

CHAPTER 10

ACCESS TO INFORMATION HELD BY POLICE OR STATE OFFICIALS FOR PURPOSES OF BAIL APPLICATION

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10.1 INTRODUCTION

The inclusion of a right to information in the Interim Constitution sparked the debate as to whether an accused should have access to the information held by the state. At first, it was primarily the issue concerning the right to discover the contents of the police docket for purposes of trial that came before the courts. When the duty of the state to disclose information for purposes of the

bail hearing eventually came before the high court, and on appeal to the Constitutional Court, the question was not decided on the basis of the right to information afforded by the Constitution.

Due to this state of affairs, and because no Canadian authority could be found dealing directly with the duty to disclose for purposes of the bail hearing, it is necessary to examine the general duty to disclose information under both criminal justice systems. These principles, and under South African law, the Constitutional Court judgment that dealt with a confined attack on section 60(14),¹ are taken into account and an appraisal is made of the duty to disclose for purposes of the bail hearing. The positions under Canadian and South African law are also compared.

As section 11(a) of the Canadian Charter² and section 35(3)(a) of the Final Constitution,³ which provides for a similar right, were not meant to bestow a

¹ Of the Criminal Procedure Act 51 of 1977. See par 10.3.1 and par 10.3.3.

² Section 11(a) provides that any person charged with an offence has the right to be informed without reasonable delay of the specific offence.

Beaudoin and Ratushny (1989) 479 state the importance that the accused knows exactly what the alleged misconduct is. The scope of the proceedings and the identity of the accuser are also stressed. The writers conclude that while the right to a specific accusation was extremely important, the Criminal Code contained detailed protections in this respect. They gather that section 11(a) would have no significant impact on the criminal process in the immediate future.

With regard to indictable offences section 581 of RSC 1985, c 27 (1st Supp), s 118 under the heading "General provisions respecting counts" provides:

- (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an indictable offence therein specified.

right on an applicant to information in the police docket or otherwise in possession of the state, this chapter does not explore these provisions. Both these sections merely enumerate a specific right to proper accusation. It has been stated that the purpose of these rights are to guarantee that the accused knows whether the offence is one known to law, and what case must be met.⁴ In addition, section 35(3)(a) only confers on an accused the right to proper accusation for purposes of trial.

10.2 CANADIAN LAW

10.2.1 General

The Law Reform Commission of Canada, in their 1974 working paper⁵ and a 1984 report,⁶ recommended comprehensive schemes regulating disclosure by

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- (2) The statement referred to in subsection (1) may be
- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
 - (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
 - (c) in the words that are sufficient to give the accused notice of the offence with which he is charged.
- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

³ In terms of section 35(3)(a) of the Final Constitution every accused has a right to a fair trial, which includes the right to be informed of the charge with sufficient details to answer it.

⁴ McDonald (1989) 405.

⁵ The paper is titled *Criminal procedure: Discovery* (the "1974 Working Paper") and formed the second part of a study report on discovery in criminal cases.

the Crown.⁷ However, no legislative action other than a limited response contained in section 603 of the Criminal Code,⁸ has implemented the proposal. The legislature has been content to leave the development of this area of the law to the courts. The right to information during litigation is therefore not governed by the Canadian Access to Information Act of 1982, or any other Act providing for the right to information.⁹

⁶ Titled *Disclosure by the prosecution* (the "1984 Report").

⁷ See "1974 Working Paper" 35 and further and *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 244.

⁸ RSC 1985 (c C - 46).

⁹ Canadian case law dealing with the right to information in possession of the Crown confirms this by looking for answers elsewhere.

The purpose of the American FOIA was explained by the court in *Miller v Bell* 661F 2d 623 (1981) at 625: "to allow public access to official information unnecessarily shielded from public view An agency must release information in its possession unless it falls within one of the nine statutory exemptions to the Act."

And at 626: "it is also well to note that it is not the purpose of this Act to benefit private litigants, ... by serving as an adjunct or supplement to the discovery provisions of the Federal Rules of Civil Procedure."

In note 10 of *NLRB v Sears, Roebuck & Co* 421 US 132, 143 n 10, 95 S Ct 1504, 1512 n 10, 44 L Ed 2d 29 (1975) it was said that the FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants."

Chamberlin (1997) 57 *ALR Fed* 903 906 analysed the American case law. He indicates that parties in pending criminal proceedings can not use the FOIA for discovery of records and information compiled by government in the course of investigations, which records are not available under normal discovery procedures.

A similar position on the purpose of the Australian FOIA was taken in Australia in the leading case of *News Corporation v National Companies & Security Commission* 57 ALR 550 (Fed Ct 1984).

10.2.2 General duty to disclose

As the Criminal Code of Canada provides for pre-trial discovery for indictable offences, but not for summary conviction offences, both sets of principles are investigated.¹⁰

10.2.2.1 Summary conviction offences

The question as to the accused's right to discovery of the Crown's case prior to a summary conviction trial came before the Alberta Court of Queen's Bench in the case of *Re Kristman and The Queen*.¹¹ McBaine J indicated that there was no right at common law, nor under the Canadian Charter, which obliged the courts to require the Crown to give full and complete pre-trial disclosure of all evidence available from police officers involved in a police investigation prior to the trial of a summary conviction offence. Production before trial is at the discretion of the Crown, while production at trial is at the discretion of the trial judge and not a right of the accused. The court concluded that while the Criminal Code entitled the accused to make full answer and defence at trial,¹² these provisions do not include a right to pre-trial discovery. While the Criminal Code provides for preliminary hearings in respect of indictable offences to be

¹⁰ The South African system has long since ceased to utilise a system premised on the existence of a preparatory examination (see footnote 47 of this chapter).

¹¹ (1984) 12 DLR (4th) 283 (Alta CA).

¹² The court referred to sections 577(3) and 737(1). Section 577(3) provided that an accused was entitled to make full answer and defence personally or by counsel after the close of the case for the prosecution. See Rodrigues (1981) 17 - 240. Section 737(1) stated in general that the defendant was entitled to make full answer and defence. See Rodrigues (1982) 24 - 119. These section numbers changed with the 1985 revision of the statutes of Canada.

held, no such vehicle for pre-trial discovery has been provided for by Parliament in relation to summary conviction offences.

10.2.2.2 Indictable offences

When the duty of disclosure by the Crown came before the Canadian Supreme Court in *R v Stinchcombe*,¹³ the duty to disclose had not been settled. This was so even though a number of cases have addressed some aspects of this subject.¹⁴

Sophinka J discussed at length the duty of the Crown to disclose in the context of indictable offences.¹⁵ He indicated that production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. Although this was similarly applied to criminal and civil proceedings, this aspect has long since disappeared from civil proceedings. Full discovery of documents, and oral examination of parties and even witnesses, are now familiar features of the practice in civil proceedings. The principle that justice was better served when the element of surprise was eliminated from the trial, and that the parties were better prepared for the issues on the basis

¹³ (1991) 68 CCC (3d) 1 (SCC).

¹⁴ See for example *Re Cunliffe and Law Society of British Columbia*; *Re Bledsoe and Law Society of British Columbia* (1984), 13 CCC (3d) 560, 40 CR (3d) 67, (1984) 4 WWR 451 (BCCA); *R v Savion and Mizrahi* (1980), 52 CCC (2d) 276, 13 CR (3d) 259, 4 WCB 239 (Ont CA); *R v Bourget* (1987), 35 CCC (3d) 371, 41 DLR (4th) 756, 56 CR (3d) 97 (Sask CA).

¹⁵ At 6 and further. Although the duty to disclose was discussed in the context of indictable offences, the gist of the judgment seem to be applicable to all criminal trials.

of complete information of the case that was to be met, resulted in this change.

The Supreme Court found it surprising that in a criminal case where the liberty of the accused was at stake, this aspect lingered on.¹⁶ The court reminded that there had been considerable resistance to the enactment of comprehensive rules that would make the practice mandatory in criminal trials, but also pointed out that the prosecution had generally been co-operative in making disclosure on a voluntary basis. The court attributed the resistance to the fact that proposals for reform in this regard did not provide for a reciprocal disclosure by the defence.¹⁷

The court found the notion that the Crown had no legal duty to disclose all relevant information difficult to justify. The arguments in favour of such a duty were overwhelming and the arguments against the existence of such a duty were groundless. The court furthermore indicated that the argument that the duty should be reciprocal, may deserve consideration but that it was not a valid reason for absolving the Crown of its duty. The role of the prosecution and the defence is fundamentally different.¹⁸

¹⁶ At 6.

¹⁷ Also see the "1974 Working Paper" at 29 - 31; "1984 Report" at 13 - 5; Marshall Commission Report volume 2 at 242 - 4 (Royal Commission on the Donald Marshall, Jr, Prosecution) as cited by the court.

¹⁸ At 7. This difference was also referred to in *Boucher v The Queen* (1955), 110 CCC 263, [1955] SCR 16, 20 CR 1 270 (SCC). Rand J stated that it could not be overemphasised that the purpose of a criminal prosecution was not to obtain a conviction but rather

to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is

The Supreme Court added that the fruits of investigation which are in the possession of counsel for the Crown, is not the property of the Crown for use in securing the conviction, but the property of the public to be used to ensure that justice is done. Against this, the court said, the defence had a purely adversarial role towards the prosecution and had no obligation to assist the prosecution. The absence of a duty to disclose by the defence was therefore consistent with this role.¹⁹

a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

¹⁹ At 7. Under South African law the courts have taken a similar view on the role of the prosecution and the defence. In *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 241i Myburgh J held that the prosecutor does not represent a client. He "stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth ...". In *S v Fani* 1994 (3) SA 619 (E) at 621i Jones J held that "[t]he duty of the prosecution is to present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth". The prosecutorial duty described in *Boucher v The Queen supra* was also approved in *S v Majavu* 1994 (2) SACR 265 (Ck) at 275i - j. In contradistinction to this role, the defence has a client to defend. It was accordingly held in *Khala* at 240 and further that it was undesirable to justify nondisclosure by drawing an analogy between legal professional privilege and docket privilege. Docket privilege is based on issues like the argument that witnesses may be tampered with. Legal professional privilege is based upon the necessity of confidentiality between attorney and client for the proper functioning of the legal system. This policy consideration does not apply to the unprivileged information in the police docket. If communications between client and attorney were subject to compulsory disclosure there would be a potentially serious restriction on which advice could be sought and given. If a client cannot seek advice confident that he is not acting to his disadvantage, then this lack of confidence will likely be reflected in the instructions he gives, the advice he is given, and ultimately the legal process of which the advice forms part. See also *S v Safatsa* 1988 (1) SA 868 (A) 886D - G. Under American law the supreme court in *Upjohn Co v United States* 449 US 383 (1980) at 389 explained that this privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client. Frank communications between attorneys and clients therefore promote the

Commenting on arguments raised against the general duty to disclose all relevant information,²⁰ the court said that it would be a matter of timing of the disclosure, rather than whether disclosure should be made at all. The discretion of the Crown included the timing of the disclosure, the exclusion of what is clearly irrelevant, the withholding of the identity of persons to protect them from harassment or injury, or the enforcement of the privilege relating to informers. The prosecutor has a discretion in respect of these matters that is subject to review by the court. The discretion also “extend[s] to the timing of disclosure in order to complete an investigation”.²¹

The Supreme Court reviewed the advantages and disadvantages of disclosure by the Crown and found no practical reason to support non-disclosure. The court saw the overriding concern in the fact that failure to disclose might impede “the ability of the accused to make full answer and defence”.²² This was a common law right of an accused and was strengthened by virtue of its inclusion in section 7 of the Canadian Charter as one of the principles of

broader public interest in the observance of law and order.

On this rationale it is therefore highly unlikely, and correctly so, that any argument to relax this oldest of privileges on the basis that such relaxation may be a justified limitation to the right to freedom and security of either system, will be sustained.

²⁰ At 7 and 8. The arguments are that:

- It would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial.
- The material will be used to enable the defence to tailor its evidence to conform with information in the Crown’s possession.
- It may put at risk the security and safety of persons who have provided the prosecution with information.

²¹ At 9.

²² *Ibid.*

fundamental justice.²³ Sophinka J indicated that “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”.²⁴

It is worthwhile to consider some of the other comments made by the Supreme Court in *R v Stinchcombe* in order to determine whether a duty to disclose for purpose of the bail hearing was not suggested.

The court explained that in some situations early disclosure may impede the completion of an investigation. However, delayed disclosure on this account should be avoided because the completion of an investigation before proceeding with the prosecution is largely within the control of the Crown. The court indicated that it was nevertheless not always possible to predict events which may require an investigation to be re-opened. The Crown must have some discretion to delay disclosure in these circumstances.

The court indicated that this discretion of the Crown was reviewable by the trial judge. The review could be initiated by counsel for the defence when an issue arose with regard to the exercise of the Crown’s discretion. On review the Crown must justify its refusal to disclose. However, the court stated the general principle to be taken into account by the presiding officer on review: “[T]he information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence.”²⁵

²³ *Ibid.* See also *Dersch v Canada (Attorney-General)* (1990), 60 CCC (3d) 132 140 - 1, 77 DLR (4th) 473, [1990] 2 SCR 1505 (SCC).

²⁴ *Ibid.* See also *R v Chaplin* [1995], 1 SCR 727 742, 96 CCC (3d) 225 (SCC).

²⁵ At 11.

As to exactly when the disclosure should be made, the court agreed with the recommendation of the *Law Reform Commission of Canada* in both of its reports. Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead.²⁶ The court saw these steps which affect the accused's rights in a fundamental way, as crucial. It will assist the accused to a great extent to know the strengths and weaknesses of the Crown's case before committing on these issues. As it fosters the resolution of many charges without trial through an increased number of withdrawals and pleas of guilty, the system also profits from early disclosure.

The court furthermore indicated that the accused may request the information at any time after the charge. Where such request has been made timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare instance of an unrepresented accused, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. Even if the Crown's brief is not complete at this stage disclosure must be made. The obligation to disclose is a continuing one and disclosure must be completed when additional information is received.²⁷

From what has been held it is clear that the evidence has to be disclosed for trial purposes. It is to ensure that all relevant evidence is available to the defence and before the decision-maker(s) at trial, to ensure that justice is done. Even though it may be requested at any time after the charge has been made, the Crown is under a duty to provide the requested information before the

²⁶ See also *R v Girimonte* (1997) 121 CCC (3d) 333 (Ont CA).

²⁷ At 13.

decision by the accused whether a jury is going to be used, or before plea.²⁸ Even though this may be at an early stage of the process and long before the trial actually takes place, its purpose is to ensure that an accused's ability to make full answer and defence is not impeded. It ensures that the innocent is not convicted.²⁹

The argument that the accused is only entitled to be informed of the contents of the police docket for trial purposes may be further strengthened by the statement in *R v Stinchcombe* that the Crown has an obligation only to disclose the *relevant* material in its possession. "Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown."³⁰

"Relevance" was described in *R v Egger*³¹ as follows:

One measure of relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may effect the conduct of the defence such as, for example, whether to call evidence.

Sopinka J, on behalf of the majority of the Supreme Court of Canada in *R v Carosella*³² recently stated the following in this regard:

²⁸ At 14.

²⁹ At 9.

³⁰ *R v Dixon* (1998) 122 CCC (3d) 1 (SCC).

³¹ [1993], 2 SCR 451 467, (1993) 82 CCC (3d) 193 (SCC).

³² [1997], 1 SCR 80 106, 112 CCC (3d) 289 (SCC).

[T]he right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is the principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

Where there is therefore a reasonable possibility that the undisclosed information would have aided an accused in meeting the case of the Crown, or advancing a defence, or otherwise making a decision which could have the effected the conduct of the defence, he has also established the impairment of his right to disclosure in terms of the Canadian Charter.

10.2.3 Appraisal of duty to disclose for purposes of bail hearing

Although it is clear that the right to disclosure under present Canadian law is limited to the trial stage, it is submitted that an argument can be made for the disclosure of the evidence pertaining to the offence for purposes of the bail hearing, where the information is shown to be relevant.³³ In terms of section 7 of the Canadian Charter everyone has the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Bearing in mind the affirmation of the Supreme Court of Canada that the fruits of the investigation in possession of the Crown are the property of the public to be used to ensure that justice is done, it can be argued that, if relevant, these facts must be supplied before the bail application so that justice can be done. One of the factors to be taken into account when granting bail is the strength of the Crown's case. The information may therefore be very relevant at that stage. Just as it is accepted that the information in the possession of the Crown is not there to ensure a conviction, but to see that justice is done, it can and must be argued that the information

³³ Even for trial purposes the right is not absolute as only relevant information has to be disclosed.

at the stage of the bail proceedings is there not to ensure that the accused stays behind bars, but to ensure that justice is done.

This argument, in my view, is in line with the decision made by the Supreme Court of Canada in *United States of America v Dynar*³⁴ where it was decided that an extradition hearing must be conducted in accordance with the principles of fundamental justice.³⁵

10.3 SOUTH AFRICAN LAW

10.3.1 General

Section 32 of the Final Constitution provides as follows:

- (1) Everyone has the right of access to –
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.³⁶
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.³⁷

³⁴ (1997) 147 DLR (4th) 399 (SCC).

³⁵ However, the court decided that at an extradition hearing the fugitive was not entitled to the highest possible level of disclosure because of the treaty and the statute that governed it. The court indicated that in deciding whether the information must be given it had to be remembered that the role of the extradition judge was limited and the level of procedural safeguards required, had to be considered. See also *United States of America v Kwok* (1998) 127 CCC (3d) 353 (Ont CA).

³⁶ Subsection (1)(b) has no antecedent in foreign Constitutions.

³⁷ The Interim Constitution also afforded a right to information by way of section 23:

Schedule 6 to the Final Constitution, which deals with transitional arrangements, provides that national legislation must be enacted within three years of the date upon which the Constitution took effect.³⁸ Until this is done, the right to information in the Interim Constitution will prevail.³⁹

As at 30 June 1999 no comprehensive Act granting access to information or “freedom of information” had been introduced,⁴⁰ but the legislature has

Every person shall have the right to access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of his or her rights.

³⁸ Item 23.

³⁹ See par 10.3.4 for a discussion whether section 32 (presently to be read with schedule 6) includes a right to information for purposes of litigation (and thus also for purposes of a bail application) or whether it serves some other public purpose.

⁴⁰ However, a draft bill called the Draft Open Democracy Bill which provides for access to information from governmental bodies, was published for comment on 18 October 1997 in Government Gazette 18381 (General Notice 1514 of 1997). The objects of the Act are stated in part 1 par 3 of the Act. The objects are to:

- Provide for public access to information held by governmental bodies subject to certain exemptions.
- Make information in respect of the functions and operations of governmental bodies available to the public.
- Provide a mechanism for individuals to correct information about themselves held by government or private bodies.
- Provide for protection against abuse of information about individuals held by government or private bodies.
- Provide for protection of individuals who make known evidence disclosing contraventions of the law.
- Generally to provide for transparency of all organs of the state.

However, see now the Promotion of Access to Information Act, Act 2 of 2000 which was published on 3 February 2000 in Government Gazette 20852 (General Notice 95 of 2000). This Act which takes effect on a date yet to be determined by the president (see section 93) was not taken into

specifically denounced the right to information for purposes of a bail hearing by way of the Second Criminal Procedure Amendment Act 85 of 1997.

Section 60(14) of the Criminal Procedure Act 51 of 1977 now determines the following:

Notwithstanding anything to the contrary contained in any law,⁴¹ no accused shall, for the purposes 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:⁴² 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 or her trial.⁴³

account for this study. See also footnote 71.

In many other countries access to official information has been regulated by legislation for some time. See for example The United States Freedom of Information Act (5 USC s 552), the Canadian Access to Information Act of 1982, the Australian Freedom of Information Act of 1982 and the New Zealand Official Information Act of 1982. These statutes demarcate a range of exceptions and detailed procedures to obtain information.

⁴¹ Subject, of course, to the Constitution.

⁴² It seems that the legislature prefers this decision to lie with the prosecution and not the courts. This approach is in the first instance contrary to a fundamental rights culture where due process is to be protected by the courts. It certainly appears as if the legislature is of the opinion that an applicant is not entitled to a fair bail hearing. The legislature also seems to say that the courts may decide when the docket is to be supplied for purposes of trial, but they are not equipped to do so when bail is applied for.

⁴³ It is not unreasonable to conclude that section 60(14) was put on the statute books to clear up any perception that might have existed after *Shabalala* 1995 (12) BCLR 1593 (CC) that the accused had a right to the police docket right from the outset of the prosecution. The prosecution in *Schietekat* 1999 (2) BCLR 240 (C), *Joubert* 1999 (2) BCLR 237 (C) and *Dladla* (Protea magistrate's court) argued that there was indeed such a wide perception. However, as will be indicated later on, *Shabalala* is no authority for the proposition that applicants for bail are entitled to the contents of the police docket.

10.3.2 General duty to disclose

The question as to the right to the information in the police docket for purposes of trial was the focus of many provincial and local divisions⁴⁴ before it ultimately came before the Constitutional Court in *Shabalala v Attorney-General of the Transvaal*.⁴⁵ Before the Interim Constitution the accused did not have access to the docket because there was a common law docket privilege as formulated in *R v Steyn*:⁴⁶

When statements are procured from witnesses for the purpose that what they say shall be given in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal after the decision of the court of first instance.

Immediately before the Interim Constitution the situation was as follows: The accused had the right to be furnished with particulars of matters alleged in the charge, and in the case of superior courts the right to have a summary of substantial facts and a list of the state witnesses.⁴⁷

⁴⁴ (Now high courts.) See for example *S v Smith* 1994 (3) SA 887 (SE), 1994 (1) BCLR 63 (SE); *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E); *S v Sefadi* 1994 (2) BCLR 23 (D); *S v Majavu* 1994 (2) BCLR 56 (CK); *Khala v Minister of Safety and Security* 1994 (2) BCLR 89 (W); *S v Botha* 1994 (3) BCLR 93 (W); *S v Lombard* 1994 (3) BCLR 126 (T); *Phato v Attorney-General Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99 (E); *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C); *S v Dontas* 1995 (3) BCLR 292 (T); *S v De Klerk* 1995 (3) BCLR 385 (T).

⁴⁵ 1995 (12) BCLR 1593 (CC).

⁴⁶ 1954 (1) SA 324 (A) 335A - B.

⁴⁷ A system of preparatory examinations had been in use in the superior courts. However, in 1963 section 152*bis* was introduced into the Criminal Procedure Act 56 of 1955 that allowed the attorney-general to direct a summary trial (by way of section 11 Act 37 of 1963). Although the section was enacted to

However, it is clear that the Constitutional Court in *Shabalala*,⁴⁸ when it declared the blanket docket privilege unconstitutional, decided the matter in the context of ensuring a fair trial. The test was therefore formulated as to whether the contents of the docket was necessary to enable the defence to prepare properly. Would the defence therefore be able to effectively exercise the constitutional right to properly “adduce and challenge evidence”, without access to the docket?

Before the decision by the Constitutional Court there had been considerable debate as to whether or not section 23 of the Interim Constitution⁴⁹ applied when access to the police docket is required to advance an accused’s defence. Some courts decided that section 23 was applicable.⁵⁰ Other courts indicated

cope with political subversion it conferred a generous discretion and led to the summary procedure becoming the rule for all cases. As an accused was supplied with a full set of particulars when he underwent a preparatory examination the accused lost the advantage of knowing what the state could prove at trial. As a concession the attorney-general started supplying accused who appeared before a superior court with a summary of facts and a list of witnesses. See *Hiemstra* (1977) 71 - 76; *Dugard* (1977) 50 - 51 and 82.

⁴⁸ 1995 (12) BCLR 1593 (CC).

⁴⁹ And hence section 32 of the Final Constitution.

⁵⁰ *S v Majavu* 1994 (4) SA 268 (Ck) 309D, 1994 (2) BCLR 56 (Ck) 76D - 77E; *S v Sefadi* 1995 (1) SA 433 438B - E, 1994 (2) BCLR (D) 23 28F - 1; *S v Botha* 1994 (4) SA 799 (W) 831G and 834F, 1994 (3) BCLR 93 (W) 121I - 124H; *Phato v Attorney-General, Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99 (E) 112E - 114B; 1995 (1) SA 799 (E) 814D - 816B; *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 226G - H, 1994 (2) BCLR 89 (W) 96F - G; 97A and 107G; *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) 89C - E; 1994 (3) SA 625 (E) 642G - H; *S v Smith* 1994 (3) SA 887 (SE) 895G - H, 1994 (1) BCLR 63 (SE) 70J - 71B; *Nortje v The Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250E; 1995 (2) SA 460 (C) 473H - 474D; *S v Fani* 1994 (3) SA 619 621B - E, 1994 (1) BCLR 43 (E) 45D - G; *S v De Kock* 1995 (3) BCLR 385 (T) 391H and 392I - 393A; *S v Mtyuda*

that they were uncertain.⁵¹ In some cases there were positive arguments that section 23 did not apply.⁵²

The interaction between the right to information as provided for in section 23 and the right to a fair trial in terms of section 25(3) of the Interim Constitution was discussed in *Shabalala v Attorney-General of the Transvaal*.⁵³ The Constitutional Court found that the support for the contention that section 23 applied to trial proceedings was substantially placed on the unqualified language of section 23, and the increasing human rights jurisprudence concerning the right to official information.⁵⁴

Support for the opposing contention was substantially founded on the maxim *generalialia specialibus non derogant*. In this instance, this maxim contends that the rights of an accused person in a trial are regulated by the specific provisions of section 25(3), and not by the general provisions of section 23. It is furthermore contended that section 23 was not intended to be a “discovery”

1995 (5) BCLR 646 (E) 648B - 649D; *S v Khoza* 1994 (2) SACR 611 (W) 617F; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 643A - C, 1994 (6) BCLR 85 (T) 119F - H.

⁵¹ *S v James* 1994(1) BCLR 57 (E) 61C - I; 1994 (3) SA 881 (E) 885C - I; *S v Dontas* 1995 (3) BCLR 292 (T) 300D.

⁵² *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250B; SA 473H - J; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 620F - I, 1994 (6) BCLR 85 (T) 97D - G.

⁵³ In par 32 to 36 of the judgment.

⁵⁴ Par 32 of the judgment. See for example *Khala v Minister of Safety and Security* 1994 (2) BCLR 89 (W) 95 and 96; 1994 (4) SA 218 (W) 225 and 226; *S v Majavu* 1994 (4) SA 268 (Ck) 308H - 309F, 1994 (2) BCLR 56 (Ck) 76J - 77H; *Phato v Attorney-General, Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99(E) 112E - 114C; SA 814D - 816D; *S v Botha* 1994 (3) BCLR 93 (W) 121; 1994 (4) SA 799 830I - 831G.

mechanism in criminal trials. It is a right conferred on citizens to compel disclosure of information in the public interest.⁵⁵

The court indicated that in the present case application was made for the discovery of the documents during the course of a criminal prosecution. The court found section 25(3) of the Constitution to be of direct application in considering the merits of that application and found it difficult to understand how section 23 could take the matter any further. The court held that if the accused were entitled to the documents sought in terms of section 25(3), nothing in section 23 could operate to deny that right. Conversely, if the accused could not legitimately contend that they were entitled to such documentation in terms of section 25(3), the court found it difficult to understand how they could, in such circumstances, succeed in an application based on section 23. The court saw the real enquiry as whether or not the accused were entitled to succeed in the application on the basis of a right to a fair trial asserted in terms of section 25(3).⁵⁶

The court nevertheless added that section 25(3) should not be interpreted in isolation, but together with section 23, and in the broad context of a legal

⁵⁵ Par 33 of the judgment. See for example *S v Botha* 1994 (3) BCLR 93 (W) 120H - I; 1994 (4) SA 799 830E - G; *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250A; 1995 (2) SA 460 (C) 473H; *S v James* 1994(1) BCLR 57 (E) 61C - 61J; SA 885C - J; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 620F - H, 1994 (6) BCLR 85 (T) 97D.

⁵⁶ Par 34 of the judgment. The Constitutional Court referred to many cases to illustrate the application of the right to a fair trial: *R v Stinchcombe* 18 CRR (2d) 210 (SCC); *R v Egger* (1993) 103 DLR (4th) 678 (SCC); *R v Leyland Magistrates, ex parte Hawthorn* [1979] 1 All ER 209 (QB); *R v Maguire* [1992] 2 All ER 433 (CA); *R v Ward* [1993] 1 WLR 619 (CA); *R v Brown (Winston)* [1994] 1 WLR 1599 (CA); *S v Nasar* 1994 (5) BCLR 60 (Nm); *Bendenoun v France* (1994) 18 EHRR 54; *Hentrich v France* (1994) 18 EHRR 440.

culture of accountability and transparency manifested by both the preamble to the Constitution, and the detailed provisions of chapter 3.⁵⁷

The court described the basic test as “whether the right to a fair trial in terms of section 25(3) included the right to have access to a police docket or the relevant part thereof”.⁵⁸ However, the court indicated that the question could not be answered in the abstract. Regard must be had to the particular circumstances of each case.⁵⁹

As to the exact moment when in the course of a criminal prosecution the information has to be supplied, Le Roux J in *S v Botha*⁶⁰ indicated that the information ought to be given after completion of the police investigation. Le Roux J referred with approval to the decision of Myburgh J in *Khala v Minister of Safety and Security*,⁶¹ from which he quoted the following passage:

If there is a right of an accused to access to the information in the police docket, that right should be exercised only after the matter has become ‘ripe for hearing’, i.e. after the investigation is complete, the charge sheet drawn, and the State is prepared to proceed to trial.

This also seems to be the position in the United States of America. LaFave states:⁶²

⁵⁷ Par 35 of the judgment. See also *S v Makwanyane* 1995 (6) BCLR 665 (CC) where the court enunciated the principles to be applied when interpreting fundamental rights.

⁵⁸ Par 36 of the judgment.

⁵⁹ *Ibid.*

⁶⁰ 1994 (2) SACR 541 (W) 569D - E and 577B.

⁶¹ 1994 (2) SACR 361 (W) 379D.

⁶² (1992) 844.

Ordinarily, discovery provisions do not take effect prior to the filing of charges in the court of general jurisdiction. Thus, those provisions are not available during the course of the preliminary proceedings in the magistrate's court, such as the preliminary hearing and the bail hearing.

But the question at hand is whether an applicant for bail has the right to the information mentioned, for purposes of the bail hearing.

10.3.3 Duty to disclose for purposes of bail hearing

When the constitutional validity of section 60(14) ultimately came before the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*⁶³ it was not argued that section 60(14) had to comply with section 32 or, in violation of section 32, had to be saved by section 36. The argument was advanced that the combined effect of section 60(11)(a) and 60(14) was that the applicant incarcerated on a schedule 6 offence was denied bail in breach of the right protected by section 35(1)(f). This is so because the applicant in terms of section 60(11)(a) is faced with an uphill battle in proving exceptional circumstances. Apart from the fact that the applicant bears the burden of proof, he has the duty to begin. This, it was argued, cannot be done without knowledge of the contents of the docket.

The Constitutional Court noted that there was substance in these contentions. However, the court pointed out that the legislature did provide that an applicant falling under subsection (11)(a) be given a reasonable opportunity to prove the existence of "exceptional circumstances" which in the interests of justice permit his release. An applicant for bail in terms of

⁶³ 1999 (7) BCLR 771 (CC).

section 60(11)(a) must therefore be informed of the grounds against his being granted bail, in order to afford him a reasonable opportunity to prove "exceptional circumstances".

Although the worst case scenario created by subsection (11)(a) was at the centre of the discussion, it seems that the argument included subsection (11)(b) which also afforded the applicant a reasonable opportunity to adduce evidence which in the interests of justice permit his release. It is clear from the judgment that the prosecutor may in spite of subsection (14) be ordered to lift the veil to afford the applicant the reasonable chance prescribed in section 60(11). Where the grounds militating against bail have to be supplied to an applicant falling under section 60(11)(a) to enable him to prove "exceptional circumstances", it seems that an applicant falling under section 60(11)(b) is not always entitled to this information. He is only so entitled if it is needed to afford him a reasonable opportunity to adduce the necessary evidence to obtain bail. The court indicated that what was, or was not, a reasonable opportunity, depended on the facts of each case. The Act does not spell out what is reasonable either. However, the court quoted an excerpt by Schutz JA in *Naude v Frazer*⁶⁴ which indicates that it is fundamental that a party be apprised of the case which he faces. Does this mean that an applicant for bail who does not carry the burden of proof will also be entitled to be apprised of the case? He is after all a party to the proceedings.⁶⁵

⁶⁴ 1998 (4) SA 539 (A) 563E - F.

⁶⁵ If the state contends that sufficient information is supplied by way of the charge sheet it can be argued that the charge sheet deals with another issue. The charge sheet does to a large extent not provide the grounds against being granted bail and therefore does not provide information of the case to meet in the bail hearing.

The Constitutional Court did therefore not regard subsection (14) as sanctioning an absolute denial of information for purposes of a bail application. The court also proposed a less absolute interpretation of the words “have access to” in subsection (14) to bring the subsection in harmony with subsection (11). The court indicated that it should be interpreted as barring physical access to the contents of the docket in the sense of seeing or perusing the contents. But the court did not find any general right to the contents of the docket for purposes of a bail application.⁶⁶

10.3.4 Appraisal of duty to disclose for purposes of bail hearing

The question arises whether section 32 of the Final Constitution does not afford the right to the information held by the state for purposes of the bail hearing.

It is clear that the scope of the right in section 32 of the Final Constitution is wider than that under the Interim Constitution. Under the Final Constitution everyone is entitled to information held by the state irrespective whether the information is required to protect a right or not.⁶⁷ Where the information is needed to protect a right, everyone is entitled to any information held by another person.⁶⁸ The right to information under section 32(1)(b) is no longer limited to information held by the state. The right to information for purposes

⁶⁶ See par 80 - 84 of the judgment.

⁶⁷ Section 32(1)(a).

⁶⁸ Section 32(1)(b).

of litigation, be it criminal or civil, thus falls squarely within the ambit of paragraph (b).⁶⁹

In terms of section 32(2) national legislation must be enacted to provide for subsection 32(1)(a) and (b) respectively. As has been indicated, no comprehensive legislation has as at 30 June 1999 been enacted to regulate subsection (1)(a).⁷⁰ It is also accepted that the legislation envisaged to give effect to subsection (1)(a) would not apply to litigation.⁷¹ However, the right

⁶⁹ It is suggested that the legislature took note of:

- the comments by, and the arguments in, the various courts on the right to information under the Interim Constitution, and
- the statutes granting access to official information in comparable societies when it structured section 32.

Because of the latter point the denial of information for purposes of a bail application by section 60(14) would not fall under legislation issued to provide for the right in section 32(1)(a).

Section 32(1)(b) cannot be equated with the various "Information Acts" where the public is given a general right of access to official information, subject to certain exemptions. In the first instance section 32(1)(b) is not subject to the limitations of those "Information Acts", but more importantly the right is narrower in its scope. The right is only conferred on an individual "in so far as that right is required for the exercise or protection of any of his or her rights". The purpose of section 32(1)(b) was thus not to provide for official information unnecessarily shielded from the public view and accordingly falling outside the scope of litigation.

However, it has been argued that the similar provision in section 23 of the Interim Constitution was introduced to ensure an accountable government in terms of Constitutional Principle IX. See Davis, Cheadle & Haysom (1997) 147.

⁷⁰ See par 10.3.1.

⁷¹ See also the Draft Open Democracy Bill published in October 1997 which in part 3 chapter 1 par 11 excludes parties to court proceedings from access under the Bill. However, now see the about-turn in the Promotion of Access to Information Act, Act 2 of 2000 which was published on 3 February 2000. This Act gives effect to the constitutional right of access to information in terms of both sections 32(1)(a) and (b). See the long title to the Act, the

to information for purposes of the bail hearing has specifically been regulated in terms of national legislation by way of section 60(14) of the Criminal Procedure Act. If one accepts that section 32 does not apply when bail is sought, then section 60(14) was not enacted in line with section 32(2) and its purpose was not to give effect to the right in section 32(1)(b). If it does apply, an applicant would have a right to information that can only be limited in accordance with section 36. The first step is therefore to decide whether section 32 applies.

Because the rights of an arrested person have been specifically dealt with in section 35(1), the advocates for the exclusion of section 32 may argue that it does not apply when bail is sought, relying on the rule of interpretation *generalia specialibus non derogant*. The content of the rule was explained as follows by Goetsche J in *R v Gwantshu*:⁷²

The general maxim is *generalia specialibus non derogant*. When the legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. ... Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that special and earlier legislation is not to be held directly ... altered ... merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view and not particular cases which have been already otherwise provided for by the special Act.

preamble and section 9. Section 11(1)(b) of the Act provides that access to requested material must only be given in terms of this Act if access is not refused in terms of chapter 4. Chapter 4 by way of section 39(1)(a) read with section 33(1)(a) specifically refuses access, if access is prohibited in terms of section 60(14) of the Criminal Procedure Act. It is therefore clear that this Act does not entitle an applicant for bail to the information held by the prosecution for purposes of the bail hearing.

⁷² 1931 EDL 29 31.

This decision also indicated that the maxim applied equally if not with greater force to earlier and later provisions of the same enactment. However, in the situation under discussion the general provision is the earlier and the specific the later. From the judgment in *S v Coulter*⁷³ it seems that it does not matter whether the general provision is placed first or later in the Act.⁷⁴

Bearing in mind that the purpose of the maxim *generalia specialibus non derogant* is to resolve conflict between provisions,⁷⁵ it would operate to resolve any conflict between section 32 and 35(1). However, there is no special provision in the Constitution dealing with the right to information for purposes of bail applications. I therefore submit that the rule of interpretation *generalia specialibus non derogant* cannot exclude section 32. There is also no principle of fairness in section 35(1) to cover this situation which can be said to be of direct application. Accordingly only section 32 (if not section 12)⁷⁶ can take the matter any further.

The supporters of the exclusion of section 32 may argue that it has been specifically provided that an arrested person does not have such a right

⁷³ 1971(1) SA 162 (RA).

⁷⁴ The court in *Barry v Union Government* 1912 OPD 114 saw the situation somewhat differently by indicating that where there are both specific and general provisions in a statute, and the latter conflicts with the former, the specific provisions are read as exceptions to the rule.

⁷⁵ See *Khumalo v Director-General of Co-operation and Development* 1991(1) SA 158 (A); *S v Coulter* 1971(1) SA 162 (RA) 163; *Miller v Zimmerman* 1957 (1) SA 44 (A); *S v Mhlungu* 1995 (7) BCLR 793 (CC) par 113 and further. See also Botha (1991) 69.

⁷⁶ See chapter 6. Section 12 should provide protection where protection is not provided in specific terms. This allows for conceptual similarity in the analytical process.

because of its exclusion from the rights of an arrested. Even if this is accepted, which it is not, the judgments indicate that the presumption may be rebutted by a clear expression of intent in the general provision.⁷⁷ It is submitted to be the clear intent of section 32(1)(b) to provide for information in every case where information is needed to exercise or protect a right. The intention is therefore clearly to entitle an applicant in bail proceedings to information if it is needed to exercise the right to be released from custody. As has been indicated, one of the factors to be taken into account when granting bail is the strength of the state's case. The information may therefore be very relevant at that stage.⁷⁸ Is it not then manifestly the intention of the legislature that section 32(1)(b) must be applied?⁷⁹

Of more concern is the reasoning by the Constitutional Court in erecting a conceptual wall between sections 11 and 25 IC.⁸⁰ Following the argument of the Constitutional Court in those cases, it seems that there will be a similar barrier between section 32 and 35. The Constitutional Court in *Shabalala*, on the same reasoning, chose to decide the right to information at trial in the context of the fair trial provision and not on the basis of section 23 of the Interim Constitution.⁸¹ Yet, the court still indicated that section 25(3) should

⁷⁷ See *New Modderdam Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 397; *S v Mseleku* 1968 (2) SA 704 (N).

⁷⁸ See *Nieuwoudt v Prokureur-Generaal van die Oos-Kaap* 1996 (3) BCLR 340 (SE).

⁷⁹ Because of its application section 12 will not in this instance have to act in a residual due process capacity.

⁸⁰ And also section 12 and 35FC. See par 6.3.1.

⁸¹ In *Shabalala* because of its direct application and the fact that section 23 IC could not take the matter any further.

not be read in isolation, but together with section 23.⁸²

Section 32 should apply when application is made for bail and the above-mentioned maxim is put to use. But even if the ordinary rules of interpretation do not rule out the application of the maxim, the principles of constitutional interpretation will arguably do so.

It is widely accepted in case law throughout the world that there is a marked difference between statutory and constitutional interpretation.⁸³ The rationale for this difference is perhaps best explained by the judgment of the South African supreme court in *Matiso v Commanding Officer, Port Elizabeth Prison*.⁸⁴ Froneman J held that in a system based on parliamentary supremacy the intention of the legislature had to be determined. Where the Constitution reigns supreme and not the legislature as in South Africa after 27 April 1994, the interpretation must be directed at ascertaining the foundational values inherent in the Constitution. This is so because the Constitution is supreme and not the legislature.⁸⁵ This purpose has an impact on the manner in which the Constitution is interpreted. Constitutional interpretation is therefore primarily concerned with the constitutional values and the search is not directed at finding the literal meaning of statutes.

⁸² Par 35 of the judgment. Statements like these certainly do not help to clear up the matter. It seems that the court subscribes to the *generalia specialibus non derogant* principle but remembering the principles of constitutional interpretation tries to incorporate it by deciding that regard should be had to section 23 IC.

⁸³ See Kentridge and Spitz in Chaskalson *et al* (1996) 11 - 10 and Botha (1991) 143.

⁸⁴ 1994 (4) SA 592 (SE) 596F - 599C.

⁸⁵ However, see my comments on the amending provision of the Constitution in par 11.3.1.

Under Canadian law the rationale for the difference in interpretation and function of a Constitution as a whole, was described by the Supreme Court in *Hunter v Southam Inc.*⁸⁶

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution by contrast, is drafted with an eye on the future. *Its function is to provide a continuing framework for the legitimate framework of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.* Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.

In *R v Big M Drug Mart Ltd*⁸⁷ the Supreme Court of Canada held that the interpretation of the Canadian Charter should rather be a generous than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing the full benefit of the Charter's protection.

In *Government of the Republic of South Africa v Cullera* 2000⁸⁸ the Supreme Court of Namibia took a similar approach:⁸⁹

⁸⁶ (1985) 11 DLR (4th) 641 649 (SCC) (the italics are mine). See also *S v Acheson* 1991 (2) SA 805 (Nm) where Mahomed AJ (as he then was) makes a similar statement; *Ntenti v Chairman, Ciskei Council of State* 1993 (4) SA 546 (Ck); *The Attorney-General v Dow* 1994 (6) BCLR 1 (Botswana) 7B - 9D (per Amisshah JP) and 40F - 41I (per Aguda JA); *Swart v Minister of Home Affairs, Namibia* 1998 (3) SA 338 (Nm) 343G - 344C.

⁸⁷ (1985) 18 CCC (3d) 385 (SCC).

⁸⁸ 1994 (1) SA 407 (Nm).

⁸⁹ At 418F and G per Mahomed AJ as he then was. See also *S v Zuma* 1995 (4) BCLR 401 (CC) par 14; *Attorney-General v Moagi* 1982 (2) (Botswana) LR 124 184; *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposefully be interpreted 'so as to avoid the austerity of tabulated legalism', and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of values bonding its people and in disciplining its Government.

In *Minister of Home Affairs v Fisher*⁹⁰ the Privy Council had to decide whether an illegitimate child had the rights stated in terms of the 1968 Bermuda Constitution which benefited "a child of a citizen of Bermuda". If the ordinary rules of interpretation applied the presumption pertaining to statutes concerning property, succession and citizenship determined that only a legitimate child qualified as a "child". The Privy Council held that the presumption did not apply when interpreting the Constitution. The Privy Council explained that, as opposed to any other Act of Parliament, a constitution has special characteristics. The Bermuda Constitution was modelled on the bills of rights of other countries and on international human rights instruments especially for the protection of human rights. A constitution, especially a bill of rights, was drafted in broad and ample style which laid down principles of width and generality. A bill of rights therefore had to be given "a generous interpretation avoiding ... 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".⁹¹ The presumption of statutory

(Nm) 361 - 2.

⁹⁰ [1980] AC 319, [1979] 3 All ER 21, [1979] 2 WLR 889 (PC). This decision has been cited with approval by the Constitutional Court in *S v Zuma* 1995 (2) SA 642 (CC) 651 par 14, the Appellate Division in *S v Marwane* 1982 (3) SA 717 (A) 748 - 9, the full bench of the Namibian Supreme Court in *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (Nm) 362 and it seems by about every court that dealt with the interpretation of a constitution containing a bill of rights.

⁹¹ At 328H.

interpretation was therefore found inappropriate in order to effect the purpose and full measure of the fundamental rights taken up in the 1968 Bermuda Constitution.

All of this bears on the role of the ordinary rules of interpretation in the interpretation of a constitution. Lord Wilberforce for the Privy Council in *Minister of Home Affairs v Fisher* explained that this does not mean that there are no rules of law that apply to the interpretation of a constitution.⁹²

A constitution is a legal instrument giving rise, amongst others things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences.

In *Nyamakazi v President, Bophutatswana*⁹³ the Bophutatswana Provincial Division, after thorough investigation of foreign, international and local law, also suggested the rules of interpretation of a constitution containing a Bill of Rights.⁹⁴ The role of the ordinary rules of interpretation in constitutional interpretation can be seen from these suggestions.

Friedman J held that the method of interpretation or construction was an

⁹² At 329E - G.

⁹³ 1992 (4) SA 540 (B). This decision was with apparent approval referred to by the Constitutional Court in *S v Zuma* 1995 (2) SA 642 (CC) 650 and the Witwatersrand Local Division in *Khala v Minister of Safety and Security* 1994 (4) SA 218 222.

⁹⁴ At 566.

open-ended process of clarification. It reads into, derives and attaches significance to every word, section or clause in relation to the whole context. Interpretation is not a conclusion but rather a process that searches for the exact meaning of words and the use of terms. But irrespective of how the language is construed, the ordinary meaning cannot be dismissed. The constitution must be interpreted liberally according to its terms and spirit to give effect to the intention of the framers, the principles of government contained therein, and to the reasons for and objectives of the legislation. The ordinary rules and principles must give way to a more liberal construction.⁹⁵ A broad construction must be given as far as language permits.⁹⁶ Provisions in a constitution, which may be regarded as far-reaching or absolute must be given a more extensive and humanitarian interpretation than when contained in an ordinary statute. As constitutions are expected to survive for long periods of time and are more difficult to amend, constitutions are not bound by the strict and confined interpretations applied to, for example, criminal statutes. The strict interpretation of contracts should also not be applied. A purposive interpretation is necessary to enable the court to take into account factors other than mere legal rules. These factors are the objectives of the rights contained therein, the circumstances at the time of interpretation, the impact on future generations, the future implications of the construction, and the taking into account of new developments and changes in society.⁹⁷

Under South African law the role of the ordinary rules of interpretation in constitutional interpretation was discussed by the Constitutional Court in *S v*

⁹⁵ *Ibid.*

⁹⁶ At 567.

⁹⁷ *Ibid.*

Mhlungu.⁹⁸ This decision is of special relevance as the role of statutory presumptions in constitutional interpretation came to be decided. The court had to decide on the proper construction of section 241(8) of the Interim Constitution which provided that proceedings pending immediately before the commencement of the Constitution "shall be dealt with as if this Constitution had not been passed". On a literary interpretation this meant that a person served with an indictment before 27 April 1994 could not in spite of the deeply entrenched and peremptory provisions of chapter 3 IC rely on these rights in any proceedings after 27 April. This led to formidable difficulties.⁹⁹ It was argued that in terms of a well-established rule of construction, a new statute, in so far as it affects vested rights and obligations, is presumed not to affect matters which are the subject of pending legal proceedings.¹⁰⁰

Mahomed J¹⁰¹ pointed out that the presumption only operated if there was no contrary intention. As chapter 3 sought to expand and not to limit rights, the judge saw the chapter on fundamental rights as a basis for such an inference.¹⁰² Kriegler J found the application of the interpretative presumption regarding retroactivity and retrospectivity not suitable for

⁹⁸ 1995 (7) BCLR 793 (CC). See also par 8 where the purposive and generous focus prescribed by *Minister of Home Affairs v Fisher* [1980] AC 319, [1979] 3 All ER 21, [1979] 2 WLR 889 (PC) and *Government of the Republic of South Africa v Cultura 2000* 1994 (1) SA 407 (Nm) is quoted with approval.

⁹⁹ See par 3 and further of the judgment.

¹⁰⁰ See also *Bell v Voorsitter van die Rasklassifikasieraad* 1968 (2) SA 678 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1148.

¹⁰¹ As he then was.

¹⁰² Par 37 - 38 of the judgment. Mahomed J expounded the majority view.

purposes of interpreting the Constitution.¹⁰³ Sachs J after having specifically referred to the presumption *generalia specialibus non derogant* as a possible interpretative aid, questioned the usefulness of the common law presumptions in interpreting the Constitution.¹⁰⁴ Sachs J referred with approval to the words of Wilson J in *Thomson Newspapers v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)*:¹⁰⁵

[Such presumptions can be] inconsistent with the purposive approach to Charter interpretation ... which focuses on the broad purposes for which the rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent.

Confronted with two mutually contradictory provisions, Sachs J preferred the approach not to seek for what is general and what is specific, but rather to seek out the essential purposes and interests to be served by the two competing sets of provisions. By “using a species of proportionality” they should then be balanced against each other. The objective was to achieve appropriate weight for each other and to preserve as much as possible of both. Mahomed J indicated that chapter 3 rights should be given the construction most “beneficial to the widest possible amplitude”.¹⁰⁶ Applied to the main issue under discussion where section 32 does not contradict section 35(1), the full extent of the rights contained in sections 32 and 35(1)

¹⁰³ See par 99 of the judgment. Kriegler J gave a separate judgment agreeing with the interpretation placed on section 241(8) by the majority, but for different reasons.

¹⁰⁴ Par 113 - 116 of the judgment. Sachs J gave a separate judgment agreeing with Mahomed J but for different reasons.

¹⁰⁵ (1990) 67 DLR (4th) 161 192 (SCC) per Wilson J in a dissenting judgment.

¹⁰⁶ Par 9 of the judgment.

must be preserved.

It is clear that constitutional interpretation seeks the purpose and fundamental values of a constitution. Where the ordinary rules of statutory interpretation detract from this purpose and the fundamental values of the Constitution, these rules are inappropriate and inapplicable. Where the Bill of Rights is interpreted the full benefit of protection must be afforded. In this instance the maxim *generalia specialibus non derogant* does not afford an interpretation that promotes the protection of fundamental rights in the Constitution. The maxim should therefore not apply. Accordingly section 32(1)(b) of the Final Constitution should afford an applicant for bail the right to access to information held by the police or state officials for purposes of the bail hearing.

However, taking note of the objections in making the contents of the police docket available at an earlier stage than trial, it is submitted that this right should be limited so as to ensure that the docket is available only once the investigation has been sufficiently completed to determine the merits of the case. The investigation would have been sufficiently completed if the case has been put down for plea. If it can be proven, or the state concedes that the merits have been determined at an earlier stage, the information must be made available at the earlier stage. If it has to be supplied earlier, the prosecution might not have had time to investigate properly, and of course the defence will argue that there is no case against the arrested, and that he should be released on bail. In practical terms this limitation might result in the arrested person not being entitled to the information at an earlier stage than where it is requested for trial purposes. The arrested person in any event has the choice to lodge his application for bail after he has received the contents of the docket for trial purposes.

Bearing in mind that the result of the investigation in possession of the prosecution is the property of the public, to be used to ensure that justice is done, the contents must be made available on request at the earliest moment after the merits have been investigated.

10.4 CONCLUSION

This is one area where an applicant for bail in South Africa might have a slight edge over his counterpart applying for bail under Canadian law. This is so, notwithstanding the fact that the South African legislature has expressly refused access to information for purposes of the bail application, and that there is no similar prohibition under Canadian law. While it is clear from the judgments by the Canadian courts that there was only a duty to disclose for purposes of trial,¹⁰⁷ the Constitutional Court has diluted the effect of the prohibiting legislation under South African law to allow for disclosure in certain instances.

The Constitutional Court has indicated that section 60(14) of the Criminal Procedure Act does not sanction an absolute denial. The court concluded that the prosecutor would sometimes have to inform the applicant of the grounds against bail being granted to afford an applicant burdened with an onus a reasonable opportunity in terms of subsection (11). The Constitutional Court also proposed a less absolute interpretation of the words "have access to" in subsection (14) to bring the subsection into harmony with section 60(11) of the Criminal Procedure Act.¹⁰⁸ Where

¹⁰⁷ Before the accused is called upon to elect the mode of trial or plead.

¹⁰⁸ It remains to be seen whether the courts will order the veil to be lifted in the instance of section 60(11)(b) of the CPA "where exceptional circumstances"

“exceptional circumstances” have to be proved in terms of section 60(11)(a), the principle clearly applies. The veil must be lifted to afford the applicant a reasonable opportunity to prove the “exceptional circumstances”. An applicant falling under section 60(11)(b) would be entitled to the information held by the state for purposes of the bail application if the information is required to afford the applicant a reasonable opportunity to obtain bail. What is or is not a reasonable opportunity depends on the facts of each case. It is not clear whether an applicant for bail that does not carry the burden of proof, might under the correct circumstances, be entitled to be informed of the grounds against the granting of bail. It seems doubtful. Under Canadian law, an applicant for bail whether burdened with the onus or not, is not entitled to the information held by the Crown for purposes of the bail application.¹⁰⁹

does not have to be proved.

¹⁰⁹ It seems that South Africa is “ahead” in this regard primarily because of the interpretation by the Constitutional Court of the requirement of a “reasonable opportunity” in section 60(11). It is not because of the purposive and unremitting protection of the right to information in section 32 FC, the right to freedom and security in terms of section 12 FC, nor the right to bail in terms of section 35(1)(f) by the Constitutional Court. The Constitutional Court thus missed a golden opportunity to explore the fundamental basis for granting the information held by the state to an applicant for bail.

The interpretation does therefore not represent a break away from the indefensible erosion of the principle of disclosure that characterises the decades leading up to 1994 on the basis any of these sections or other provision in the Bill of Rights (see par 2.5.2.1 and further and 10.3.2 (including footnote 47) for the erosion of the principle of disclosure in criminal trials, and *S v Makwanyane* 1995 (3) SA 391 (CC) par 262 and *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) par 26 for the new direction that the Constitution has heralded). Even if the Constitutional Court wanted to give effect to the new direction that the Bill of Rights has heralded it could not do so because of the conceptual wall that the court has erected between the criminal procedure rights and the other rights in the Bill of Rights. The misdirection by the Constitutional Court when it built the conceptual wall once again becomes evident. Because of the wall, the court could not rely on the aspirations to protect the freedom and security of the person and the legal culture of transparency and



accountability articulated in the Bill of Rights.

South Africa is also not “ahead” because the legislature wanted to give an applicant for bail the right to the information held by the state. The legislature seems to say that where the applicant for bail carries the burden of proof it is only for the prosecution to say if and when the information held by the state is needed to afford the reasonable opportunity prescribed in section 60(11). In instances where the state has the burden of proving, the state can also decide whether the applicant should have access to the information. It therefore seems that the result was probably coincidental.