REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC08/2018

In the matter between:

THE STATE

And

ELTON LENTING AND 19 OTHERS ACCUSED

JUDGMENT – 24 July 2023

LEKHULENI J

[1] The twenty accused in this case are facing a slew of charges totalling 145. The State has brought applications in terms of sections 158(2)(b) and 153(2)(b), of the Criminal Procedure Act 51 of 1977 ("the CPA") in which it seeks an order that the witness it intends calling testify behind closed doors through a closed-circuit television and that her identity should not be disclosed to the public. The relevant counts in these applications are count 124 to 126. These counts involve a charge of Housebreaking

with intent to commit Murder and Murder, Possession of Unlicensed Firearm, and Possession of Ammunition. These counts implicate accused 1, 2, 3, and 9. At the hearing of these applications, Mr De Villiers, who appears on behalf of accused 1, 2, and 3, informed the court that his clients do not oppose the applications. However, Mr Badenhorst, who appeared on behalf of accused 9, opposed the State's applications.

[2] Mr Damon, who appeared on behalf of the State, sought an order that the identity of the witness he intended to call in respect of the abovementioned counts be anonymous in respect of the proceedings in court in terms of section 153(2)(b) of the CPA. The State also sought an order that the said witness's identity should not be revealed or published and that the witness's evidence be rendered in camera in terms of section 153(2)(a) of the CPA. In addition, the State sought an order that a closed-circuit television or similar electronic media be used for the said witness's evidence in terms of section 158(2) of the CPA.

[3] Counsel for the State, tendered oral submissions and further handed in an expert report of a Clinical Psychologist, ("Colonel Clark") who assessed the witness in question. The State also submitted an affidavit of the investigating officer supporting these applications.

[4] In her report, Colonel Clark notes that the said witness appears to be suffering from anxiety. The witness reported experiencing symptoms of a panic attack when she recounted the crime she witnessed. Colonel Clark's report indicates that the witness experiences heart palpitations and difficulty in breathing when she is under emotional stress. She feels as though there is a weight on her chest and shakes. Colonel Clark further reported that the witness evinced symptoms of Post-Traumatic Stress Disorder ("PTSD") and was visibly distressed by the events she had witnessed. In her expert

opinion, there is a possibility that this witness may experience further trauma if she testifies in the presence of the accused. She recommended that the witnesses testify in camera through a closed circuit television.

[5] Her sentiments were shared by the investigating officer, Sergeant Van Wyk. The investigation officer alluded to the fact that the specific witness, has since the incident, obtained permanent employment. The witness's personal circumstances have significantly changed since the incident in that she has become a parent with a stable environment. The witness is also currently in the early stages of pregnancy, which will make the process of testifying in court more traumatic and intense for her. The investigating officer also notes that the witness is terrified that her identity will become known and that this will have severe security implications and consequences for her and her minor children if made known.

[6] Accused 9, on the other hand, also tendered oral submission through his counsel in opposition to the State's application and also deposed to an affidavit in which he set out reasons why he opposed the application. Accused 9 contends that he is entitled to a public hearing in an open court in terms of section 35(3)(c) of the Constitution and that he stands accused of charges of murder that he did not commit. Wherefore, he has a right to see the witness present in court so that her demeanour can be observed when his legal representative cross-examines her. Accused 9 avers in his affidavit that he did not see the room where the witness would be testifying from, nor is he certain that the witness would testify spontaneously without reading from a document. During consultation, his legal representative showed him the statement where the names of the witness in question appear at the top of the statement. For

this reason, he contends that it serves no purpose that the relief the State is seeking be granted.

Submissions by the Parties

[7] At hearing of this application, Mr Damon submitted that the witness feels intimidated and would suffer harm as tension would rise if she testifies in the presence of the accused. He impressed upon the court to grant the orders as prayed. Mr Badenhorst, on the other hand, submitted that this court should be hesitant when exercising its discretion in limiting an accused's right. Counsel argued that the court should not adopt an approach of allowing applications of this nature as a general rule, but instead in very exceptional circumstances, while still having regard to the well-known case of *S v Staggie and Another* 2003 (1) SACR 232 (C) which the Supreme Court of Appeal approved.

[8] Mr Badenhorst further submitted that the application in this matter is distinguishable from the case of *Staggie* in that the witness in *Staggie* was a complainant in a rape matter, in which case the court would be more inclined to grant an application if it is merited. Counsel stated that there is no reason why the complainant cannot testify as an ordinary witness in open court. Counsel contended that in the present matter, the court should take into consideration the fact that the witness is known to the accused; she is 32 years old and was 25 years old at the time of the murder; that the witness has passed grade 12 and that at the time of the alleged incident, the witness was involved in a relationship (for 8 years) with the deceased who was a member of the 28 gang.

[9] Furthermore, the argument was that allowing the witness to testify behind closed doors would make the trial unfair and not serve the interest of justice or the public, including the family members of the accused. The advantage of cross-examining the witness when in court, counsel argued, has a distinguished advantage for the defence and should not be readily denied.

Relevant Legal Principles and Discussion

[10] Section 153 and 158 complement each other, and for the sake of completeness, I will consider the State's applications in terms of two sections jointly. The relevant parts of section 153 provide as follows;

(1) In addition to the provisions of section 63(5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.
(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct—
(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

[11] Meanwhile, the relevant parts of section 158 provide as follows:

(2) *(a)* A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
3 …

(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

[12] It is trite that trial proceedings should be held in open court unless there are compelling reasons to close the court doors for the public and the media. Our court system is based on the open justice principle, which is constitutionally entrenched in section 35(3)(c) of the Constitution. This section provides that everyone has a right to a fair trial, which includes a right to a public trial before an ordinary court. The right to a fair public hearing entrenched in the Constitution guards against the iniquities of secret trials and contributes to public confidence in the justice system. *Klink v Regional Court Magistrate NO* 1996 (3) BCLR 402 (SE). It underscores the well-established principle of our law that justice must not only be done but manifestly be seen to be done.

[13] Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. *S v Mokoena; S v Phaswane* 2008 (2) SACR 216 (T). However, this right is not absolute. Like other rights in Chapter 2 of the Constitution, it may be limited in terms of section 36. Depending on the circumstances, the court may direct that the proceedings be held behind closed doors if the interests of justice so demand.

[14] Section 153 expressly allows the courts, in exceptional cases, to exclude the public or certain members or categories of people from attending the proceedings. Section 158 on the other hand, allows witnesses to not testify directly in courtrooms

for a variety of reasons. Section 158(3) empowers a Court to allow for the giving of evidence through a closed-circuit television or other electronic means if the facilities are available. Section 153 of the CPA, is therefore intended to protect vulnerable witnesses from public exposure, either because disclosure of their identity may endanger their lives or safety or because of the discomfort or embarrassment at having to testify before an audience.

[15] Where the accused's right to a fair trial (in the form of the right to a public hearing) is at odds with the provisions of sections 153 and 158, a court must ensure that the proceedings before it is fair and must strike a balance between those competing rights and determine what is in the interest of justice. In resolving this conflict, the Court must protect those interests which, on the facts of the case, weigh in favour of the proper administration of justice. Crucially, an equitable and unbiased criminal justice system can only be achieved if the rights of victims, witnesses, and accused persons are recognised, protected, and balanced.

[16] The Constitutional Court observed in *S v Jaipal* 2005 (1) SACR 215 (CC) at para 29, that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.

[17] I also find the dictum of Cloete JP, as he then was, in *S v Madlavu and Others* 1978 (4) SA 218 (E) at 225G - 226A, apposite. The learned justice stated as follows:

'It seems to me that the administration of justice is made impossible unless witnesses can give their evidence without fear of repercussions and danger to themselves. It is of paramount importance that the Courts should, wherever possible, give such witnesses the protection which the law allows. Such protection is provided for in ss (2) of s 153.'

[18] In many instances, sections 153 and 158 have been invoked in sexual offences cases as well as in cases involving minor children. However, I must stress that the application of these sections is not exclusively limited to child witnesses / offenders and sexual offences cases. These sections apply with equal force to adult witnesses whose evidence is likely to be compromised by fear or distress about testifying in an open court or in the accused's presence. In *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) para 115, within the context of section 170A of the CPA, the Constitutional Court held that these measures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all. In my view, this dictum applies with equal force regarding sections 153 and 158 of the CPA.

[19] In the present matter, it was argued on behalf of the accused that the court should not be readily inclined to grant the application as this is not a sexual offences matter and is distinguishable from *S v Staggie* because there, the court was faced with a sexual offence matter. Counsel for the accused further argued that the witness, in this case, had passed grade 12 and that there are 9 to 10 members of the Tactical Response Team in this court to protect the witness.

[20] This argument, with respect, is fundamentally flawed. As discussed above, this court has a discretion to dispense with the basic rule of hearing a matter in open court if satisfied that the prescribed jurisdictional facts set out in these sections are present and that there is a likelihood that harm may result if the witness testifies in open court. More so, section 12(1)(c) of the Constitution guarantees a person's right to freedom and security, while section 12(1)(e) underscores the need for a person not to be treated inhumanly or degradingly.

[21] During argument, the defence relied on the decision of the Constitutional Court of *S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae; S v O' Connell and Others* 2007 (2) SACR 28 (CC) where the Constitutional Court had to consider the constitutionality of section 309(3A), 309C(4)(c) and 309C(5)(a) of the CPA governing the rights of the accused persons convicted in the Magistrates Court to appeal to the High Court against their conviction or sentence. In *S v Shinga,* it was held that section 309(3A) provided for an appeal to be disposed of in chambers without oral argument. The court found that closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based. The court concluded that this section was inconsistent with the right of an accused person to a fair trial as appeals are to be held in open court. Relying on this case, the defence argued that the court should not be easily inclined to grant the State's applications.

[22] In my opinion, the present matter, is distinguishable to that of *S v Shinga.* The court in *Shinga* dealt with some sections of the CPA that endorsed the hearing of appeals in chambers as opposed to hearing them in open court. In the present matter,

the proceedings will only be held behind closed doors or through a closed circuit television after the court has weighed all the competing rights of the parties and determined what would be fair and just in the circumstances.

[23] Undoubtedly, it would be detrimental to the principles of fairness and justice to force an adult witness who is afraid of the accused to testify in open court where she may experience anxiety while recounting what she saw during the commission of the alleged crime. To expose such a witness to aggressive cross-examination by the accused in this circumstance, would not be in line with proper administration of justice. In my view, such an approach will have a deleterious effect on the witness and expose her to secondary trauma. Similarly, such an approach would conflict with the tenets and the values espoused in the Constitution.

[24] Crucially, the various charges levelled against the accused in the present matter are gang related. The accused have been charged in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998. This court cannot simply ignore the witness's fears of danger to her life and family.

[25] As adumbrated above, the State has applied that the said witness be allowed to testify in camera, through a close circuit television, and that her identity should not be disclosed. The court was informed that the witness fears for her life and exhibits symptoms of PSTD when discussing the incident. The defence, on the other hand, has submitted that the witness is known to the accused and that during consultation, the accused perused the witness's statement, and the names of the witness in

question appear at the top of the statement. For this reason, so the contention proceeded, the application must be dismissed.

[26] I have some difficulty with this argument. It must be stressed that the protection envisaged in sections 153 and 158 is not only aimed at protecting a witness, but ensures that the evidence that is given to the court is not reduced and diminished in quality because of the witness's fear or distress in testifying in an open court or in the presence of the accused. The protection ensures that the witness gives his evidence in a more coherent and relaxed manner. In other words, the protection is intended to ensure that the court obtains a full and candid account from the witness of the acts complained of. To this end, I agree with the views expressed by Mr Damon that the essence of the protection is crucial for ensuring that witnesses feel at ease and can provide reliable evidence to the court to enable the court to make a finding as to the reliability of the evidence that the witness is giving.

[27] Importantly, if the court were to accept the argument proffered by Mr Badenhorst that the accused knows the identity of the witness and has perused her statement, it would suggest that there will be very few circumstances, if any, that such an order would be granted especially because in most cases, complainants know their assailants. In my view, with the evolution of technology, it is expected that various criminal cases will be heard through the virtual platform in the near future. I am fortified in this conclusion by the recent amendment of subsection 2(a) of section 158 by the Criminal Law Amendment Act 12 of 2021 to provide that the subsection applies to witnesses irrespective of whether the witness is in or outside the Republic. This Amendment Act also added a new subsection (6) to section 158 which is

intended to apply to witnesses who are outside the Republic and who give evidence by means of closed-circuit television or similar electronic media.

[28] Protecting distressed adult witnesses is not unique or exclusive to South Africa. In developed Countries, there are laws that are directed at protecting adult witnesses. For instance, in Canada, section 486.2(2) of the *Criminal Code* (R.S.C, 1985, c. C-46) permits adults who are not disabled to testify from behind a screen or via closed circuit television but only if the court is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of. For instance, in *R v Pal* [2007] B.C 21 92 (S.C), the Supreme Court of British Columbia held that for section 486.2(2) to be used by an adult, it is not sufficient for the witness to satisfy the court that he or she is fearful. It must be shown that the fear would render the witness unable to give a full and candid account of the acts complained of.

[29] While in the United Kingdom, section 2(1) of the Criminal Evidence (Witness Anonymity) Act 2008, empowers courts to grant a witness anonymity order, which requires appropriate measures to be taken to preclude the disclosure of a witness's identity. Section 4(3)(a) of this Act contemplates that before a court may grant a witness an anonymity order, three conditions must be satisfied. Firstly, the measures must be necessary to protect the witness's safety, the safety of another, or 'serious damage to property'. Secondly, the measures must be consonant with a fair trial, and thirdly, the order must be made if it is 'in the interests of justice.

[30] In *casu,* the witness developed PTSD from witnessing a crime allegedly committed in her presence. She is currently three months pregnant and highly

vulnerable. She fears for her life and that of her family to testify in an open court and in the accused's presence. She does not want to be identified. Colonel Clark reported that there is a possibility that the witness may experience further trauma if she testifies in the presence of the accused. Colonel Clark further reported that the witness would be recalcitrant if she testifies in open court as she is deeply concerned about her safety, and that of her mother and daughter. This evidence has not been challenged. The accused did not lead any evidence contradicting the expert witness's scientific evidence.

[31] The right of an accused person to be present in court throughout the trial and to observe his accusers and those who testify against him is a fundamentally important right and should not be lightly interfered with. *R v Pal* [2007] B.C 21 92 (S.C). However, as previously stated, section 158 of the CPA does permit exceptions in a number of cases. I am mindful that the interests of the accused must be borne in mind when it comes to whether or not closed-circuit television ought to be used. It must be asked whether this prejudices the accused and, if so, whether a fair balance has been struck between the various interests. Section 158(4) provides that the prosecutor and the accused have the right, by means of that procedure, to question a witness and observe the witness's reaction. In my view, section 158(4) serves as a safety net for any prejudice that may be suffered by an accused during cross-examination. The court, the defence, and the State will be in a position to see the witness's reaction and demeanour during cross-examination.

[32] Thus, the argument that the accused wants to challenge the witness in court through cross-examination has no merit and is unsustainable. In my view, this is an

exercise which the accused and his legal representative will ably exercise even when the witness testifies through a close circuit television.

[33] This court has been informed that a facility is readily available in this court for hearing the witness's evidence through a close circuit television. On a conspectus of all the evidence place before court, I am of the opinion that the jurisdictional requirements of section 153 and 158 have been satisfied. I am further of the view that for this witness to give a full and candid account of the acts complained of, her evidence must be heard in camera, and her identity should not be disclosed. Therefore, in order to enable this witness to give her evidence without fear of repercussions and danger to herself and her family, she must give her evidence through a close circuit television. Undoubtedly, this initiative will add some measure of protection to her.

Order

[34] In the result, the following order is granted:

34.1 The application of the State to have the witness testify through a close circuit television is hereby granted.

34.2 It is further ordered that the evidence of the witness will be heard behind closed doors.

34.3 The name and identity of the witness in question in respect of the proceedings in court in terms of section 153(2) shall not be disclosed to the public.

LEKHULENI JD

JUDGE OF THE HIGH COURT