mazibuko inspected the building and noted that the padlock on the door was broken.

17. The Third Respondent informed him that the unidentified man had blocked him with his vehicle, preventing him from leaving the premises.
18. During cross-examination, it was confirmed by the defence that the Third Respondent had been on the premises with the unidentified man and that the latter had prevented him from leaving.
19. At the stage when the State sought to call Mr Du Plessis, three State witnesses, including Constable Mazibuko, had testified. The other two State witnesses were not present at the premises on 29 December 2020 and had never met Mr Du Plessis.
20. The purpose of providing the Third Respondent with the contents of the docket is to inform him of the charge with sufficient detail to enable him to answer it, as required by section 35(3)(a) of the Constitution. In *S v Msimango*, the Court held that such disclosure is intended to enable an accused to defend himself and to prevent any “trial by ambush.”
21. The Third Respondent was aware from the docket contents that the State intended leading evidence relating to the events of 29 December 2020, including the circumstances under which he was found on the premises. His version put to Constable Mazibuko confirmed that he was present on the premises with another individual. The statement of that individual did not form part of the further particulars disclosed to him.
22. One would reasonably expect the State Advocate to inform the defence and the Court at the commencement of the trial, or at least after the testimony of Constable Mazibuko, that the investigating officer was still attempting to trace the witness. This was unfortunately not done.
23. This omission does not, however, justify the conclusion that the prosecutor acted in bad faith.

24. It is not unusual for a previously unidentified or unavailable witness to be called in criminal proceedings, especially where the defence has not disclosed its case during pre-trial proceedings, as in the present matter. The State is entitled, in conducting the trial, to evaluate its case and address identified weaknesses, provided that such conduct does not prejudice the accused.
25. To reach a just decision on whether to acquit or convict, the Court must consider all admissible and relevant evidence. This includes assessing the reliability, sincerity, and probability of the witness being the person present at the premises on 29 December 2020, and weighing any discrepancies or contradictions between his evidence and that of the late Mr Strauss or the police officers who attended the scene.
26. The only witness who may need to be recalled, if necessary, is Constable Mazibuko. The State still intends to call Constable Khanyile, who also observed the unidentified man at the scene.
27. On that basis, I find that the Third Respondent's right to a fair trial will not be violated by allowing Mr Du Plessis to testify.
28. I therefore order as follows:
- a. The application for review is granted.
 - b. The Regional Court Magistrate's decision dated 28 March 2025 is set aside.
 - c. The matter is referred back to the trial court for further evidence.

L E RABORIFE
ACTING JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:
Prosecutions

The Director of Public
Gauteng Division, Pretoria.

For the Respondent:

Advocate S Mathambo