# AN ACCUSED'S RIGHT TO INFORMATION IN THE POLICE DOCKET FOR PURPOSES OF A BAIL APPLICATION

**S v Green 2006 1 SACR 603 (SCA)**

## 1 Facts

### *1 1 Regional court*

The two appellants were charged with robbery with aggravating circumstances involving the use of firearms. They were represented by an attorney.

On the date of the bail hearing the defence attorney applied for access to the police docket for purposes of the application. The regional magistrate, relying on section 60(14) of the Criminal Procedure Act 51 of 1977, denied the application. The prosecutor indicated that the State relied *inter alia* on fingerprints and closed-circuit video footage implicating the appellants to connect the appellants to the crime. The defence attorney then applied for access to the video tapes. The State opposed the application and the application was dismissed.

The following day the two appellants testified in support of their application. The investigating officer testified in opposition to the application. The defence attorney argued on the merits that the evidence of the investigating officer be rejected and that the evidence of the appellants be accepted. Concerning the video footage, the defence argued that the State's case could not be prejudiced by showing the video footage. The defence attorney, relying amongst others on *S v Botha* 2002 1 SACR 222 (SCA) para 21, argued that proof that an accused will probably be acquitted, as in this instance, constituted exceptional circumstances. Therefore, exceptional circumstances had been established.

The magistrate, aware that the substance of the investigating officer's testimony was discredited in cross-examination, found that certain aspects, however, could be relied on. He indicated that the law of perjury prevented the investigating officer from lying about these aspects (presumably because such perjury was sure to be revealed during the trial). These aspects were as follows:

- The first appellant's fingerprints were found on the vehicle used by the robbers as a getaway vehicle and which was later found abandoned.
- The video film taken by the closed-circuit television camera clearly showed that the first appellant was the driver of the getaway vehicle.

- The closed-circuit video footage revealed that the first appellant wore a similar t-shirt during the robbery and his appearance in court.
- The second appellant could be seen on the closed-circuit television film arriving for work substantially before the normal time, talking to two security officers, embracing them and kissing one of them. The second appellant then left the scene and returned to report for work in the normal manner. The two security officers were later seen helping the robbers load the proceeds of the robbery into the getaway vehicle.
- In an affidavit the second appellant's employer attested that the second appellant had informed him before the robbery that the first appellant had approached him for information to enable him to commit a robbery. The employer also attested that the second appellant had been told to investigate the matter so that a case could be brought against the first appellant, and that this did not happen prior to the robbery.
- Other affidavits revealed that the second appellant had on various occasions shortly before the robbery made enquiries as to the amount of cash in the safe on the premises while this had nothing to do with his job description.

Relying on these aspects, the regional magistrate found that a strong *prima facie* case had been made out against the appellants and denied the application.

*1 2 Court* a quo

The court explained that the appellants had not appealed against the refusal of the regional magistrate to grant the appellants access to the police docket. The court had to decide whether the appellants had established exceptional circumstances and were therefore entitled to be released on bail. The court dismissed the appeal.

## 2 The appellants' arguments in the Supreme Court of Appeal

Counsel for the appellants argued that the magistrate had erred in relying on certain aspects of the investigating officer's evidence. Counsel argued that the rejected evidence had shown the investigating officer to be untruthful and that he was not deterred by the spectre of perjury. Counsel submitted that, in the circumstances, it was wrong to rely on the evidence of the investigating officer on aspects where the video-footage and statements could easily be produced. The production of the video-footage and statements would not have led to a dress rehearsal of the State's case and would not have prejudiced the case for the prosecution. Also, if the evidence of the appellant (which had not been considerably challenged) is truthful, the investigating officer's evidence as to the video-footage and fingerprints must be false. Counsel contended that the appeal should therefore succeed and the appellants be released on bail.

## 3 Judgment

The court did not agree with the approach of the magistrate and indicated that section 65(4) of the Criminal Procedure Act compelled the court to reach another decision. The court held that the submission by defence counsel that the appellants should be released on bail cannot be summarily accepted. In the circumstances the refusal by the prosecutor to make available the video-footage does not necessarily mean that the investigating officer gave false evidence concerning the footage. The court held that section 60(10) of the Criminal Procedure Act

directed the court to be more proactive and the decision in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC) bade the court play a more inquisitorial role. A reasonable court should have realised that it lacked reliable and important information necessary to reach a decision. The court was therefore obliged in terms of section 60(3) of the Criminal Procedure Act to order that the video-footage and fingerprint statements linking the appellants to the crime be made available to the defence. It does not matter that an order denying access to the footage was made earlier as the decision was interlocutory and subject to revision in light of subsequent events.

No order as to bail was made and the State was ordered to make available the video-footage and fingerprint statements linking the appellants to the crime.

## 4 Discussion

Section 60(14) of the Criminal Procedure Act provides as follows:

> "Notwithstanding anything to the contrary contained in any law, 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 a police official charged with the investigation in question, unless the prosecutor otherwise directs. 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 trail."

In this case, as in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* it was not argued by the appellants that section 60(14) of the Criminal Procedure Act had to comply with section 32 of the Constitution, 1996 or, if in violation of section 32, had to be saved by section 36.

This is presumably because of the conceptual wall that has been erected by the Constitutional Court between sections 11 and 25 of the interim Constitution and sections 12 and 35 of the Constitution, 1996 (see *inter alia Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) and *De Lange v Smuts NO* 1998 3 SA 785 (CC)). Following the argument in these cases it seems that there will be a similar barrier between sections 32 and 35 of the Constitution. The Constitutional Court in *Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593 (CC) on the same reasoning decided to judge the right to information at trial in context of the right to a fair trial and not on the basis of section 23 of the interim Constitution which provided for access to information.

Section 32 of the 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.
>
> (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."

The Promotion of Access to Information Act 2 of 2000 came into effect on 9 March 2001. Section 11(1)(b) of the Act provides that access to requested material must only be given in terms of the Act if access is not refused in Chapter 4. Chapter 4, by way of section 39(1)(a), read with section 33(1)(a), specifically refuses access, if access is prohibited by section 60(14) of the Criminal Procedure Act.

Based on the abovementioned, an accused can therefore not rely on sections 12 (see *inter alia Ferreira* and *De Lange*) or 32 of the Constitution (on the same argument) to gain access to the police docket for purposes of a bail application. Also, access is specifically denied by section 60(14) of the Criminal Procedure Act and The Promotion of Access to Information Act read with section 60(14).

Notwithstanding the wording of section 60(14), the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* held that section 60(14) does not sanction an absolute denial and ordered the veil to be lifted to give an applicant falling under section 60(11)(a) a "reasonable opportunity" (see the wording of section 60(11)(a)) to prove exceptional circumstances. Although section 60(14) was under discussion it seems that an applicant under section 60(11)(b) may also be so entitled if circumstances were such that the information was necessary to afford such an applicant a "reasonable opportunity" (see the wording of section 60(11)(b)). What was or was not a reasonable opportunity depended on the facts of the case.

In 2004 the Supreme Court of Appeal again confirmed that the weakness of the State's case may constitute exceptional circumstances for purposes of section 60(11)(a) (*S v Van Wyk* 2005 1 SACR 41 (SCA)). The court explained that the function of the court in a bail application is to *prima facie* establish the relative strength of the State's case and not to make a preliminary finding of guilty or not guilty.

Notwithstanding the wording of section 60(14), the Supreme Court of Appeal in the case under discussion held that the magistrate was obliged in terms of section 60(3) of the Criminal Procedure Act to order that the video-footage and fingerprint statements linking the appellants to the crime be made available to the defence because the court lacked reliable and important information to reach a decision.

However, having regard to the introductory part of section 60(14) "[n]otwithstanding anything to the contrary contained in any law", and in light of the clear prohibition, section 60(14) arguably does not allow the court discretion to grant access to the State documents for purposes of the bail hearing for any purpose delineated in the Criminal Procedure Act or any other Act (except the Constitution). Only the prosecutor may direct otherwise.

Once again the unfortunate drafting of section 35 of the Constitution and the conceptual wall erected by the Constitutional Court between criminal procedure rights and other rights in the Constitution creates tremendous problems. Section 35 does not provide for the right to a fair procedure during the bail application. Section 35(3) only provides for fairness during the trial. Because of this conceptual wall, section 60(14) cannot be tested against section 12 which should act as a residual due process right and section 32 which provides for the right to information. The legislature can therefore, as in section 60(14), deny an accused the right to access to the contents in the police docket for purposes of the bail application under any circumstances.

Sections 12 and 32 of the Constitution should apply when application is made for bail. In this way the legislature would have to abide by the Constitution's aspirations to protect the freedom and security of a person applying for bail and comply with the legal culture of transparency and accountability articulated in the Constitution.

The results of the investigation in possession of the prosecution is the property of the public to be used to ensure that justice is done. If justice requires that the contents of the docket be made available at the bail hearing, the presiding officer should have the discretion to make such an order. The decision whether to afford access to the police docket should not be with the State, the party involved in a *lis* with the accused. In a constitutional dispensation the courts are the protectors of the rights of the individual.

However, the interests of justice also dictate that the State should be given a reasonable opportunity to investigate the merits of the case. Whilst agreeing that there may be exceptions, the contents of the State docket should only be made available at the earliest moment after the merits have been adequately investigated.

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