

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, SITTING IN PLAM RIDGE**

Case Number: 55/2025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


SIGNATURE

19 May 2026
DATE:

In the matter between:

PHELELANI VINCENT MKHIZE & OTHERS

Applicant

and

THE STATE

Respondent

In re:

THE STATE

and

PHELELANI VINCENT MKHIZE

Accused 1

MAKHUMULENI MKHIZE

Accused 2

PEDRO BERDICHEVSKY

Accused 3

RULING

Mfenyana J:

- [1] There are two applications before this court, brought by accused 1 and 3 respectively. Accused 1, 2 and 3 face various charges, including murder.
- [2] In the first application, accused 1, who made a confession to Colonel Zwane challenged the admissibility of that confession. A trial within a trial was held to determine the admissibility of the confession. Sergeant Sigidi (Sgt Sigidi) is the first witness to testify for the state in the trial within a trial.
- [3] At the commencement of cross-examination, the applicant made an application for the state to disclose the contents of Section C of the docket, also known as the investigation diary or the SAPS5, on the basis that it could reveal what occurred between the accused's arrest and his confession to Colonel Zwane.
- [4] Access to Parts B and C was subsequently granted by the state on the basis of the decision in *Krejcir*¹, subject to the condition that the contents thereof were not disclosed to the accused (insight into the docket without disclosure).
- [5] During the cross-examination of Sgt Sigidi on 8 May 2026, the applicant revived its request for access to section C of the case docket, and on 11 May 2026, filed a formal request to the state to be granted access to sections B and C of the case docket.

¹ [2014] ZAGPJHC 190.

- [6] The reasons advanced for access are that the requested information is essential for obtaining proper instructions from the applicant; to enable the applicant to prepare his defence; to cross-examine Sgt Sigidi and enforce his rights under sections 35 and 179 of the Constitution and in the interests of justice.
- [7] According to the applicant, the application was prompted by Sgt Sigidi's responses during cross-examination, specifically his failure to follow certain Standing Orders on record-keeping during investigations and interactions with the accused. In particular, the applicant contends that the police overlooked a directive on the front page of the pocketbook, which instructs them to make an entry in the pocketbook when informing a suspect of their constitutional rights. This directive also requires the police to complete a warning statement form (a SAPS 3m) whenever a suspect is interviewed.
- [8] In the second application, accused 3 also seeks access to sections B and C on the ground that his right to a fair trial requires that he be provided with as much information as possible, concerning the offence the state intends to prove against him, as is necessary for the thorough preparation of his defence². This includes particulars of the facts relied on by the state in respect of each accused where conspiracy or common purpose is alleged, and he contends that the contents of both sections are necessary to enable him to properly prepare for and continue with the trial.
- [9] In this regard, it is worth noting that accused 3 did not play any part in the trial within the trial, as the confession in question pertains only to accused 1.
- [10] The state declined the request and has opposed both applications.

² *S v Cooper and others* 1976 (2) SA 875 (T).

- [11] In respect of accused 1, the state avers that the applicant has not provided a *prima facie* justification for the request, and that the request is not in the spirit of *Krejcir*.
- [12] The State argues that, although Sgt Sigidi conceded his failures, albeit remaining defiant as to whether his actions were wrong, he was honest about the issue. The State further submits that Sgt Sigidi's credibility is not an issue to be determined in the present application. What must be determined is whether this contention by the applicant establishes *prima facie* facts pointing to the contents of sections B and C of the case docket as being relevant to the applicant's plight.
- [13] As regards the application in respect of accused 3, the State argues that the application is premature, pre-emptive and speculative and may be revisited at a later stage should that need arise.

Legal framework

- [14] The principles governing the provision of access to Parts B and C of the docket are not in dispute between the parties. They are trite. The main contention is whether the applicants in the present case are entitled to such access.
- [15] As a point of departure, various constitutional provisions are worth noting.
- [16] In terms of section 32 of the Constitution, everyone has the right of access to any information held by the state, and information held by another person, that is required for the exercise or protection of any rights.
- [17] In terms of section 35(3):
- “ Every accused person has a right to a fair trial, which includes the right

- (a) To be informed of the charge against them with sufficient detail to answer it”.
- (b)
 - (i) To adduce and challenge evidence;
 - (ii)

- [18] In terms of section 36, the rights in the Bill of Rights may only be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.
- [19] Section 39 enjoins the court, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, to consider international law and may consider foreign law.
- [20] It is well understood that Parts B and C of the docket contain privileged information necessary to prosecute an accused. They are generally withheld from the defence in a bid to protect the integrity of the investigation, prevent intimidation of witnesses, and maintain a clear distinction between the functions of the defence and the state. However, this position is not absolute. As already stated section 32 provides for access to information that is necessary to exercise or protect rights while section 35 advances fair trial. These rights may be limited under section 36 of the Constitution.
- [21] In *Shabalala*³, the Constitutional Court ruled against a blanket denial of an accused person's access to information. The court held that the interests of the accused must be balanced against other legitimate considerations, including ‘the risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the risk that a fair trial might not ensue’ (if such access is denied). The court is required to make an assessment of the balance of risk involved in either case.

³ *Shabalala and Others v Attorney-General of the Transvaal* [1995] ZACC 12; 1995 (12) BCLR 1593; 1996 (1) SA 725.

[22] The court noted that while an accused person should ordinarily be entitled to witness statements, the prosecution may, in some cases, be able to justify the denial of such access on the basis that it is not justified for the purposes of a fair trial. The determination of what a fair trial will vary from case to case, depending on the circumstances of each case.

[23] In *King*⁴ the Supreme Court of Appeal addressed the balance between an accused's right to a fair trial and the state's claim of litigation privilege regarding the documents in sections B and C of a police docket. The court ruled that the accused does not have a general right to a 'motivated index' of all withheld documents. In the context of the present case, this translates to every bit of information held by the State. Moreover, while a blanket denial of access is unconstitutional, as found in *Shabalala*, the state can still invoke litigation privilege if the information is not relevant to the defence. This means that an accused's access to the case docket should be strictly tailored to what is relevant for a fair trial.

[24] Importantly, the court noted that:

"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. 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. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation— 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 to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'.

⁴ *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA).

- [25] It is worth stating that of the judgments cited by the applicant, *Krejcir* does not find application at this stage of proceedings, given that access (without disclosure) was already granted to sections B (to a limited extent) and C of the docket, in line with *Krejcir*.
- [26] As I understand the applicants' case, the main reliance is placed on the decision in *Wolf*⁵, in which Govindjee J ruled that the applicant be provided with copies of sections B and C of the docket. Reiterating the principles enunciated in *King*, the court held that an accused person is generally entitled to such contents of the docket as are *prima facie* relevant for the exercise or protection of his/her right to a fair trial. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be important for an accused to properly adduce and challenge evidence in ensuring a fair trial⁶.
- [27] What emanates from the authorities, which have been relied on by all the parties alike, is among others, that:
- (a) There is no blanket docket privilege or a blanket denial of access to documents.
 - (b) An accused person does not have an automatic right of access to Parts B and C of the case docket.
 - (c) The documents to which access is required must be relevant to the defence for the exercise of the accused's rights, such that his / her right to a fair trial is implicated.
 - (d) In exercising its discretion, the court should seek to balance the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice.

⁵ *Wolf v S* [2023] ZAECQBHC 62.

⁶ *Shabalala* para 57.

[28] In the present case, as in *Wolf*, access to the documents in sections B and C is sought on the basis of their “perceived helpfulness or relevance to the defence. Govindjee J referenced the test formulated in *King*, as reformulated by Goosen J in *Panayiotou*⁷, to determine whether access should be permitted, as follows:

- “(i) *Has the applicant established prima facie facts which point to the contents of sections B and C of the case docket as being relevant in the sense required by the King matter?*
a. If not, access to the documents should be refused.
- (ii) *If so, is there a justified ground for non-disclosure raised by the State?*
a. If not, access to the documents should be ordered.”

[29] Whether the applicant has satisfied this test depends on the circumstances of the case. Of relevance for present purposes is that the applicant’s contention does not concern the instructions which may or may not have been entered in the investigation diary by the investigating officer. Rather, the issue is whether Sgt Sigidi, who is not an investigating officer in the case, complied with the standing orders. During cross-examination, Sgt Sigidi conceded that he had not complied with the standing orders referred to by defence counsel, adding that ‘things work differently in practice’. The standing orders do not form part of section b or C. It is therefore not clear how the applicant’s right to a fair trial is impacted by this concession.

[30] In my view, the present case differs from *Wolf*. In *Wolf*, access was granted to both sections B and C of the docket to allow the defence to challenge contradictory witness statements and investigate alleged improper relationships between the investigation team and state witnesses. This is not the case in the present case. The facts of this application are

⁷ *Panayiotou v The State and Others* [2016] ZAECPEHC 50; 2017 1 SACR 354.

distinguishable. In my view, the applicant has not established any *prima facie* facts which point to the relevance of those documents such that his right to a fair trial is implicated. His desire to cross-examine Sgt Sigidi on what may be contained in the investigation diary is not sufficient to entitle him to access to section B of the case docket as envisaged in *King, Shabalala*, *Krejcir*, *Panayiotou* and *Wolf*. Consequently, the application in respect of Part C falls to be dismissed on this aspect.

[31] As to Part B, although this application may be said to share similarities with *Panayiotou*, the court in that case refused access to Part B of the docket because the applicant provided no basis for seeking those documents. Likewise, the applicant in this case gives no basis for requesting Part B, which contains internal memoranda, status reports, and correspondence with stakeholders among others.

[32] In short, the applicant has also not demonstrated why Parts B and C of the case docket are relevant to his defence or how they would assist him in exercising or protecting his rights. The entire exercise, in my view, amounts to a fishing expedition. It requires the court to speculate, alternatively, to apply a blanket approach in granting the applicant access to the requested parts of the docket. In the circumstances, the application as it relates to Part B also falls to be dismissed.

[33] I agree with the respondent that the application in respect of accused 3 is both premature and speculative. The need for the application has not yet arisen in respect of accused 3. Accused 3 has not cross-examined Sgt Sigidi and can thus not be in a position to ascertain what information would be required in cross-examination. This is despite his contention that the irregularities as conceded to by Sgt Sigidi are only the tip of an iceberg.

[34] As it stands, the application requires the court to perform guesswork as regards the information required from the docket. This renders the application speculative. While *Shabalala* did away with the blanket docket

privilege, it ruled that an accused's access to Parts B and C is not automatic. Ironically, both applications have the effect of adopting a blanket approach to the accused's access to privileged information.

[35] I also agree that having found as I have, it is not necessary to deal with the second leg of the test, which requires the State to advance grounds which justify the non- disclosure. That would have been necessary, had the applicants satisfied the first leg of the test.

[36] For these reasons, the applications fall to be dismissed.

Order

[37] In the result, I make the following order:

- a. The application in respect of both accused 1 and 3 is dismissed.


S Mfenyana
Judge of the High Court

Date heard: 14 May 2026

Date delivered: 19 May 2026

Appearances:

For the first applicant:
Counsel: J van Heerden

Instructed by van Heerden Attorneys

For the second applicant:

Counsel: M Witz

Instructed by: Cliff Alexander Attorneys

For the respondent:

Counsel: GJ Ehlers

Instructed by DPP, Johannesburg