

SOUTH AFRICA / JUDGMENT

McBride v Regional Magistrate Pretoria and Another (A394/2008) [2008] ZAGPHC 271 (11 September 2008) [2008] ZAGPHC 271

COURT

High Courts - Gauteng

BEFORE

N.M. Mavundla, K. Makhafola

CASE / FILE NUMBER

A394/2008

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A 394/2008

In the matter between:-

ROBERT McBRIDE

And

THE REGIONAL MAGISTRATE, PRETORIA FIRST RESPONDENT (Mr. P JOHNSON)

THE STATE SECOND RESPONDENT

JUDGMENT

MAVUNDLA J.,

- [1] The applicant brings this application to have the decision taken by the first respondent whilst presiding in case no. 14/2138/2007 in the Regional Court, Pretoria on 24 April 2008 refusing the application by applicant in the said case, reviewed, corrected and set aside. He further seeks that the second respondent be ordered to make available in case no 14/2138/2007 to the applicant, in which case he is the accused, each and every statement in possession of the State made by State witnesses Sagathevan, Koko and Johnson in connection with their alleged involvement, or the alleged involvement of the applicant, in any criminal activity. The application is being opposed by the respondents.

- [2] The applicant is being charged at the regional court Pretoria on charges of contravention of section 65 (1) (a) of Act 93 of 1996 (driving under the influence of liquor) alternatively contravention of section 63(1) of the aforesaid Act (reckless/ negligent driving), defeating the ends of justice, alternatively fraud. These proceedings are still pending at the magistrate's court awaiting the outcome of the present application.
- [3] In essence the applicant seeks a mandamus. He seeks an order reviewing the magistrate's decision in a pending case before such magistrate and he seeks an order to be furnished with documents that are in the police dockets. It needs mentioning that the High Court, as a general rule does not have inherent jurisdiction to interfere with proceedings in a magistrate's court that are still proceeding.¹ It will do so only in exceptional circumstances.²
- [4] Section 87 of the Criminal Procedure Act 51 of 1977 entitles an accused person to seek a request for further particulars, as the appellant did in *casu*. It is common cause that the first application the applicant had brought before the same magistrate to be furnished with the documents in the police dockets, was refused by the magistrate on the grounds that he did not have jurisdiction to grant such an order. Such refusal was, in my view palpably wrong. In the Commentary on the Criminal Procedure Act, Du Toit et al, the learned authors state that; "If a magistrate rejects an application for particulars, the accused may seek a mandamus from the High Court against the magistrate. In accordance therewith the High Court would direct the magistrate to order that particulars be furnished (*Berhman v Regional Magistrate, Southern Transvaal & Another* 1956
- (1) SA 318 (T) 319-20). Although the High Court is reluctant to intervene in criminal proceedings that are still pending in a lower court, it would not hesitate to direct a magistrate to order delivery of particulars if the magistrate's refusal would seriously prejudice

the accused (*Weber & another* 1969 (4) SA 394 (SWA) 397; *Berhman v Regional Magistrate, Southern Transvaal & Another* 1956 (1) SA 318 (T) 319-20)." I must mention that each and every case must be decided on its own peculiar facts. In the matter of *Le Grange en 'n Ander v Loubser NO en 'n Ander*³ the Court referred with approval to the matter of *Ismail and Others v Additional, Magistrate, Wynberg, and Another* 1963 (1) SA 1 (A) at 5-6 where it is stated that:

"A Superior Court should be slow to intervene in untermiated proceedings in a court below, and should, generally speaking, confine the exercise of its power to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained."

- [5] In *Moodley and Others v NDPP and Others*⁴ Nicholson J, with Ntshangase J concurring, stated that: "[44] There are situations where the court will intervene in untermiated

proceedings, but it will only do so in cases where grave injustice might otherwise result; *S v Burns and Another* 1988 (3) SA 366 (C). See also *Nourse v Van Heerden NO and Others* 1999 (2) SACR 19; *S v The Attorney-General of the Western Cape*; *S v The Regional Magistrate, Wynberg and Another* 1999(2) SACR 13 (C). [45 The reasons for this strict procedure are self-evident. Any accused is entitled to wait for the conclusion of the trial, and if there is a conviction, to take the

point on appeal or review. The power exists in limited and exceptional circumstances to prevent illegalities in lower courts which could severely prejudice the accused."In adjudicating this matter, I must be mindful of the authorities I have just referred to herein above.

BACKGROUND

APPLICANT'S CASE[6] The applicant's case in brief is that he filed a request for further particulars.⁵ After receiving the reply⁶ to the aforesaid request for further particulars, he further sought Better⁷ and Further Particulars requesting "Any other statements, that is other than those already provided to the defence, made by Stanley Sagathevan and /or Koko and/or Johnson in terms of Section 204 of the Criminal Procedure Act following their decision to implicate the Accused".[7] The applicant through his counsel directed a letter⁸ on 4 March 2006 stating that the aforesaid mentioned persons had made section 204 statements and that it is these statements that are sought. The response of the second respondent's counsel Mr. Roberts was that he had "no knowledge of the other 204 statements to which" it is referred.⁹

[8] The applicant in his statement in terms of section 115 of the Criminal Procedure Act¹⁰ contended, inter alia, that during the trial he will ask the court to adjudicate on material infringements of his constitutional right to a fair trial including his right to prepare his defence and his right to adduce and challenge evidence. He further averred that the second respondent compromised his right to a fair trial by: (a) as part of investigation of his case both before and after he was charged, the second respondent embarked on a course of intimidating and coercing witnesses, (b) getting witnesses to make statements, to change statements, not to make statements and not to co-operate with the defence; (c) threatening witnesses with arrest and prosecution; (d) labeling witnesses Ash Bhoothoo, Hennie Erasmus and Tris Armstrong as suspects in the same charges of obstructing the course of justice, which the applicant faces and threatening that they may be arrested at any time; Dr Moratioa, who issued a certificate that the applicant was not drunk on the night of the motor vehicle accident, and later charging him with defeating the ends of justice¹¹; Mathope also complained of being threatened by inspector Kekana¹². He contends that these are material witnesses in his defence and the status of "suspects" exposed them to material prejudice in the event they testify for the appellant, which in turn prejudiced the applicant in the preparation of his defence. He further averred that the conduct of the second respondent has materially compromised his right to a fair trial, including his right to prepare for trial and his right to adduce and challenge evidence.

[9] The persons who the applicant states they recanted from their original statements are Sagathevan, Koko and Johnson who made statements under oath that the applicant was not under the influence of alcohol on the night of 21 December 2006. However, six months after the investigations had commenced, in detailed statements they made under section 204 they have alleged that the applicant was under the influence of liquor;¹³ and that Salim Ebrahim, an attorney was recorded as saying to one of his clients that the reason why the 204 witnesses implicated

the applicant is because they required indemnity for serious crimes in which they themselves are implicated. Tris Armstrong and Hennie Ersamus,¹⁴ William Engelbrecht changed his statements made immediately after the accident to make far incriminating statement,¹⁵ Elsie Harris, in a subsequent statement now states that she smelt a strong smell of alcohol, Jeffrey Harris, in his statement of 22 December 2006 referred to "a strong smell of alcohol in his statement of March 2007 said that the applicant was under influence of alcohol .

- [10] The applicant has further referred to the affidavit of Edward Conlon¹⁶ who he say that he is aware of other crimes committed by the section 204 witnesses in respect of which the police had a hold over them.¹⁷ Conlon also told the applicant that the section 204 witnesses informed him "that they made statements that the applicant was drunk and that he tried to cover his drunken state, when they knew that this is not the truth and that they did so in order to cover their own criminal activity and other misconduct so that they can obtain indemnity."
- [11] The applicant states that he needs the section 204 statements so that he can be in a position to demonstrate the general motive of the second respondent in prosecuting him. He avers in his affidavit that the second respondent is abusing its machinery and the procedures available to it to coerce and intimidate witnesses and at the same time compromise the applicant's right to a fair trial. He further avers that in the context of this matter, it is essential that he be provided with the required documents and that these are necessary for him to enjoy a fair trial. He says that he is entitled to the relevant documents in accordance with section 35(3)(b) of the Constitution, the right to adequate facilities to prepare his defence.
- [12] The applicant states that the first respondent acted irregularly in denying him access to the statements in question and in so doing infringed his right to a fair trial. He says that the decision is irregular because there can be no blanket denial of access to statements contained in a police docket simply because the individual requiring such access, has the status of a suspect in that docket. Access can only be properly denied if the Second Respondent can legitimately claim privilege against such disclosure, which privilege must be claimed on a case by case basis in respect of each and every docket. He says that in respect of other dockets he is no longer a suspect because a decision has been made by the Director of Public Prosecutions not to prosecute him and that the respondent ought to have afforded him access in respect of those dockets.
- [13] It is further averred by the applicant that Mr. Roberts was obligated to read the dockets before claiming that they were not relevant to the charge in issue, especially if he had not had any sight thereof of their contents. He further avers that the respondents bear the onus of proving that a particular privilege pertains to a disclosure of any document or statement. He says that even if privilege can be claimed in respect of certain dockets, privilege pertains until the investigation is complete or reaches a stage where privilege is no longer required. He says that privilege does not deprive him permanently of his right to a fair trial. He says that in instances where it is found that the privilege does not apply, his case must be

postponed until the investigation has been completed. He says that the documents in question are essential to his defence in the present case. He says that once the documents are furnished, he would have to recall some of the section 204 witnesses.

Second respondent's case

- [14] The replying affidavit of the second respondent has been deposed to by one Petronel Du Plessis who is stationed at the offices of the Director of Public Prosecutions in Pretoria. She states that documents which are sought by the applicant are in dockets handed to the Director of Public Prosecutions, Witwatersrand in whose area of jurisdiction such dockets fall, and that the aforesaid Public Prosecutions, Witwatersrand should have been cited. She further states that it is incorrect that the second respondent is being represented by the regional court prosecutor. She states that the matter against the applicant is being prosecuted by two advocates. She states that the said Advocates have been delegated in terms of the National Prosecuting Authority Act 32 of 1998 to prosecute within the area of jurisdiction of the Director of Public Prosecutions of Transvaal and that they should have been cited in these proceedings.
- [15] The essence of the second respondent's case is that the decision to charge the applicant for drunken driving was premised on information of an independent witness at the scene of the accident. Further it is denied that the section 204 witnesses were coerced to recant, but during their cross-examination these witnesses stated that they recanted on their own volition. The magistrate ruled that this issue is collateral. It is further contended by the second respondent that even if the applicant were to recall these witnesses, in the light of the magistrate's ruling on this point, the applicant cannot further cross examine these witnesses since they have already given an answer.
- [16] It has been submitted on behalf of the respondents that, inter alia, in respect of the case dockets where the Director of Public Prosecutions (WLD) has declined to prosecute, the applicant has no standing whatsoever to apply in a court of law for the contents of the said dockets. It is further submitted that section 60(14) of the Criminal Procedure Act 51 of 1977 bars an accused person from applying for contents of a police docket for purposes of a bail application. It is submitted that the applicant has not been charged in respect of the charges that are still being investigated. It is contended that the applicant can only seek those documents by employing the provisions of Promotion of Access to Information Act, 2 of 2000. It is further contended that the relevant statements are irrelevant to the trial under way and that this view has been bolstered by the decision of the magistrate in holding that the question of other statements made by the witnesses is a collateral matter. It has further been pointed out that the case of *Shabalala and Others v Attorney-General, Transvaal and Another*¹⁸ makes the right to access only to accused persons and that if a person is still a suspect he is not allowed access to the docket in which he is still a suspect.

[17] It has further been submitted on behalf of the respondents that the applicant bears the onus to prove on a balance of preponderance of probability that he has a right to the documents he seeks and that his right has been violated. It is contended that the respondents must then show that the limitation clause in section 36 of the Constitution applies.

In this regard we have been referred, *inter alia*, to *S v Mgcina*¹⁹

[18] With regard to the first respondent, it is averred that he has not had an opportunity to adjudicate on the applicant's right to a fair trial as the matter is still pending before him.

The right to be furnished with contents of the docket

[19] The crisp question to be decided is whether the applicant is entitled to statements made by the section 204 witnesses in respect of the other cases that are being investigated against him. This question has to be answered in the context of the *Shabalala* decision (*supra*) and section 35(3) the Constitution, must be accepted that the applicant does not have a blanket open handed right of access to police dockets.

[20] It is indeed so that the applicant is guaranteed by the Constitution the right to a fair trial in terms of section 35 (3)²⁰ "(b) to have adequate time and facilities to prepare a defence," and, *inter alia* "(i) to adduce and challenge evidence"²¹. The question of a fair trial has to be determined within the context of the set of facts in that particular case. Whereas in the decision of *S v Steyn*²² a decision Mr. Roberts on behalf of the respondents has referred us to, it was decided that there was a blanket docket privilege which protected the contents of a police docket from disclosure without the consent of the State. In his illuminating judgment in the matter of *Shabalala and Others v Attorney-General, Transvaal, and Another*²³ the late Chief Justice Mahomed, then DP, ushered a new epoch in regard to the right of accused person to the contents of a police

docket, thus antedating the *S v Steyn* decision, (*supra*), and underpinning this right, in my view, to be an integral part of the

right to a fair trial as enshrined in the Constitution²⁴, then the Interim Constitution. Indeed this view is echoed in the well reasoned minority judgment, which I sanguine myself with, of Mlambo J in the unreported judgment of *Jewell Crossberg* case 440/07 (CC)

[2008] ZASCA 13 (20 March 2008), who said, *inter alia*,:

"[130] ...indeed in *Shabaiaia and Others v Attorney-General, Transvaal, and Another* [1995] ZACC 12; 1996

(1) SA 725 (CC) the Constitutional Court outlawed blanket privilege as previously asserted by the state and thereby reinforced an accused's right to a fair trial, by ordaining that an accused person is entitled to have access to documents in a police docket.

[131] what would constitute a fair trial depends on the circumstances of each case. Shabalala at 743 para 36 and 37. Simply put the full and ambit of an accused's right in so far as access to docket contents is concerned is that an accused must be in a position to formulate and provide a full answer and defence to the charges brought against him. This was articulated in *Stinchombe v The Queen* (1991) 68 CCC (3d) 1 (2d) 210 at 217 as follows:

'The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.' See also *R v Taillefer* (2004 114 CRR (2d) 60 (SCC) at 84 para 71."

[21] The right to a fair trial is fundamental. If such right accords an accused person a right to access to the police docket, in my view, it places a corollary obligation on the part of the State to make a full disclosure to the accused person of what is contained in the police docket. The remarks relating to the duty of the prosecuting representatives as stated in the *S v Jija and Others* matter equally applies to Mr. Roberts. Once Mr. Roberts was informed of the existence of section 204 statements made by Messrs Sagathevan, Koko and Johnson, this placed an obligation on the State to consider whether such statements need to be disclosed or not. The State must at all relevant times make an informed decision, as to whether or not it will make a disclosure of the documents sought. In the matter of *Investigating Director, Serious Economic Offences v Gutman NO* the Supreme Court was considering the question of access to information held on behalf of the State by an Investigating Director appointed in terms of s7 of National Prosecuting Authority Act 32 of 1998, held that where access to such information is sought in terms of s32 (1) of the Constitution of the Republic of South Africa Act 108 of 1996, the Investigating Director is required to come to a bona fide informed decision as to whether access should be granted or refused. I am of the view that the principle flowing from the *Gutman NO* decision (*supra*) equally applies in the instance of Mr. Roberts, as the representative of the State. Mr. Roberts could not have made an informed decision without having inquired from his WLD counterpart about the contents of the dockets in his possession. I would have expected him to at least make an effort to know what is contained in those documents, which he failed to do.

[22] The subsequent contention by Mr. Roberts that the requested documents should be requested from his counterpart and that they do not fall within his area of jurisdiction cannot assist him because both his office and that of his counterpart fall within the jurisdiction of the Director of Public Prosecutions of Transvaal, on his own version. In my view, it is to be expected that there should be greater co-operation within the two Offices of the Prosecuting Offices within which Mr. Roberts is stationed and that of the 'WLD', as demanded by s 20 (1),(5) read with s 22(4)(d) of the National Prosecuting Authority Act no 32 of 1998 in order to actuate their respective duties to carry out any necessary functions incidental to instituting and investigating criminal proceedings. He could also not have taken an informed bona fide decision in concluding that even if such documents exists, he would not be relying on them nor does he intend to call any witness relevant to such documents until he knew what was contained therein. In this regard, his decision, which I

find that it, was not

an informed one nor taken bona fide has the potential of impacting negatively on the right of the applicant in preparing his defence. In my view, applicant is entitled to the section 204 statements not only for purposes of testing the credibility and the motive of the relevant witnesses in making such statements, but also for purposes of preparing his defence.

[23] In so far as the fact that the magistrate has decided that once the witnesses have provided an answer to what actuated their making the s204 statements such answer is final, the witnesses cannot be further cross examined, the magistrate cannot be faulted on that point. However, as i have already found herein above, the applicant does not only seek the documents to further cross examine the witnesses on their motive for recanting (that would only deal with credibility). The applicant also seeks the documents as material to cross examine inspector Kekana, the investigating officer, who took over the investigation and shortly thereafter the three witnesses then recanted. He also seeks the documents for purposes of preparing his defence.

[24] In my view, it would be incorrect to refuse the applicant access to the documents when he states that he also seek these for purposes of preparing his defence. I can see no greater relevance than that which is disclosed by the applicant, namely, seeking the documents for purposes of preparing his defence. Denying him access of the documents, would have the potential of negatively impacting on his right to a fair trial. To wait until the trial has been finalized to determine after the event on appeal whether his right to a fair trial has been negatively affected, would, in my view, be a serious inroad to the very right to a fair trial of the applicant. Where there is a potential of the right to a fair trial being breached, there is no reason to say that the applicant must proceed with the trial and raise that aspect on appeal as is stated in other decisions. In my view, it is in the best interest of justice that this Court should intervene at this juncture and direct that the relevant documents be furnished to the applicant.

[25] With regard to the question of costs, I am of the view that the traditional principles should apply, which are that the costs follow the event. Indeed the nature of this matter warranted the services of a senior counsel with the assistance of a junior.

[26] In the result it is ordered:

That the decision of the first respondent herein, whilst presiding in case no 14/21138.2007 in the Regional Court Pretoria, on 28 April 2008, refusing the application by the applicant, the accused in the said case, for an order as set out hereunder, is hereby reviewed, corrected and set aside; That the second respondent is ordered to make available in case no. 14/21138/2007 to the applicant, in which case he is the accused, each and every statement in possession of the State made by State witnesses Sagathevan, Koko and Johnson in connection with their alleged involvement, or alleged involvement of the applicant, in any criminal activity, within 15 days from date of this order

3. That the second respondent is ordered to pay the costs of this application on a party and party scale, which costs shall include the costs of two counsel.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

K. MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

HEARD ON THE: 18 AUGUST 2008 DATE OF JUDGEMENT: 11 SEPTEMBER 2008 APPLICANT'S ATTS : AP LEDWABA INC. APPLICANT'S ADV : MR. GH PENZORN SCWITH HIM : Mr. J HOWSER RESPONDENTS' ATT : STATE ATTORNEY RESPONDENTS' ADV: MR. FC ROBERTS

HEARD ON THE: 18 AUGUST 2008

DATE OF JUDGEMENT: 11 SEPTEMBER 2008 APPLICANT'S ATTS : AP LEDWABA INC. APPLICANT'S ADV : MR. GH PENZORN SCWITH HIM : Mr. J HOWSER RESPONDENTS' ATT : STATE ATTORNEY RESPONDENTS' ADV: MR. FC ROBERTS

1 In their work *The Civil Practice of the High Court of South Africa*, fourth edition, Van Winsen et al page 931 the learned authors state that: "The Supreme Court does not have inherent jurisdiction to interfere with the proceedings in a magistrate's court if there is no allegation of injustice or irregularity. Apart from its general, overriding jurisdiction to prevent abuse of its process, the court has inherent power to make orders furthering the administration of justice only when a statute or rule of court is silent."

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2 "But to compel a magistrate to do his duty, clearly set out in the statute is a very different thing from interfering with the magistrate's jurisdiction in a matter which upon the face of documents is rightly before and properly before him."; vide also *The Civil Practice of the High Court of South Africa*, 4th edition at 931 under heading "C WHEN THE COURT WILL INTERFERE"

3 1990 (2) SACR 202 (O) at 206c.

4 2008 (1) SACR 560 (NPD) at 569c-e

5 Paginated page 29 annexure "RM2"

6 Paginated page 38 annexure "RM3"

7 Paginated page 41-45 annexure "RM4"

8 Paginated page 51 annexure "RM6"

9 Paginated page 53 annexure "RM7"

10 Act 51 of 1977

11 Paginated pages 14 para51, 15 paragraphs 52, 53 and 56

12At paginated page 16 para 57 an annxure ;AM21' Mathope sates that "Kekana, also threatened me to give a statement. I feel

threatened and traumatized by these threats ..."

13 At paginated pages 12, 13 at paragraphs 41, 43 et 45

14 Paginated page 18 paragraph

15 Paginated page 16 para59

16 Paginated 'Rm22 1 pages 117-159.

17 Paginated page 17 paragraph 60-62.

18 1996 (1) SA 725 (CC)

19 2007 (1) SA SACR 82 (T) at 95b.Vide in the same case at 94c-f where Claassen J is cited, as having said in *S v Mathebula and Another* 1997 (1) SACR 10 (WLD) "In the first instance the well-established double-barreled approach must be followed. The applicant, plaintiff or accused who alleges that a legal prescription violates his fundamental right and he wants to found legal relief thereon, must first prove that the right has been violated. If it is proved, and the concerned respondent or the State, wants to justify the violation in terms of section 36 of the Constitution, then comes into play the so-called second stage consideration. The party who wants to justify the violation, must prove the justification thereof in terms of s36 (according to *S v Zuma and Others* (supra) at [21] (My own translation)).

20 Section 35(3) (b) and (i) of the Constitution Act 108 of 1996.

21 '35 (3) Every accused person has a right to a fair trial, which includes the right— (b) to have adequate time and facilities

to prepare a defence; (i) to adduce and challenge evidence;"

22 1954 (1) SA 324 (A)

23

[1995] ZACC 12; 1996 (1) SA 725 (CC)

24 Shabalala & Others v Attorney-General of Transvaal & Another (supra) at 749 C-D "[52] In such circumstances it might be proper to protect the disclosure of witnesses' statements and the State might succeed in establishing that such a restriction is reasonable, justifiable in an open and democratic society based on freedom and equality and that it is necessary and does not negate the essential content of the right to a fair trial. Even in such cases, however, it does not follow that the disclosure of the statements concerned must always be withheld if there is a risk that the accused would not enjoy a fair trial. The fair trial requirement is fundamental. The court in each case would have to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interest of the State in enhancing and protecting the ends of justice."

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