REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE №: CC56/2020
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
Date: 14 April 2023

In the matter between:

CHRISNA VAN DER MERWE	**APPLICANT**
V	
NATIONAL PROSECUTING AUTHORITY (As Duly Represented by the Prosecutor)	**1st RESPONDENT**
SAPS	**2nd RESPONDENT**

Heard : **24 MARCH 2023**
Delivered : **14 April 2023 by circulation to the parties' legal representatives**
Coram : **PILLAY AJ**

JUDGMENT

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[1] Ms. van der Merwe is arraigned in the High Court Polokwane on the charges of Murder and Theft.

The first allegation is that the Accused on 11 December 2018 committed an act of murder by unlawfully and intentionally killing her husband Mr Botes van der Merwe.

The second allegation is that on the 21 December 2018 the Accused stole R141000,00 (One Hundred and Forty-One Thousand Rand) the property of Botes van der Merwe and or Botes Hunting Safaris.

The accused pleaded not guilty. She denied the allegations against her in respect of both charges and raised the Defence of amnesia in respect of the incidents prior to and after the circumstances leading up to her arrest. The proceedings is part heard with 3 witnesses having testified for the State.

[2] During the course of the trial the accused brought an application seeking a Court order, for the following relief:

> 2.1 That the 1st and 2nd respondents being the NPA and the SAPS, be ordered to allow the applicant and her legal team including experts duly appointed by the applicant supervised access to any and all ballistic evidence, including but not limited to the bench notes of the 1st and/or 2nd respondents in their direct or indirect possession and or control and also to all the attendance registers and any other related documentary evidence used in the evaluation of the ballistic material.
>
> 2.2 The 1st and 2nd respondents be ordered to allow the applicant and her legal team including experts duly appointed by the applicant copies of any and all patient files, any and all related observations notes and or any related documentary evidence, source documents (written, visual, medical results) of any kind and or tests and the results thereof regarding the evaluation previously done on the applicant in terms of S77,78 and 79 of Act 51/1977.

[3] The application is opposed by the State. The Court requested that the State and the Defence, provide the Court with written heads of argument dealing specifically with the arguments for and against granting the application.

[4] The applicant's heads of argument briefly are as follows:

4.1 The offence of premeditated murder attracts to it the provisions of section 51 (1) part 1 of Schedule 2 of Act 105/1997 as amended. It is paramount that any and all relevant information to assist the Court in reaching a just conclusion be brought to the attention of the Court for due consideration. That includes the above-mentioned information being sought to assist the Defence in its proper preparation of the matter.

4.2 The documents and information required relates to the core of the applicants Defence as set out in her S115 plea explanation. It's paramount importance in the current trial against her that she has access and insight into such documents.

4.3 The obtaining of this information was ultimately ensure that the matter continue without any further delays and interruptions as the part heard case is postponed to September and October 2023.

4.4 The 1st and 2nd respondents rely on privileged information and or part C of the docket been the investigation diary. The applicant relies on the constitutional right to a fair trial, regard being had to the facts of the specific matter. Initially the State had no objection at least to the first order sought now has turned 180° change of mind for unknown reasons.

4.5 The applicant will not be successful in securing the information via requests from the 1st and 2nd respondents as the previous requests have fallen on deaf ears and justification for a Court order.

4.6 S 227(2) of CPA provides that only a Court can determine the relevance of these documents and whether they should be admitted or excluded as evidence as the Court is *dominus litis* once the plea stadium is completed.

4.7 The respondents have total disregard for the constitutional rights of the applicant as guaranteed in section 35 of the Constitution.

4.8 The prosecution is abusing the process by seeking reliance on the case of **State v Shabalala(CC).** This case affords the respondent absolutely no legal justification to deny the applicant her prayers. The respondent's dilatory tactics to frustrate the applicant in properly affording the applicant the opportunity to validate the allegations and alleged evidence against her from the respondents cannot be tolerated in the interest of justice. The vital issues relevant to the trial and evidence to be presented by Defence and possible S174 application could very likely be forthcoming with the experts of the Defence evaluating the information requested. The State should not have an unfair advantage in light of the applicant's issue of pathological or non -pathological amnesia.

4.9 The respondents seek to avoid possible inadequacies being exposed by the Defence.

4.10 The information sought by the applicant is not unwarranted, ill-founded or misplaced. It is the cause of action directly linked to the Defence case which the applicant intends perusing. The respondents have in their possession specific and specified documents and information which constitutes vital evidence in substantiation of the applicants Defence and therefore essentially of great importance and absolutely necessary.

4.11 The inspection of the aforesaid information, can be done under the supervision of the respondent's, and for the benefit of the Court joint minutes in respect of the expert reports. By denying the information the respondents are defeating the purpose of accessing information in the respondent's possession and preventing the applicant from using the damning evidence against the version of the State. Ultimately it is for the court to scrutinize any information

and the evidence placed before it and by the respondents unilaterally refusing for this information to be accessed is premature.

4.12 In terms of the Constitution an accused person should be afforded the opportunity to properly prepare their Defence. The balance of convenience favoured the applicant and the applicant has no alternative remedy available to her. In view of the evidence before court the applicant is not merely on a fishing expedition. It is a fact that the respondent might have knowledge of crucial evidence which might support and even corroborate the applicant in her case, it would be grossly unfair not to have access to this information.

4.13 The respondent opposed the application on an extremely emotionally laden ground. The trial should be approached on an equitable basis for justice to be done. If one assumes for one moment the allegations and or test results in the ballistics and or the pathological evidence by the State against the applicant may have untrustworthy results and or could even be false, then it is highly likely that justice dictates an order by Court. The applicant may find indications in the information sought which may support the applicant in the Defence against the serious charge. The potential detriment to be suffered by the applicant greatly outweighs any possibility of damage which the respondent might possibly suffer. The order sought gives the applicant her best opportunity to advance her Defence against a total onslaught coming from the mighty machinery of the State against an individual.

4.14 The applicant's fundamental human right to a fair trial might be hindered by the refusal as the applicant may have to postponed the matter on various occasions to scrutinize the information provided which needs further investigation.

4.15 The bona fides of the applicant in seeking to compel proper discovery can therefore not be questionable. In denying the applicant's entitlement to proper discovery based on some sort of frivolous argument. The mere fact that the 1st respondent did cooperate to some extent in providing disclosure to the

case docket that does not exclude the applicant from the order compelling proper and specific discovery in accordance with the prayers sought.

4.16 The right to information remains relevant and must be read together with the right to a fair trial which the applicant is entitled to. Based on the prosecutorial duty to disclose on the right to a fair trial is the preferable course as it sets the ambit of the duty clearly within the confines of the right to a fair trial.

[5] The applicant filed supplementary heads of argument raising the following points:

5.1 The applicant disputes the allegation of the open ended manner in which these applications are framed. The applicant indicated that it is the prerogative of the Court to couch the final Court order regarding disclosure as prayed by the applicant in a manner and within the parameters to be exclusively determined by the Court. The 1st respondent's argument have no merit.

5.2 The reliance on the Shabalala case by the respondent is misplaced. It is a well-known principle in criminal law litigation that there exists a huge difference between access to docket as envisioned in the Shabalala case on the one hand and proper disclosure of all relevant facts and information for the purpose of a fair hearing in accordance with section 35 of the Constitution. The applicant is entitled in terms of the Constitution not only to the contents of the police docket but also to any other relevant source information for a fair hearing. This is especially true in the instance where the final intellectual product vis a vie the expert report filed by the State, but not the source information.

5.3 The 1st respondent as an officer of the Court must disclose much more information to the Court and the Defence even that which is beneficial to the Defence. It is an obligation on the 1st respondent in view of the plea explanation by the applicant.

5.4 The respondent's argument based on paragraph 37 of the Shabalala decision in support of the applicant's version suggesting a minimum entitlement and not the upper end of the benchmark. The applicant reiterates that this is an exceptional criminal matter.

5.5 The applicant disputes that cross-examination of the expert witness would have baring without the source documents which formed the basis of the report. It argued that experts on both sides should have access to the relevant documents requested. This could ultimately prove that the same conclusion reached by the expert is not disputed curtailing unnecessary challenging of the evidence.

5.6 The applicant disputes that section 87 of the criminal procedure act 51 of 1977 as amended is applicable instead argues further disclosure which differs from S 87of the Criminal Procedure Act 51 of 1977. There is no principle in the Criminal Procedure Act which justify the State to refuse essential information simply because the provisions thereof will or could disclose evidence that could benefit the applicant.

5.7 The reliance by the respondents in respect of the case of NDPP v King deals with section 87 and is improper and ill-founded.

5.8 The applicant reiterates the highest standards expected of the 1st respondent and the duty on the 1st respondent to ensure ascertaining the truth and not the conviction.

5.9 The applicant is specific to what it seeks namely the documents in addition to the bench notes and the documents as highlighted in prayers 1 and 2 of the draft order is requested. That the application be granted as prayed for by the Defence. The applicant attached a pro forma document to the supplementary heads of argument indicating that the said document would have been completed by the officials of the 2nd respondent during the investigation and compiling of the ballistic report and this was part of the information being sought by the Defence.

[6] The respondents filed written heads of argument and supplementary heads of argument. In short the respondent argued;

6.1. The Shabalala case remains relevant to the application as the entire application is premised on the notion of access to information in direct or indirect possession of the respondents and is the right of the applicant to same based on the right to a fair trial.

6.2. The applicant was furnished with a complete copy of the relevant docket the report of the experts has already been disclosed. These source documents that are sought are not contained in the police docket and access to such information is not justified for purposes of a fair trial.

6.3. The applicant can counter the evidence of the respondents by calling their own experts to testify which is over and above the right to cross-examine the evidence for the respondents.

6.4. The applicants motive as revealed, is to expose any possible inadequacies in the respondent's evidence.

6.5. The applicant seeks access to the bench notes and the unspecified documents before she could conduct her own assessment and ballistic report, thus seeking inadequacies in the respondent's version.

[7] The supplementary heads maintained the following:

7.1 The Shabalala case has baring to the right to information and fair trial rights as contained in S35 of the Constitution.

7.2 The reference to the Case Law dealing with S87of Act 51 of 1977 as amended is not misplaced as it deals specifically to how Courts attend to the question of access to information beyond what was provided. The relevant separate provisions determine whether the accused has sufficient information

regarding the charge, in order to prepare and challenge evidence against the accused.

7.3 Reliance of the applicant on PAIA is not applicable.

7.4 The applicant was unable to show why she is not able to prepare her Defence on the information provided. The applicant failed to ventilate why an expert who is seeking to express an opinion, is seeking first to see how the opponent reached its conclusion, which is a fishing trip, looking for loopholes in the system.

7.5 Nothing stops the applicant from obtaining her own expert report, the information contained in the ballistic report has nothing to do with the plea explanation and the amnesia Defence is not a Defence in law. The applicant is entitled to produce evidence to the contrary in respect of both issues.

7.6 Application must be dismissed as it lacks merit.

The cases cited by both parties were considered in respect of this application as well as the arguments raised by both sides on the occasions that the application was argued before Court.

THE APPLICABLE LAW:

[8] **Section 35** of the Constitution provides:

35. (1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent;

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a Court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first Court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary Court hours or on a day which is not an ordinary Court day;

(e) at the first Court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly

(c) to have a legal practitioner assigned to the detained person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a Court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a Defence;

(c) to a public trial before an ordinary Court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher Court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[9] **Section 36** of the Constitution provides**;**

> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.
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> Regard was had to the relevant provisions of the Criminal Procedure Act 51 of 1977 as amended and Case Law.

[10] The applicant has indicated that she relies on the Constitution with specific reference to Section 35 as grounds for the Court to grant her application as sought in respect of the documents that the State must make available for her to be in a position to properly defend herself in respect of the charges.

[11] In response the State indicated that Section 87 of the Criminal Procedure Act 51 of 1977 as amended sets out the provisions for further particulars and the case of Shabalala further expanded the rights to a fair trial as envisioned in Section 35 of the Constitution when considering the information required to be disclosed by the State to the Defence at trial.

[12] Regard was had to the case of ***Shabalala v The Attorney General of the Transvaal and Another***[1] where the Court noted:

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[1] 1996(1) SA 725 CC paragraph 55

"Even where the State has satisfied the Court that there is a reasonable risk that the disclosure of the Statements or documents sought might impair the protection and the concerns referred to in items 1 or 2 of paragraph 40 above or in any way impede the proper ends of justice, it does not follow that access to such Statements in such circumstances must necessarily be denied to the accused.

The Court still retains a discretion. There may be circumstances where the non-disclosure of such Statements might carry a reasonable risk that the accused may not receive a fair trial and might even wrongly be convicted. The Court should exercise a proper discretion in such cases by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What is essentially involved is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts pendente lite."

[13] The Constitutional Court has held in Shabalala that, the 'blanket' docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of Rights.[2]Accordingly, litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the Defence.[3]This means that an accused is entitled to the content in the docket 'relevant' for the exercise or protection of that right. The entitlement is not restricted to Statements of witnesses or exhibits but extends to all documents that might be 'important for an accused to properly 'adduce and challenge evidence' to ensure a fair trial'.[4]

[14] In the case of ***National Director of Public Prosecutions v King***[5] Nugent JA remarked:

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[2] *Shabalala* para 72 A2.
[3] *Shabalala* para 72 A3-A5.
[4] *Shabalala* para 57.
[5] *National Director of Public Prosecutions v King [2010] ZASCA 8 (8 March 2010) paragraph 58*

> *"I do not think that s 35(3) goes that far. In its terms it entitles Mr King to be tried fairly in fact. It does not entitle him to be satisfied that the trial will be fair. If he were able to show in advance that his trial will not be fair it might be that a Court will grant him appropriate relief. But the prosecution is not called upon to satisfy an accused person that his trial will be fair as a precondition to prosecuting If that were to be required as a precondition for a trial it seems to me that there might be few criminal trials at all."*

This case dealt with the right of an accused to information contained in parts B and C of the docket. The accused sought in terms of the Constitution, a list of all the documents in the possession of the prosecution, together with an explanation in respect of each document for why it has not been disclosed. The SCA highlighted that Section 35 of the Constitution entitled an accused to a fair trial but this did not extend to what was already considered and approved in Shabalala when dealing with disclosure of the contents of the docket. The SCA also considered the issue of PAIA and the provisions of Section 32(1) of the Constitution. Section 7 of the PAIA excludes its operation from records required for criminal or civil proceedings, which were in the process of being litigated.

[15] In the unreported case of ***Steven McGregor v The Regional Court Magistrate Ms B. Asmal N.O. and Another***[6] Swain J dealing with a review application for the stay of the prosecution of the applicant noted the following concerning the issue of non- disclosure of chain Statements and the eventual blood analysis report in the current rape trial, where the questioned turned on the alleged presence of a date drug and whether the blood was that of the complainant. The Court noted the following:

> *"I do not regard the lack of the evidence requested as a serious impediment to the applicant's preparations for trial. The applicant would be able, even in the absence of the evidence, to obtain expert advice on the scientific process, or methodology necessary to analyse a blood sample to detect the drug in question in a reliable manner, as well as the necessary qualifications of the*

[6] *Case No. 11224/11KZN (Pietermaritzburg)*

individual carrying out such a test. In addition, expert evidence could be obtained as to the proper steps to be taken to preserve the blood sample, as well as the correct manner in which to seal the sample. Again, any prejudice experienced by the applicant in this regard during the course of the trial, would have to be assessed by the trial Court, as and when it may arise within the context of the evidence led at the time."

The application was subsequently dismissed.

[16] Concerning this application, the Defence seeks all the information leading up to and preparation in respect of the findings made in the Ballistic reports and the (Section 77/78 of Act 51 of 1977) mental observation report in terms of.

The Defence claim that such information is crucial and relevant to properly empower the Defence to prepare and secure the necessary reports by the accused experts, since the basis of the findings made by the State, will need to be known by the Defence, before they can do their own investigation and findings.

[17] The State in response to this application highlighted that the reports have been provided to the Defence in compliance with the case of Shabalala where all the relevant information and Statements relied upon by the State were disclosed and as such there was no further duty on the State to provide more information especially as same did not form part of the docket and was not relied on by the State in proving their case.

[18] The Ballistic report affidavit in terms of S 212 Act 51 of 1977 (affidavit in respect of the ballistic report) is prima facia proof of the relevant qualifications, experience skill, process and findings made by the police official in his capacity and during the course and scope of his employment. Once disputed and at the relevant time during cross examination that evidence can be tested and discredited, if found not to comply with the relevant provisions of the Criminal Procedure Act 51 of 1977.

The Defence made reference to S 227(2) which provides that only a Court can determine the relevance of these documents and whether they should be admitted or

excluded as evidence as the Court is dominus litis once the plea stage is completed. I had regard to S227(2) of Act 51 of 1977 as amended which deals with character evidence with specific reference to the Sexual Offences Act 32 of 2007 as amended.

Section 227(2) only allows evidence of the sexual experience of the complainant to be admitted with the leave of the Court if it is satisfied that such questioning is relevant. It is accepted that ultimately it is for a Court to determine the relevance of evidence tendered and the weight to be attached to same, in Criminal proceedings, the State is dominus litis in prosecuting an accused person throughout the trial proceedings.

[19] The Defence allege potential, possible inaccuracies which may be to the accused benefit if the bench documents and preparation notes are disclosed. There is no real allegation that these irregularities exist and if exposed would be of value to the Defence. The applicant did not take the Court into her confidence as to the need and relevance of the various registers which were sought and the purpose of seeking such information. All the Defence has argued and relied upon is speculative, potential issues and not real prejudices which were found to be present in the disclosure already provided to the Defence. It is uncertain at this stage in the proceedings whether the chain evidence in respect of the ballistic report and the ballistic report itself, have discrepancies pertaining to the seal numbers or the handling of the exhibits. The applicant did not highlight that this is the issue and thus the need for the source documents.

[20] The Defence has made bald allegations concerning the 1st respondent having knowledge of unknown irregularities and not disclosing them, whilst there is a duty on the 1st respondent to do so. This was submitted in the heads of argument without any corroboration of these serious allegations. To strengthen this perception, the 1st respondent is accused of failing in his duty as an officer of the Court to make available this pertinent information which would benefit the accused. This creates doubts in the mind of the Court in respect to the conduct of the 1st Respondent which has no factual basis as again its allegations of potential misconduct without any corroboration.

[21] The reports were compiled in terms of the provisions of the Criminal Procedure Act 51 of 1977 as amended. The applicant failed to motivate why it was necessary at

this stage in the proceeding to delve into the unknown to investigate the foundational documents, bench notes and relevant registers so as to test the veracity of the truth of such expert report. It is unknown to the Court whether these reports are not compliant with the provisions of the Criminal Procedure Act 51 of 1977 as amended and or if the chain evidence is missing.

[22] The Defence argued that they intended obtaining their expert reports but needed the source documents to determine if there were any ‘inadequacies’ found in the reports. In response the State highlighted that it was the so called ‘inadequacies’ that was being sought and nothing else. The technical challenge of the expert evidence, rather than the merit of the case. The State submitted that nothing prevented these experts from doing their own investigation by examining the exhibits and compiling their report free from any ancillary information which was not required to compile such expert report.

The State argued that once the Defence compiled the report, it could be compare with the S212 affidavit and the report compiled in terms of Section 79 of the Criminal Procedure Act.51 of 1977 as amended.

It is during cross examination that the Defence would have their opportunity to test the evidence and the expert for the accused could be present to help test the findings and credibility of the expert witnesses testifying for the State.

The Defence argued that a joint minute could be compiled to assist the Court, however unlike Civil proceedings, joint minutes would not feature. If the expert finding by the applicant is made, if it is aligned with the S212 affidavit in respect of the ballistic report, then possibly the need for extensive cross examination may be avoided, but this too would feature at the relevant stage of the trial proceedings.

[23] The accused has pleaded not guilty to the charges and denied the allegations against her, placing the onus squarely on the State to prove its case against the accused beyond reasonable doubt. I align myself to the case of Steven McGregor where the Court found that the onus remained with the State to secure a conviction and there was nothing hampering the accused from being in a position to defend

himself in respect of the charge, without the information sought. The applicant relied on the aspect of possible irregularities or false distorting of the evidence to warrant the success of the need for the source documents, but this is speculative and not supported by any evidence for the conclusion to be drawn of a conspiracy to falsely implicate the applicant.

[24] Regard was had to the Constitutional provisions of Section 36 in respect of the application concerning the information sought by the accused. The accused's rights as envisioned in Section 35(3) of the Constitution have limitations. The limitations on Section 35 would be relevant where the interests of society would outweigh that of an accused person when considering the prejudice to be suffered if the application was refused. The relevant aspect being whether the refusal of the application would hinder the Defence from being in a position to properly present its rebuttal and response to the State's version. When weighing up the reasonableness of the limitation the Court weighed up the accused's constitutional right provided in Section 35 with that of society and the limitations provided for in Section 36 of the Constitution. I am satisfied that the applicant failed to establish the relevance of these documents in so far as the Defence raised and that the provisions of Section 35 grants an accused the right to be informed sufficiently to defend herself, however the information sought cast the net too wide, beyond what is necessary to prepare her Defence to the charges against her.

[25] The accused is in a position to properly defend herself against the allegations armed with the disclosure provided to her by the State. The application for these documents is not warranted nor does the refusal to provide same infringe on the accused's constitutional premise fair trial right procedure. Access to this information is not just for the granting on account of it being sought in terms of Section 35.

[26] The duty still rests with the State to prove the elements of the offence of murder and the theft charge which includes the witness Statements, chain evidence, ballistic reports and the findings made during the observation of the accused in terms of S77 and or S78 of Act 51 of 1977 as amended. The Defence raised by the accused does not shift the onus from the State and a Court must be weary to grant an application based on possible, hypothetical, potential irregularities and innuendo without a more tangible basis for why the relief sought should be granted.

[27] Having taken all the aspects into consideration, all the written heads of argument and the address by the State and Defence, the Court orders as follows:

The Application by the Defence is dismissed.

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K.L. PILLAY
Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES:

HEARD ON : 24 MARCH 2023

JUDGMENT DELIVERED ON: 14 APRIL 2023. This judgment was handed down electronically by circulation to the a parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **14 April 2023** at **13:00**

FOR THE STATE: ADV. N. MUNYAI
INSTRUCTED BY: THE NATIONAL PROSECUTING AUTHORITY

FOR THE ACCUSED: DR. L. CURLEWIS
INSTRUCTED BY: CLARKE & VAN ECK ATTORNEYS