THE PROSECUTION'S DUTY TO DISCLOSE: MORE REASON TO LITIGATE?*

1 *Introduction*

Pursuant to the finding of the constitutional court in *Shabalala v Attorney-General of Transvaal* (1995 2 SACR 761 (CC)) that the blanket docket privilege in criminal cases as enunciated in *R v Steyn* (1954 1 SA 324 (A)) was inconsistent with the right to a fair trial as guaranteed by the 1993 constitution (interim constitution), courts have been called upon to adjudicate on a number of questions that arose in relation to the prosecution's duty to disclose. This was to be expected, as the constitutional court emphasized that, should the state object to disclosure, each individual case had to be decided on its own merits with reference to the guidelines provided in this regard by the constitutional court (par 55).

In this contribution the initial objections raised in the *Shabalala* case in support of the privilege against disclosure are again briefly considered and evaluated, where possible with the knowledge of hindsight, to establish whether or not the notions that informed the objections indeed manifested themselves to the detriment of the criminal justice system. Consideration is given to the state's approach to disclosure, the duty to disclose as interpreted by the courts in two recent decisions and the question is posed to what extent, if at all, the prosecution's duty to disclose is utilized for purposes other than to ensure a fair trial. The extent to which the Criminal Procedure Act 51 of 1977 (the act) and the Promotion of Access to Information Act 2 of 2000 (PAIA) contain provisions, in addition to the state's duty to disclose, to assist an accused person to obtain sufficient information in order to advance his case is also considered.

2 *Background*

Prior to the constitutional dispensation the state exercised a blanket docket privilege in terms of the decision in *R v Steyn* (1954 1 SA 324 (A)) (for a discussion on its origin and nature, see Du Toit *et al Commentary on the Criminal Procedure Act* (2011) 23-40). This privilege extended to the contents of the entire police case docket, including witness statements, expert reports and documentary evidence contained in part A of the docket, internal reports and memoranda (part B) and the investigation diary (part C) and existed until at least conclusion of the proceedings on appeal. The privilege entailed that disclosure of the docket contents could only be obtained with consent of the state. Disclosure seldom occurred before or during trial, with the exception of when a serious discrepancy arose between the testimony of the witness and the contents of his statement. The prosecutor would then be required, in view of his special duty to assist the court in arriving at the truth, to make the witness statement available to the defence for purposes of cross-examination (the *Steyn* case 337A).

After acceptance of the interim constitution the question arose in the *Shabalala* case whether the blanket docket privilege of the pre-constitutional era could survive the fair trial guarantees contained in section 25(3) of the interim constitution. Section 25(3), which provided that "[e]very accused person shall have the right to a fair trial,

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which shall include the right … (b) to be informed with sufficient particularity of the charge …", was amplified by section 23, which guaranteed that "[e]very person shall have the right of access to all information held by the state … in so far as such information is required for the exercise or protection of any of his rights". In finding the blanket docket privilege inconsistent with the constitutionally guaranteed fair trial rights, the constitutional court ruled that the right to a fair trial would include access to the statements of witnesses and such content of the police docket as are relevant in order to enable an accused person to properly exercise that right. The court further indicated that the prosecution might in a particular case be able to justify the denial of access on the grounds that it is not justified for purposes of a fair trial (par 72). The court emphasized that no rigid rules should be formulated in this regard and that the circumstances of each case should determine what is required for a fair trial, referring to a few examples where a fair trial might not require such access (par 37-38). The general tenor of the judgment was however indicative of the fact that the emphasis had shifted to accountability and transparency.

3 *Did the fears materialize?*

Five general objections were raised in support of the privilege against disclosure. Some of the objections anticipated that disclosure of the contents of case dockets would eventually have a negative impact on the criminal justice system. Although the objections failed to convince the constitutional court that they were, either individually or combined, of sufficient import to justifiably limit the fair trial rights of an accused person it is nevertheless of value to revisit the objections to determine what effect docket disclosure had on the criminal justice system.

3.1 It was firstly contended that inaccuracies occurred frequently in written statements made by witnesses to the police due to administrative and language difficulties as well as logistical challenges experienced during the initial stage of investigations. It was suggested that disclosure of such statements might lead to cross-examination and unfairly impact on credibility after a witness delivered more comprehensive and considered evidence in court. The constitutional court countered this objection by indicating that a trial court should be alive to the fact that witness statements are compiled by police officers with administrative, linguistic and logistical problems. It further noted that the possibility of disclosure might serve as an incentive to police officers to compile statements as accurately as possible (par 45).

The courts are indeed sensitive to the problematic situation pertaining to inaccurate and poorly drafted witness statements. In *S v Mafaladiso* (2003 1 SACR 583 (SCA) 594A-G) the supreme court of appeal warned that language and cultural differences between the witness and the person who recorded the statement should be considered when discrepancies between a witness's evidence in court and her statement are evaluated (also see *S v Bruiners* 1998 2 SACR 432 (SE) 437G-J). The hope expressed by the constitutional court that the possibility of disclosure might improve the quality of statements unfortunately never materialized, possibly owing to low experience levels and linguistic and other challenges still being experienced by the South African Police Service.

3.2 The second objection related to an accused person "tailoring" evidence after having had the opportunity to peruse the statements of state witnesses. Although the constitutional court agreed that the state would in some matters lose the tactical

advantage of surprise, it pointed out that the normal principles applicable to trials and the testing and evaluation of evidence would enable a court to establish the credibility of an accused person's defence (par 46).

The allegations against an accused are contained in a charge sheet provided to him before trial and the opportunity has always existed to request further particulars in terms of section 87 of the act in order to clarify the charges. In addition thereto, an accused is not compelled to reveal the basis of his defence after pleading not guilty and the burden of proof on the state requires the prosecution to commence with the presentation of evidence. It can therefore not be reliably stated that the disclosure of witness statements created an opportunity that did not already exist, to some extent, to "tailor" evidence or fabricate defences or increase the incidence thereof.

3.3 The concern was expressed that disclosure would place an onerous burden on the prosecution and may lead to delays in bringing an accused to trial. The constitutional court correctly pointed out that this objection held little weight, as a prosecution could in any event not commence without the statements having been prepared (par 47). In addressing this concern the court indicated that:

> "… disclosure will not be necessary in a large number of cases because the State may be able successfully to contend that, regard being had to the relative triviality of the charge or its inherently simple content or the particularity already furnished to the accused … no access to the police docket is justified for the purposes of ensuring a fair trial for the accused" (par 47).

In practice the prosecution follows a more liberal approach in respect of disclosure. Part 14 of the policy directives of the national prosecuting authority does not draw a distinction between different types of cases as alluded to in the *Shabalala* case. Full disclosure of witness statements takes place on request by the accused, irrespective of the nature of the charges levelled and irrespective of whether further particulars have been requested and provided. General disclosure of witness statements as contained in part A of the docket therefore takes place as a matter of policy. In terms of the policy directives, requests for parts B and C are however refused as a general rule and accused persons have to formally apply to court for disclosure of the documentation contained therein. The constitutional court provided the following guidelines as possible factors that might justify non-disclosure: the real risk that the identity of an informer might be disclosed, state secrets might be revealed, and intimidation of state witnesses and impeding the proper ends of justice might occur (par 50). The disclosure of policing methods and investigative techniques and revelation of confidential cooperation between various police forces are listed in the policy directives as further factors justifying non-disclosure (part 14.3).

It is submitted that it would be an incorrect interpretation to infer from this objection that the investigation cannot proceed after an accused has been charged or after the trial has commenced. Although the ideal would be that a case is not enrolled or a trial at least not commenced with before the investigation is finalized, reality and practical considerations dictate otherwise. The prosecution should for example be in a position to follow up on defences raised or investigate new information that comes to light during the trial. New evidence so discovered obviously also has to be disclosed to the accused (see Schwikkard and Van der Merwe *Principles of Evidence* (2009) 173).

The constitutional court predicted that disclosure might encourage the offering of guilty pleas and shorten delays (par 47). No statistical data is available to indicate whether the number of guilty pleas has indeed increased for this reason since 1995, but it seems logical that an accused person presented with copies of a thoroughly

investigated, watertight case will be advised to offer a guilty plea. It appears, however, that the concept of disclosure might unfortunately be susceptible to abuse and in fact be utilized to cause delays. This aspect will be more fully considered in the discussion below.

3.4 The fourth objection related to concerns that the trial might become side-tracked into "extraneous issues" as to what a witness might or might not have said on a previous occasion (par 48). This concern is closely linked to the first objection and would once again require of the trial court to consider the relevance of and apportion the necessary weight to possible discrepancies between a witness's statement and his testimony in court. Legal representatives, whether from the prosecution or defence, are in any event required to protect their witnesses and object to irrelevant cross-examination. Courts should also be vigilant in this regard and not allow long-winded excursions on irrelevant matters. There appears to be no major or insurmountable challenges in this regard.

3.5 The last objection expressed concern for possible intimidation of witnesses and prejudice to the ends of justice or state interests. The court found that the interests of the accused in a fair trial outweighed the interests of the state in the non-disclosure of statements (par 49). This finding refers to a category of witnesses earlier listed by the court as those not requiring protection for fear of intimidation (par 40). As regards vulnerable witnesses, the court remarked that "… there appears to be an overwhelming balance in favour of an accused person's right to disclosure in those circumstances where there is no reasonable risk that such disclosure might lead to … intimidation or obstruction of the proper ends of justice" (par 50). The task of deciding whether the state is justified in refusing to disclose statements on this ground rests with the trial court after receiving evidence to determine the extent of the risk.

It does not appear as if this aspect causes undue difficulties in practice. To ensure minimal interference with the investigation process, disclosure is as a rule only made after finalization of the investigation. To this end section 60(14) of the act provides that an accused person is not entitled to access the case docket for purposes of a bail application. A further practical arrangement employed by the police entails that personal and contact particulars of witnesses are completed on a separate document named "preamble to statement" (form SAP 3M(a)), which is attached to the actual witness statement. In cases where the state would not want to disclose these details of witnesses to the accused, the preamble document could simply be removed from the actual statement.

Although none of the initial objections seems to have had a general negative impact on the criminal justice system, other difficulties not anticipated in the *Shabalala* case did arise and are discussed below.

4 *The duty to disclose as interpreted by the courts*

Section 32 of the 1996 constitution provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. The challenges pertaining to the prosecution's duty to disclose that arose in *Kerkhoff v Minister of Justice* (2011 2 SACR 109 (GNP)) and *National Director of Public Prosecutions v King* (2010 2 SACR 146 (SCA)) will be considered. Although the *Kerkhoff* case was reported a year after the *King* matter, it

is discussed first, as the judgment was delivered approximately a month prior to the judgment in the *King* case.

4.1 *Kerkhoff v Minister of Justice*

The applicant was charged in the Brits regional court with three counts of sexual assault (contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the sexual offences act)), three counts of compelling or causing children to witness a sexual act (contravening s 21(1) of the sexual offences act) and one count of assault. The applicant applied in the Brits district court for an order to compel the state to disclose the whole police docket (parts A, B and C). The prosecutor opposed discovery in respect of parts B and C but after hearing evidence the court ordered disclosure of the whole docket. Copies were thereupon provided to the applicant (par 12.4). The state intended to call the five complainants, all boys aged 10 or 11, to testify. To this end it also intended to request the court to appoint an intermediary in terms of section 170A of the act to assist the complainants to give evidence. The state obtained intermediary reports to assist the court to make its decision. The reports, compiled by the seventh respondent (a qualified social worker) employed by the sixth respondent (a company incorporated in terms of section 21 of the Companies Act 61 of 1973), indicated that the complainants should testify through an intermediary and were included in the case docket. The applicant intended to show before the trial commenced that the evidence of the complainants was neither competent nor admissible, failing which, to oppose the appointment of intermediaries to assist the complainants leaving them to testify in open court without the protection afforded to children by section 170A. (The court made important comments and findings about the application of section 170A relating to intermediaries (par 6-7; 21). A discussion of those comments, however, falls outside the scope of this contribution.) In order to achieve this, the applicant sought the seventh respondent's working papers containing the documents relating to the tests the social worker had conducted on the complainants as well as her process notes and summaries from which she compiled her reports. The applicant applied to the Brits regional court for these documents. Despite the fact that these documents did not form part of the docket, the application was not opposed by the prosecutor and the court ordered disclosure of the documentation. The sixth and seventh respondents were unaware of the disclosure application and refused to make these documents available to either the prosecution or the accused. The refusal was based on the sixth respondent's operational policy in terms of which the documents were considered to be private and confidential. The policy was formulated, as children, and their parents and guardians who approached the sixth respondent for assistance, required their communications to be confidential (par 12.11).

As a result the applicant approached the high court seeking an order that the second to fifth respondents be found in contempt for failure to comply with the above court order and be sentenced to either imprisonment or a fine suspended on condition that the order of disclosure be complied with. A further order was sought, directing the sixth and seventh respondents to *inter alia* make the said documents available to the applicant.

All the respondents initially opposed the application but at a later stage the sixth and seventh respondents withdrew their opposition and abided by the decision of the court. During argument the applicant informed the court that he no longer sought relief against the second to fifth respondents. The concession was however made

too late to save the applicant from a cost order in view of the vexatious nature of the application in respect of the second to fifth respondents (par 20).

The remaining issue to be decided by the court was whether the applicant had demonstrated a right to disclosure of the documents in possession of the sixth and seventh respondents. The applicant based his argument that the respondents were obliged to disclose these documents on two grounds: firstly that the documents formed part of the docket (even though it had never been physically part of the docket) and that as a result the *Shabalala* case found application; and secondly that section 32 of the constitution provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights (par 15). Southwood J correctly rejected the first argument that the documents formed part of the case docket. The sixth and seventh respondents did not form part of the prosecution or any state institution. As a result the *Shabalala* case was not applicable to the documents in their possession (par 16). This finding of the court is of particular significance. After the *Shabalala* case the prosecution's duty to disclose was interpreted by several accused in applications of this nature to include disclosure of documents or information that the accused regarded as necessary to prepare for his defence, but which did not form part of the police docket and which were not otherwise in possession of the state. As a result applications were made (mostly in the lower courts) for access to information the state never investigated and did not possess. The lower courts did not approach these applications uniformly: some applications were correctly denied but others were granted, having the unfortunate effect that the criminal investigation was often turned into an unending search mission for documents and information required by the accused, causing delays in the administration of justice and even shifting the focus away from answering the charges. This position should however be distinguished from the situation where the state is in possession of additional documentation which are not included in the docket. The state may not refuse to disclose documents in its possession merely on the basis that they do not form part of the docket (*S v Rowand* 2009 2 SACR 450 (W) 455B-H; Whitear-Nel 2010 *SACJ* 263 265). Relevant information acquired during the course of the investigation forms part of that to which the accused is entitled, irrespective of whether it has been included in the case docket or not.

The court also rejected the applicant's direct reliance on section 32 of the constitution as its second ground to obtain disclosure from the respondents. In view of the existence of PAIA, Southwood J found that a party has to assert its right to access of information in terms of the provisions of PAIA and not by relying on the constitution (par 17). The applicant, however, did not seek access in terms of PAIA, and it appears from the judgment that during argument applicant's counsel first submitted that PAIA did not apply but later argued that it did find application. The question whether PAIA finds application in criminal matters is of importance, but in view of the approach taken by the applicant, the court was not called upon to decide this question. This aspect will be considered more fully below in the discussion on the *King* matter, where the question was decided by the supreme court of appeal.

Having rejected both grounds relied on by the applicant, the court found that a right to access was not demonstrated and the application was refused. In conclusion, the court remarked that the purpose of the application was misconceived and that it served no other purpose but to delay the commencement of the trial (par 21). This observation is disturbing, the more so in view of the fact that the charges are of a serious nature and the complainants are of a very young age. Unnecessary delays in the trial could impact negatively on the recollection of events by witnesses

(especially minors) and the ultimate outcome and fairness of the proceedings. The question arises why a simpler and less time-consuming process, such as the serving of a subpoena *duces tecum* on the sixth and seventh respondents, was not followed. The conclusion appears to be inevitable that the disclosure process was abused to prolong and possibly even derail the prosecution of the accused.

4.2 *National Director of Public Prosecutions v King*

The respondent in this matter was charged with 322 counts of fraud, tax evasion, contravention of the Exchange Control Regulations, money-laundering and racketeering. The South African Revenue Services (SARS) was the main complainant and apparently had a claim of R3 billion against the respondent emanating from some of the allegations. The case has a long history: the respondent was arrested in 2002 and at the time of this appeal (Feb 2010) the trial had not yet commenced. The docket was substantial: it comprised 200 000 pages in part A (copies of which were supplied to the respondent), electronic records in part B of about 21 000 emails between parties involved in the case and a further 270 lever-arch files of documents not included in part A. Copies of the statements and documents in part A were supplied to the respondent, but the state refused to disclose parts B and C. As a result the respondent (applicant *a quo*) applied to the court *a quo* for an order directing the state to grant him access to all documents in its possession, which were relevant to the charges against him and not privileged (par 12). In addition thereto the respondent also required access to all documentation providing evidence of the contact between counsel in private practice appointed to conduct the prosecution and SARS, to enable him to bring an application for the removal of those prosecutors (par 22). Having failed in his bid to gain access to these, the respondent required a full description of each and every document to which he was denied access, with a statement of the precise basis upon which access was denied (a "motivated index"). The appellant (respondent *a quo*) opposed the application on *inter alia* the grounds that the documents in parts B and C were either irrelevant to the criminal case or not exculpatory or *prima facie* likely to be helpful to the defence in the trial or privileged from disclosure on a variety of grounds or that the public interest in preserving its confidentiality outweighed any interest the respondent might have in its disclosure (par 13). It was further submitted that the compilation of a motivated index would be an arduous task of considerable cost and that the implication thereof would impact on the criminal justice system, as it would create an extension on the *Shabalala* principles (par 16). The court *a quo* found that the respondent was entitled to the motivated index requested to satisfy him in advance that the trial would be fair. The national director of public prosecutions appealed against this finding to the supreme court of appeal (par 3).

The respondent argued that the assumption could be made that all the withheld documents were relevant to his prosecution as that could be the only reason for its inclusion in the docket (par 28). The respondent relied in this regard on the decision in *R v McNeil* (2009 SCC 3) in which the supreme court of Canada found that the following two assumptions are implicit in the crown's duty to disclose: firstly, that the material in possession of the crown is relevant to the accused's case, otherwise it would not have been obtained, and, secondly, the material would likely comprise the case against the accused (par 20). In addressing this argument the supreme court of appeal pointed out that the second assumption was not applicable, as the parties were agreed that the material comprising the case against the respondent was contained in part A of the docket, which had already been supplied. Regarding

the first assumption the court found that it referred to information gathered during the course of the investigation and not material created (par 30). Illustrating the point, the court referred to its initial comment that the blanket privilege has not been replaced by a blanket right to all the information in the hands of the prosecution. It confirmed that litigation privilege, although limited by the duty to disclose, does still exist to the extent that it pertains to documents that do not comprise evidence or information relevant to the defence (par 2). Such documentation would for example include opinions by prosecutors, notes on legal research and copies of judgments, and as it is not material relevant to the conduct of the trial, it is not discoverable (par 30).

The respondent also relied on the fundamental right of access to information held by the state in terms of section 32(1)(*a*) of the constitution in order to obtain the contents of the whole docket (par 36). In view of the existence of PAIA, the respondent could not rely on the constitution to obtain access to information (Zeffert and Paizes *The South African Law of Evidence* (2007) 785; *Ingledew v Financial Services Board: in re Financial Services Board v Van der Merwe* 2003 4 SA 584 (CC) par 24). Section 7(1) of PAIA, however, provides that the act does not apply to a record of a public or private body if:

> "(a) that record is requested for the purpose of criminal or civil proceedings;
> (b) so requested after the commencement of such criminal or civil proceedings …;
> (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

The supreme court of appeal found that "other law" refers to the body of law that includes the rules relating to discovery, disclosure and privilege and therefore that PAIA cannot be utilized if access to information is required for purposes of criminal proceedings (par 39; also see Schwikkard and Van der Merwe 178).

A further aspect raised by the respondent related to the reliance placed on the mere *ipse dixit* of the state to justify withholding of relevant documents in the docket (par 32). Although the *Shabalala* judgment is clear on the aspect that a court has to decide on disclosure if the state objects thereto (par 53), the supreme court of appeal reiterated that this matter is about something else, namely the right to a motivated index to enable the respondent to audit parts B and C of the docket. The court found that on this basis the initial decision remained that of the state, but if the decision is shown to be *prima facie* wrong during the trial, a court could make the necessary order to disclose (par 32).

Harms DP concluded that the respondent did not reasonably require a motivated index of parts B and C to enable him to conduct his defence and upheld the appeal (par 48).

Nugent JA concurred with the judgment, but made the following closing remark with which the rest of the court agreed:

> "In effect, Mr King wants the prosecution to satisfy him, as a precondition to being tried, that his trial will be fair. 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 would not be fair it might be that the court would 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. Criminal proceedings are not a consensual affair" (par 57-58).

Considering the protracted history of this case (par 7-8) as background to the present application, the inevitable inference to be drawn appears to be that, as in the *Kerkhoff* case, disclosure was used as a means of avoiding the trial.

5 *Provisions in the Criminal Procedure Act*

In addition to the state's constitutional duty to disclose relevant information in its possession to the accused, the act contains important provisions to assist an accused person to obtain further information pertaining to the charges against him. Section 87 of the act provides for the request and supply of particulars to a charge whilst section 179 provides for the issuing of a subpoena *duces tecum* to obtain the attendance at criminal proceedings of any person in order to produce any book, paper or document.

5.1 Further particulars

The purpose of further particulars is to inform the accused of the case against him so that he can prepare his defence (Kruger *Hiemstra's Criminal Procedure* (2011) 14-21). Section 87 provides as follows:

> "87(1) An accused may at any stage before any evidence in respect of any particular charge has been lead [sic], in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before which a charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered …
>
> (2) … and the trial shall proceed as if the charge had been amended in conformity with such particulars."

The section provides for a simple procedure, allowing the accused to apply for particulars and if the reply thereto is unsatisfactory, to apply for further particulars. If the state's response remains unsatisfactory, the accused may object to the charge in terms of section 85(1) of the act. Should a court find that the objection is well-founded, it shall make such order relating to the amendment of the charge or the delivery of particulars it may deem fit. Should the prosecution fail to comply with such order, the court may quash the charge. Particulars might be requested before or after plea, but should be requested and supplied before any evidence is presented. The stage at which particulars are to be requested is a tactical decision, impacting on the remedies available to the accused should the state fail to supply the particulars (see Watney "Particulars to a charge in cases where the state relies on the doctrine of common purpose: easy answers to difficult questions?" 1999 *TSAR* 323 325-326). Application for disclosure of the docket, on the other hand, might be made at any stage, even after the trial has commenced. The state is bound to any particulars it provided in terms of section 87, unless it expressly abandoned a particular. Particulars supplied form part of the charge and, as with the allegations contained in the charge, must be proven. For this reason it would be incorrect to utilize section 87 to apply for disclosure of the case docket (see *S v Tshabalala* 1999 1 SACR 163 (T) 166H-J; Du Toit *et al* 23-42L-2; Schwikkard and Van der Merwe 173). As the act makes no provision for a procedural mechanism in this regard, the practice has developed to address a written request for disclosure to the relevant prosecutor (the *Tshabalala* case 169D-E and the *Rowand* case 458A-C).

Any attempt to embarrass either the state with a cumbersome request or the accused with a vague and confusing reply will not be tolerated by the courts. Section

84(2) of the act allows for the state to indicate as such if particulars requested are unknown to the prosecution. Particulars might be requested before or after the state has disclosed the contents of the case docket. Although docket disclosure resulted in a reduction of requests for particulars, especially in respect of less complex matters, the provisions of section 87 have not become superfluous. Factors such as reliance on the doctrine of common purpose, incomplete witness statements and badly drafted charge sheets will more often than not give rise to a request for particulars, despite disclosure of the docket.

As the aim with particulars is to inform the accused person of the case against him to enable him to prepare his defence, care should be taken that the procedure is not abused to conduct a paper trial in which the strength of the state case or the decision to prosecute is attacked (see Watney 334-337). At this stage of the proceedings a court is not called upon to make a judgment on the strength or otherwise of the state case, but to ensure that the accused is properly informed of the case against him.

5.2 Subpoena *duces tecum*

Section 179(1)(*a*) of the act provides that the prosecutor or accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings. This is applicable to any competent and compellable witness. In order to obtain a book, paper or document at court a subpoena is served in the same manner as an ordinary subpoena on the person in whose possession the relevant item is. The documents required must be specified in the subpoena. This subpoena is referred to as a subpoena *duces tecum*. An accused may also issue a subpoena *duces tecum* on a state witness (Kruger 23-4; *Cave v Johannes NO* 1949 1 SA 72 (T) 77). It is submitted that a witness might be so subpoenaed to obtain documents required for trial preparation even before the trial commences. Section 179(i)(*a*) provides that a person may be compelled to attend to produce any book, paper or document in criminal *proceedings*. Rule 54 of the high court rules and rule 64 of the magistrates' court rules also refer to "… any criminal case …" and do not specifically refer to *trial*. The wording of the section could therefore be interpreted to provide for the attendance of a person in circumstances wider than just the trial itself. This is supported by the fact that a person attending court in terms of a subpoena *duces tecum* is not necessarily regarded as a witness unless he is required to testify to identify the requested documents (see Erasmus *Superior Court Practice* (2011) 82; Schwikkard and Van der Merwe 363). It is suggested that a person could be subpoenaed for such an inquiry by an accused to hand over documents on a date scheduled with the court and prosecutor. If he produces the documents and no identification thereof is required, it is the end of the matter. If he declines to produce the documents, however, the court will have to inquire as to the reasons for refusal and make an appropriate order. If the person is required to identify the documents, however, he will have to testify in this regard. This testimony will have to be given during the trial to afford the state opportunity to cross-examine the witness and to ensure that findings made by the court form part of the trial record. Ferreira (*Strafproses in die Laerhowe* (1979) 160) does not specifically discuss this aspect but nevertheless refers to attendance of the *trial* when referring to the subpoena *duces tecum*. Meintjies-Van der Walt on the other hand argues that documents obtained through subpoena *duces tecum* are produced only during the trial and not before trial (see "Pre-trial disclosure of expert evidence: lessons from abroad" 2000 *SACJ* 145 149). This will however have the result that documents required for trial preparation will become available only during the course of the trial.

Reference has been made earlier to documents or information that an accused regards as necessary to prepare for his defence, but that does not form part of the police docket and that is not in possession of the state. It is submitted that the procedure of a subpoena *duces tecum* would be the appropriate procedure for an accused to follow in obtaining such information. In the *Kerkhoff* case the court made an *obiter* reference to this procedure. It is submitted that the applicant in that matter should have caused a subpoena *duces tecum* to be issued in respect of the sixth and seventh respondents, requesting them to produce the required documents in court. If the respondents still declined to make the documents available, the court would have had to consider the reasons for refusal to disclose and made the appropriate order.

6 *Conclusion*

The approach adopted by the constitutional court in the *Shabalala* case (par 46) with reliance on *Stinchcombe v The Queen* (18 CRR (2d) 210) that "… the search for truth is advanced rather than retarded by disclosure of all relevant material" placed the prosecution's duty to disclose on a sound footing and certainly enhanced the legal culture of accountability and transparency. It is clear that in terms of its policy directives the prosecution follows an accommodating approach in respect of docket disclosure. Disclosure is therefore made as a rule in all cases in respect of part A, including those matters listed in the *Shabalala* case as possible exclusions. This is most probably a practical arrangement aimed at ensuring a uniform national approach and sensible utilization of court resources. One should however also be alive to the negative possibility that "any new procedure can offer opportunities capable of exploitation to obstruct or delay" or that an accused, instead of confronting the charge, attacks the prosecution (the *King* case (par 8)). This negative side of an otherwise positive development is clearly illustrated in the *Kerkhoff* and *King* cases. As illustrated in these cases, preliminary litigation of this nature serves little or no purpose other than to delay the efficient and speedy conclusion of criminal trials. The frequent abuse of this type of litigation is a matter for concern: a mere six months after the *King* judgment, the supreme court of appeal had to again express itself in strong terms against preliminary litigation (see *Van der Merwe v National Director of Public Prosecutions* 2011 1 SACR 94 (SCA)). What is of importance, though, is that our courts have been alive to the possible negative consequences that underpinned the initial objections to docket disclosure as well as more recent legal stratagems to abuse the right of access to information and have expressed themselves clearly in this regard. That South Africa is not in a unique position is illustrated by the following remark in the *McNeil* case: "it is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources not be squandered in 'fishing expeditions' for irrelevant evidence" (par 28).

The constitutional duty to disclose supplemented by the procedures in sections 87 and 179 of the act provide sufficient mechanisms to an accused person to obtain the necessary information to protect his fair trial rights. When confronted with disclosure applications of the nature displayed in the *Kerkhoff* and *King* cases, however, courts will do well to remind themselves of the comment by Harms DP in the *King* case that "[f]airness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the state" (par 5).

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HOE GOEDGELOWIG KAN DIE MODERNE MENS WEES? ENKELE OPMERKINGS NA AANLEIDING VAN AANKOPE PER INTERNETVEILING

1 Winskopiejagters kom in iedere gemeenskap met 'n gesonde kapitalistiese trek voor. Menige persoon droom daarvan om die objek van sy of haar drome teen 'n breukdeel van die normale prys te bekom. Nie om dowe neute nie is daar gereeld berigte van stormlope en vertrappings by buitengewone uitverkopings soos die van Woolworths en word die tradisionele winter- en someruitverkopings in Europa druk besoek.

'n Variasie op die deurwinterde uitverkopingsnuffelaar is die passievolle veilingganger. Ook in ons gemeenskap was van oudsher bekend dat dié of dáárdie persoon op iedere vendusie sy opwagting maak en saambie indien hy meen dat die saak onder die hamer 'n winskopie is. Die potensiële objekte strek van grond en vee in die landelike gemeenskap tot huishoudelike artikels en kuns by die meer verstedelikte tipes. (Hier word nie nou ingegaan op die *contradictio in terminis* vervat in die noem van 'n "winskoop" in een asem met die aanskaffing per veiling van 'n kunswerk nie. Juis kuns het geen objektiewe waarde nie, en die waarde is altyd dit wat die hoogste bieder daar en dan bereid is om op te dok – "pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur" *D* 35 2 63*pr* – die waarde van sake word nie volgens persoonlike gevoelens of voordeel bereken nie, maar normaalweg bereken teen die prys wat hulle op 'n veiling sou haal.) Uiteraard word die doel verpas om 'n winskopie op te snap indien in die geroesemoes van die adrenalien gedrewe opjaag van die prys deur 'n bedrewe afslaer se afspeel van een bod teen die ander, die aanvanklik heimlike bogrens as aanvaarbare prys vir die artikel oorskry word. Dan bly sit die finale bieër dikwels met 'n toegeslane bod teen 'n prys wat met die definisie van 'n winskoop niks gemeen het nie.

Met die toenemende populariteit en benuttingsmoontlikhede van die internet was dit te wagte dat ook dié platform deur winskopiejagters aangegryp sou word. (Schlömer en Dittrich het verwys na 'n sterk stygende tendens van die getal benutters wat reeds vyf jaar gelede tot byna 250 miljoen gestyg het en sedertdien niks minder geword het nie "eBay & Recht – Bilanz der Rechtsprechung" 2007 *BB* 2129-2136.) Per slot van rekening kan nou vanuit die beskermde huislike atmosfeer per muisklik wêreldwyd aan veilings deelgeneem word, waar vanouds die fisiese beweeglikheid van die potensiële bieër na die volgende veiling dikwels 'n praktiese belemmering was om sy biesug te bevredig. Meerdere internetplatforms word vir die doel bedryf en in talle huishoudings pryk tans pronkstukke van versamelaarsporselein tot silwer wat op 'n veiling op die internet as 'n sogenaamde winskoop bekom is.

Die meeste van die platforms het "huisreëls" wat die meedoen aan die veiling beheers. Uiteraard is so 'n veiling per internet meer riskant as om fisies op 'n veiling van Sotheby's te gaan sit en bie vir byvoorbeeld die voorhande skildery. Niks kom by die klassieke "Handkauf" wat in die Wes-Romeinse reg hoogty gevier het en waar danksy *traditio vera* as voorkeur leweringsvorm, die verkoper aan die koper na afsluiting van die koopkontrak en nadat die koper hom vergewis het van die eienskappe van die koopsaak, ook daar en dan die gekoopte saak gelewer het *de manu in manum* ten einde die eiendomsoordrag te bewerkstellig nie. In die virtuele omgewing is daar daarenteen altyd die gevaar dat die aangebode artikel slegs kamma-kamma beskikbaar was of nie werklik die eienskappe het wat dit tot dié winskoop van die dag sou verhef nie.