

**An accused's rights of access to police dockets for bail hearings.**

by:

**Zola Cedric Neville Madotyeni**

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**Supervisor:** Professor N. C Steytler



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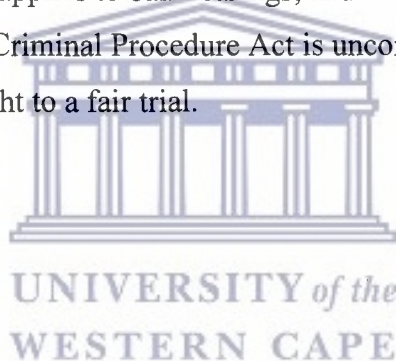
## 1. Outline

The accused has a right to a fair trial which includes access to police dockets in order to prepare for his trial.<sup>1</sup> The Constitutional Court has held that access to dockets is one of the constituent elements of the general right to a fair trial. The court left the question whether or not disclosure can be used to claim access when preparing for a bail hearings, open.

This paper will show that the right to a fair trial and particularly disclosure applies to bail proceedings. It will be argued that section 60(14) of the Criminal Procedure Act<sup>2</sup>, which purports to prohibit disclosure of any information in police dockets, is null and void for being an unjustifiable limitation of the constitutional right to a fair trial.

The key objectives of this paper can be summarised as follows:

- \* to briefly discuss the nature and purpose of bail;
- \* to show that the right to a fair trial, applies to bail hearings; and
- \* to show that section 60(14) of the Criminal Procedure Act is unconstitutional for being an unjustifiable limitation of the right to a fair trial.



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<sup>1</sup> Unless the contrary intention appears words denoting masculine gender also include feminine gender and that singular also signifies plural and are only used for convenience.

<sup>2</sup> Act 51 of 1977, as amended.

## 2. Introduction

Bail has always been a controversial and contentious topic in constitutional debate. The sensational coverage by the media of the failure by the criminal justice system to make use of the existing resources in preventing the pre-mature release of dangerous criminals, has led to public outrage and for the members of the public to blame the Constitution for the failure of the criminal justice system to keep criminals in custody.<sup>3</sup> The criminal justice system found it difficult to deal with the new challenges brought in by the new constitutional order.

The judicial officers and the prosecutors in the lower courts found it hard to reconcile the existing bail laws with the new Constitutional guarantees. This state of confusion led to the untimely release of dangerous criminals on bail. The government responded to the public and media pressure by enacting a series of tough measures to regulate the release of suspects on bail. The Criminal Procedure Second Amendment Act<sup>4</sup> is the latest statute in the series of laws that were introduced to target repeat offenders and dangerous criminals and to make it difficult for them get bail.

These provisions introduce tough and innovative measures which significantly alter the current practice in bail proceedings. For example, the new provisions have put an end to after hours bail applications and now they provide that the record of the bail proceedings now forms part of the record of the subsequent trial. The new provisions also prohibit disclosure of dockets for the purposes of a bail hearing. The new measures are presumably aimed at striking a balance between the interests of the individual and societal interests, by providing a mechanism of ensuring that the accused attends his trial on one hand, and the safety of the witnesses who will

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<sup>3</sup> See *Sunday Times* of 27 July 1997 and *Sunday Times* of 4 January 1998. These articles chronicle a series of bungles in the highly publicised case involving Dan Mabote who was charged with raping a seven year-old girl, Mamokgethi Malebane while out on bail on another charge of rape. While outside on another rape charges he kidnapped the young girl, murdered her and buried her in a shallow grave. Incidents of this nature, which has nothing to do with the constitutional guarantees, but caused by the inefficiency and incompetence in the criminal justice undermines the public's faith in the constitution.

<sup>4</sup> Act 85 of 1997 brought changes to the bail provisions in the Criminal Procedure Act, 51 of 1977.

testify against him on the other hand.<sup>5</sup> The provision prohibiting disclosure for bail applications follows after the Constitutional Court's decision in *Shabalala v Attorney General, Transvaal*<sup>6</sup>, where it was held that the docket privilege, in as far as it prohibits the disclosure of all information in all instances, is unconstitutional. The decision of the court does not extend to bail proceedings. It was, however, stressed that in a particular case disclosure may be justified at the earliest possible stage of the proceedings. It is clear that the legislature intended to pre-empt any claim that *Shabalala* applies to bail.

Since the record of the bail application now forms part of the record of the subsequent trial, it can be argued that bail the application can be regarded as an early stage of the proceedings, referred to by the court in *Shabalala*. If disclosure of police dockets is to be regarded as the general standard of fairness in the criminal trials, then it can be argued that the provision prohibiting disclosure for the purposes of bail is prima facie in conflict with the right proclaimed in *Shabalala*. The prohibition makes inroads to the broad right to a fair trial, which includes access to police dockets.



### 3. The legislative Background

Section 60(14) of the Criminal Procedure Act appears to be the government response to the media pressure and public outcry which followed the early release of dangerous criminals on bail. The criminal justice system, largely orientated in the previous dispensation, struggled to cope with the demands of a constitutional state. The new demands place emphasis on freedom, equality and openness. The government response, was the adoption of tough bail legislation which was aimed at making it difficult for certain offenders to get bail.<sup>7</sup> The new amendment consolidates the

<sup>5</sup> The Memorandum on the Objects of the Criminal Procedure Second Amendment Act identifies one of the aims of the new amendments as taking into account the interests of the society, especially of the victim, by providing a transparent and efficient bail system.

<sup>6</sup> 1995 (2) SACR 761 (CC).

<sup>7</sup> See the media statement by President Mandela released on the occasion of the signing of the Criminal Procedure Second Amendment Act, 1995, issued by the Office of the President on the 20th of September 1995 where it was stated: 'These amendments will make it more difficult for people charged with serious crimes to be released on bail ....This law is our next step in the war against crime'.

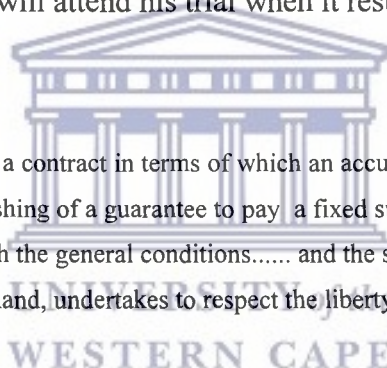
changes introduced by the 1995 Act and also to serve as one of the crime fighting strategies.<sup>8</sup> The history surrounding the enactment of this provision clearly indicates its primary aim was to prevent the application rights pronounced in *Shabalala* in preparation of bail hearings. The process leading to the adoption of these measures was accompanied statements by public officials that were indicative of the fact that the government has taken a tough line on bail and adopted a crime control model of bail legislation.<sup>9</sup>

#### 4. The Nature and Purpose of Bail

The main reason for pre-trial detention is to ensure that the accused will stand his trial. Bail gives the accused the opportunity of marshalling his resources, while at the same time maintaining his liberty, before conviction. He is given a chance of participating in his usual activities while prepare for his defence until his trial resumes. This freedom is accompanied, on the other-hand, by an undertaking on his part, that he will attend his trial when it resumes.

Bail has been defined as follows:

“Bail can, generally speaking, be described as a contract in terms of which an accused who is being held in custody is set at liberty upon his payment of, or his furnishing of a guarantee to pay a fixed sum of money and, further, upon his express or implied undertaking to comply with the general conditions..... and the specific conditions relating to his release. The state, on the other hand, undertakes to respect the liberty of the accused.....”<sup>10</sup>



While this definition can be criticised as an oversimplification of the nature of bail, it does, however, provide us with a basic understanding of the nature of bail. Bail is an arrangement between the state and the individual with consequences that differ from those normally found in

<sup>8</sup> See the Memorandum on the Objectives of the Criminal Procedure Second Amendment Act, 85 1997, at p 22 where some of the stated aims of the Act is to deal with the criticism against the current bail system and to bring to the fore the legislature’s serious desire to combat crime.

For a critical look on present bail legislation see Schonteich M ‘The Story of a Good Law, its Bad Application and the Ugly Results’ 1997 S.I.R.R. Submission to the Justice Portfolio Committee.

<sup>9</sup> The Chairperson of the Justice Portfolio Committee, Advocate J de Lange, has stated on record that it was the desire of his committee to pass a bail legislation that will tilt the balance in favour of the public as represented by the prosecution.

<sup>10</sup> See Du Toit, E, e t al. *Commentary on the Criminal Procedure Act*, (1996) at 9-1.

commercial contracts. Compliance with bail conditions is enforced by revoking bail and forfeit the bail money to the state. The state normally makes use of arrest warrants to bring a person to court in order to account for his non-compliance with bail conditions. The accused faces criminal sanctions for not complying with the bail conditions.<sup>11</sup>

While this arrangement may exhibit some characteristics of a normal contract, it must always be remembered that bail has its own peculiar characteristics which distinguish it from other commercial contracts. The accused is released on bail pending the resumption of his trial subject to a general condition that he must return to court on the next date of appearance and that he remains in attendance until his trial has been concluded. While he is out on bail, his freedom continues until verdict has been passed. The court has a discretion to extend bail even after conviction but before sentencing.

This arrangement ensures that a balance between the two opposing interests is maintained.<sup>12</sup> The interests of the accused to his liberty must be balanced against the interests of the society to safety and law and order. The underlying consideration is the all embracing concept of the interests of justice. The interests of justice embody both the expectations of the individual to his freedom and the society to its safety and proper administration of justice. These interests are compatible and serve the same purpose of ensuring that the accused is afforded a fair trial.<sup>13</sup>

In *Ellish en andere v Prokureur Generaal, Witwatersrand*<sup>14</sup> it was held that the Constitution requires the presiding officer to maintain the balance between the interests of society, which expects justice, and the interests of the individual to his freedom. Maintenance of this balance gives effect to the presumption of innocence which operates in favour of the accused even when there is a strong prima-facie case against him<sup>15</sup>. At this stage the accused is merely a suspect

<sup>11</sup> Section 67A read with section 66 of the Criminal Procedure Act 51 of 1977 read with section .

<sup>12</sup> Section 60(9) of the Criminal Procedure Act, enjoins the court to weigh the interests of justice against the interests of the accused when it decides the question of bail.

<sup>13</sup> See *S v Hudson* 1996 (1) SACR 431 (N) 433 e- f.

<sup>14</sup> 1994 (5) BCLR 1 (W) 12A - C.

<sup>15</sup> *S v Mhlawuli and Others* 1963 (1) SA 795 (C).

whose guilt has not been proven and is entitled presumed innocent until proven guilty.<sup>16</sup> The charges against him can be withdrawn or the allegation can be proven to be unfounded, hence it is so important for the courts to lean in favour of freedom. An arrest is a drastic step which not only curtails the liberty of the individual but also results in serious social, economic and psychological harm which is aggravated by the stigma attached by the community to the accused.

Every reasonable effort must be made not to unnecessarily deprive the accused of his liberty before his guilt has been proven.<sup>17</sup> In *S v Hlongwa*<sup>18</sup> it was held that bail should be granted wherever possible and that the courts should lean in favour of liberty of the accused if the interests of justice will not be thereby prejudiced.

Bail is one of the measures aimed at protecting the accused from abuse of power by the state and also ensures that further detention of the accused is sanctioned by the court. Detention should not be used by the police as the method of continuing with the investigation.<sup>19</sup> Pre-trial detention should be used only when the strong prima facie case against the accused indicates that the proper administration of justice will be defeated if the accused is released on bail.



<sup>16</sup> See *Minister of van Wet en Order v Dipper* 1993 (2) SA 221 (A) where the AD held that the purpose of bail is to minimise any infringements on the freedom of an accused who has not yet convicted.

<sup>17</sup> In *S v Acheson* 1991 (2) SA 805 (NmHC) at 822 A, Mohamed AJ held that the accused cannot be kept in detention pending his trial as a form of some anticipatory punishment because the accused person is presumed to be innocent until found guilty by the court.

<sup>18</sup> 1979(4) SA 112 (D) 113 g - h.

<sup>19</sup> In *Prokureur-Generaal, Vrystaat v Ramokhosi* 1996 (11) BCLR 1514 (O) it was held that depriving a person of his / her freedom by arrest before conviction is a drastic curtailment of a fundamental right. It was held, further, that arrest ought to occur only where sufficient investigation had been done to justify such a drastic step and, preferably, when sufficient information had been gathered to place the prosecuting authority in a position to take a proper decision, not only in respect of formulation of the charge but also in respect of the supporting or opposing of an application for bail.



## 5. The General Duty to Disclose

The common law position was that the information in police dockets, including witness statements, was privileged and the accused could not claim access thereto.<sup>20</sup> This common law rule also prohibited the defence from interviewing prosecution witnesses without the permission of the prosecutor. Access to dockets was only allowed if the information sought by the defence does not fall within the protection of the docket privilege<sup>21</sup> or if the privilege was waived by clear implication or by express waiver.<sup>22</sup>

The new constitutional dispensation based on freedom, equality and openness, radically changed the rules of common law privilege. A person can now claim access to information in possession of the state in order to enforce his right. If the state refuses, the individual can approach the court for an appropriate relief and the state will be obliged to justify its refusal to grant access before the court. This right formed the basis for the constitutional challenge against the common law docket privilege.

Although there was a general consensus that the docket privilege infringed upon the right to a fair trial and could not be upheld in the face of the new dispensation, the courts did not agree on the basis for claiming access to dockets. In some cases the courts decided that access to dockets was based on the right of access to information.<sup>23</sup> In other decisions, it was held that discovery in criminal proceedings formed part of the general right to a fair trial.<sup>24</sup>

The Constitutional Court finally put the matter to rest and held that the right of access to police dockets was a component of the right to a fair trial. The court held that the all-embracing common law police docket privilege, set out in *R v Steyn*<sup>25</sup> prohibiting disclosure of all documents in police dockets was in conflict with the right to a fair trial and that this was an

<sup>20</sup> *R v Steyn* 1954(1) SA 324(A) at 335 a - c.

See also *S v Mavela* 1990(1) SACR 582 (A) at 590g - i.

<sup>21</sup> See *S v Yengeni and Others* (1) 1990(1) SA 639 (C).

<sup>22</sup> *S v Mavela* supra at 591 a - e.

<sup>23</sup> See *Minister of Safety and Security v Khala* 1994 (2) SACR 361 (W).

See also *Qozeleni v Minister of Law and Order* 1994 (2) SACR 340 (E).

<sup>24</sup> *S v Majavu* 1994 (2) SACR 265 (Ck) 228i- 229a

<sup>25</sup> (note 21) supra.

unjustifiable limitation.<sup>26</sup> It was held further that blanket prohibition of all consultations with prosecution witnesses regardless of the circumstances was an unjustified limitation for being over-broad.<sup>27</sup> The prosecution is under a general duty to disclose the contents of the docket to the accused and that the defence may have access to prosecution witnesses, subject to the guidelines set out in *Shabalala*.<sup>28</sup>

Any dispute concerning disclosure must be resolved by the court after argument by both the defence and the prosecution have been put before court.<sup>29</sup> Access to police dockets is required for enforcing the right to a fair trial by enabling the accused to prepare for his trial. With access to docket, the accused is afforded an opportunity of adequately preparing for his defence. He is placed in a position where he can gather all the relevant evidence necessary to oppose the state case. The defence can identify at the earliest opportunity all the issues that are to be placed in dispute, scrutinise the evidence of state witnesses and gather evidence in rebuttal of the state case.

The accused is thus placed in a position where he can be able to cross-examine and discredit any state witnesses. The constitution envisages an open and democratic society based on human dignity, equality and freedom and disclosure gives meaning to these values by providing a fair and transparent criminal justice system. The right of access to police dockets is aimed at bringing equality of arms between the prosecution and the accused because disclosure eliminates the element of surprise in criminal trials and brings fair play to these proceedings.

With disclosure the interests of justice are fulfilled. The interests of justice demands the balancing of the obligations that the prosecution has towards the public and to the accused. The main goal of these obligations is the search for truth. The search for truth characterised by good faith which enjoins the prosecution to disclose to the defence even the information which tends to weaken the prosecution case.<sup>30</sup> Once this duty has been fulfilled, the court is in a position reach a

<sup>26</sup> *Shabalala* supra at para 69.

<sup>27</sup> *Shabalala* supra at para 68.

<sup>28</sup> *Shabalala* supra at para 72.

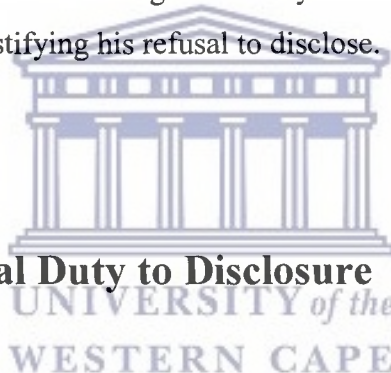
<sup>29</sup> *Shabalala* supra at para 55.

<sup>30</sup> *In R v Ward* (1993) 2 All ER 577 at 601J the Appeal Court of England held that all relevant evidence of help to an accused is not limited to the evidence which will obviously advance his case.

fair decision based on the best evidence available. It follows that the information contained in the police dockets and any other information which is the product of police investigation is not the property of the police or the prosecution. This information belongs to the society as the whole for the purposes of finding the truth and ensuring that justice is done.<sup>31</sup> Disclosure also has the function of preventing and of exposing abuse of power by the police and the prosecution.<sup>32</sup> The defence, on the other hand, is not obliged to assist the prosecution case in any way and is entitled to hold a purely adversarial attitude towards the prosecution.<sup>33</sup>

This means that the right of access to police dockets cannot be defeated by the claims that such access must be balanced with a corresponding obligation on the accused to disclose the basis of his defence to the prosecution. The prosecutor, as a public official, is the representative of the society and that he should not conduct himself in a manner that makes him an adversary of the accused. His role is not to strive for keeping the accused in custody or to solely secure his conviction but to ensure that justice is done and the truth is discovered.<sup>34</sup> In order to fulfil his role in ensuring fair trials, the prosecutor is under a general duty to disclose information in dockets unless there is a compelling reason justifying his refusal to disclose.

## 6. The Limits to the General Duty to Disclosure



The Constitutional Court in *Shabalala* recognised that there may be legitimate reasons why disclosure will be justifiably refused by the prosecution. Whether refusal is justified will depend

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See also GJ Bursey 'A Prosecutor's Duty To disclose Previous Inconsistent statements: Defence Allegations,' 'De Rebus', March 1991, p 181 -183.

<sup>31</sup> See for example *R v Stinchcombe* (1992) 68 CCC (3d) 1(SCC) at 7d.

<sup>32</sup> See also *United States v Bagley* 473 US 667 (1985) where the US Supreme Court per Justice Blackman emphasised that one of the aims of disclosure was to prevent the miscarriage of justice.

<sup>33</sup> For further discourse on the issue see *R v Stinchcombe* supra at 7e.

<sup>34</sup> In *Boucher v The Queen* (1955) 110 CCC 263 at p270 Rand J held that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. The role of the prosecutor, it was held, excludes any notion of winning or losing; his function is a matter of public duty. It was emphasised that this function had to be efficiently performed with an ingrained sense of dignity, seriousness and justness of judicial proceedings.'

on the circumstances of each case. The right to disclosure does not imply that the accused has a right to unsupervised access to the prosecution files nor does it entail a right to absolute access to police dockets. The right of access entails an orderly and controlled access to the relevant information for the purposes of enforcing his right to a fair trial.<sup>35</sup> The information sought to be disclosed must be both material and relevant. The accused cannot demand access to information which is not relevant to his case.

The courts has a duty of resolving disputes involving disclosure and decide on the facts of a particular case whether disclosure is justified or not. The court may in appropriate cases also decide the timing of the disclosure. The appropriate procedure would be that the accused will have to first request to have access to the docket. If the prosecutor refuses a reasonable request for access, then accused will have to approach the court for an appropriate order. It is impossible to lay down an exhaustive list of all the circumstances in which the disclosure may not be justified. Access must be refused if it is inherently not in the interest of justice to disclose.

Disclosure will not be in the interests of justice if it places the potential witnesses in danger or in a case which, owing to its inherent simplicity, involves a routine prosecution where disclosure is generally not required. In specific cases, where it can be shown, on balance of probabilities, that disclosure might reasonably impede the interests of justice or will be against public policy, refusal to grant access will be justified.<sup>36</sup>

The decision to refuse access will be justified if it appears that such decision is based on the need to protect the identity of witnesses, preserve safety of informers,<sup>37</sup> or to protect police investigation methods.<sup>38</sup> Disclosure will not be justified in routine and minor cases not involving any complexities of law or fact and in which there is no reasonable possibility of imposition of a prison sentence.<sup>39</sup> The onus of justifying refusal of access to dockets rests with the state to show on the balance of probabilities that disclosure is not justified in the circumstances. The state must lead reliable evidence to prove that disclosure is not justified in the given circumstances.<sup>40</sup>

<sup>35</sup> See *Pennsylvania v Ritchie* 480 U.S. 107 (1987).

<sup>36</sup> *Koortzen and Others v Prosecutor- General And Others* 1997(10) BCLR 1478 (Nm) at 1482 a - c.

<sup>37</sup> See *Els v Minister of Safety and Security* 1998(2) SACR 93 (NC).

<sup>38</sup> *Shabalala supra* at para 55.

<sup>39</sup> *Koortzen and Others v Prosecutor General and Others supra* 1482 b.

<sup>40</sup> *Shabalala supra* at para 56

## 7. Does the right to a Fair Trial apply to Bail ?

The general right to a fair trial sets down a general standard that has to be followed for ensuring that trials are conducted according to the constitutionally prescribed standard of fairness. The general parameters of these standards are defined by the courts when they interpret the right to a fair trial. It can be argued that the guarantees embodied in the right to a fair trial apply to bail proceedings. When the accused appears in court for his bail hearing, he is entitled to the protection provided by the constituent elements of the general right to a fair trial.

He will be entitled to all those rights which are relevant to a person appearing in a bail hearing. He is generally not entitled to the rights which specifically relate to his guilt. Most constituent elements of the right to a fair trial apply to bail proceedings. Apart from the qualified right to be released, the accused is also entitled the right to legal representation, a right to an interpreter, the right to adduce evidence, the right to be tried in an ordinary and open court, and the right to appeal. The general right to a fair trial which embodies these rights is an all-embracing right which is broader than the specific rights listed in the Constitution.<sup>41</sup>

The general right to a fair trial embodies, for example, the right to adversary proceedings, equality of arms and impartial proceedings. All these rights find application in bail proceedings. The defence will be able make a meaningful use of these rights only if it has enough information at its disposal. Enforcing the rights of the accused and properly advising him on the appropriate right course of action requires information contained in police dockets even at the bail stage. With access to dockets the accused and his legal representative can have an insight to the exact nature and content of the charges against him and have a full grasp of the consequences thereof.

This will help the accused prepare for his bail application and to take informed decisions in his preparation. When the state opposes a bail application it will normally place evidence before court in support of the allegations against the accused.<sup>42</sup> The state may call any witness including the complainant, the investigating officer or even experts to testify against granting of bail. In

<sup>41</sup> Section 35(3) of Act 108 of 1996.

<sup>42</sup> See *S v Mbolombo* 1995(5) BCLR 614 (C) for the discussion on the type of evidence that can be led in bail proceedings. In this case it was held that the judicial officer was entitled, for the purposes of bail, to entertain the possibility that the accused was guilty.

addition, the state has at its disposal the record of the previous convictions of the accused. The accused will then be given an opportunity to rebut the state's evidence against him. He will have to test the veracity of any evidence placed by the prosecutor in opposition of his bail. The accused will lead his evidence and call his witnesses in support of his bail application.<sup>43</sup> This process bears the hall marks of a full-blown trial and that the record of the bail application forms part of the subsequent trial.

The accused is at a disadvantage at bail proceedings because he does not have access to the resources used by the state for building a case against him. This disparity in resources required to prepare for the bail application can be remedied by granting access to dockets for the purposes of a bail hearing. It is submitted that every time an accused is brought before a criminal court for his bail hearing, he is on trial, even though the court will not at that stage determine his guilt. This is due to the fact that the court dealing with his bail application may sometimes entertain the possibility that he is probably guilty.<sup>44</sup>

The decision taken by the court in bail application may have a bearing in subsequent trial. The accused must be granted access to the dockets even in bail proceedings so that he can safe-guard his interests as early as possible. With access, he is protected from inadvertently waving his constitutional rights at the bail hearing and thereby prejudicing his case in a subsequent trial. With access, he will be protected from inadvertently incriminating himself during the bail application. The record of the bail proceedings now forms part of the record of the subsequent trial.<sup>45</sup> The fact that the record of the bail proceedings now forms part of the subsequent trial makes the case for access even stronger.<sup>46</sup>

Without access to dockets the accused runs a risk of building the prosecution case, when there was no case for him to answer. This violates his right against self-incrimination which can be exercised effectively if the accused is granted access to dockets to take informed decisions whether or not it is advisable for him to testify in the bail hearing. The right can be effectively

<sup>43</sup> *S v Mbele* 1996 (1) SACR 212 (W) 217 d -e.

<sup>44</sup> See *S v Dlamini* 1997(1) SACR 54 ( W).

<sup>45</sup> The decision of Myburgh J in *S v Botha and Others* (2)1995(2) SACR 612 (W) has been overtaken by the legislation.

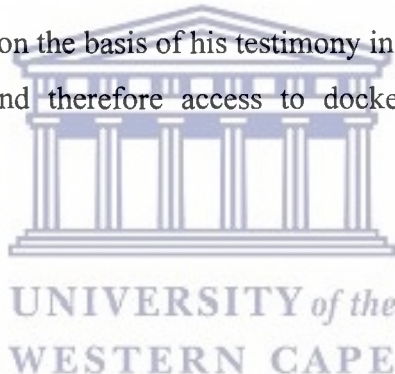
<sup>46</sup> Section 60(11B)(c) of Act 51 of 1977.

See also *S v Nomzaza* 1996 (2) SACR 14 (A) at 18- f.

invoked if the accused is granted access to docket and all the options he has at his disposal. The standard of proof required at bail proceedings is lower in the bail proceedings than in the subsequent trial. The state is only required to prove on balance of probabilities that it is not in the interests of justice to grant bail to the accused, unlike the higher standard of proof in the main trial where the state is required to prove its case beyond reasonable doubt.

It is inequitable for the state to allow the accused access to dockets in preparation for his main trial but refuse this protection in bail proceedings especially where the state is only obliged to discharge a lower onus of proof in bail proceedings. The accused is even more vulnerable in bail proceedings because the evidence that is generally inadmissible during the main trial, is admissible in bail proceedings. There is no provision in the Constitution to suggest that the right to a fair trial does not apply to bail.<sup>47</sup>

It can be safely concluded that the protection granted by the components of the right to a fair trial, especially disclosure of dockets, apply to bail. The existence of the inherent risk that the accused can be convicted in a subsequent trial on the basis of his testimony in bail proceedings justifies the need for the right to a fair trial and therefore access to dockets to be applicable in bail proceedings.<sup>48</sup>



## 8. Disclosure in Bail

The general right to a fair trial applies to bail proceedings. One of the components of the right to a fair trial includes the right of access to police dockets. In exercising this right, the accused will be entitled to only those components of the right to a fair trial which are relevant to advance his bail application. Disclosure of dockets is indispensable in bail proceedings in that it protects not only that the interest that are at stake during the bail application, but also those interests that can be adversely affected in his subsequent trial. The extent of protection required by the accused in a particular case will be determined by the facts of the case. The courts will be required to play an

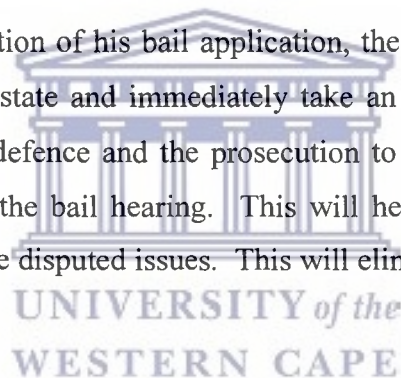
<sup>47</sup> In *S v Zuma and Others* 1994 (4) BCLR 401 SA 411 G - 412 A. Kentridge AJ held that all courts hearing criminal trials and appeals must give content to the concept of substantive fairness embraced by the right to a fair trial.

<sup>48</sup> See *S v Dlamini* 1998(5) BCLR 552 (W).

active and inquisitorial role in determining the extent, the nature and the timing of the disclosure required in a particular case. The accused requires access to police dockets in order to prepare for his bail application. He needs the information in the dockets in order to secure his release and to put the legitimacy of his continued detention into question. There should at least be a prima -facie case against the accused to justify his detention.

If there is no prima facie case against him, then he must be released. With access to dockets, the defence counsel would be in a position of satisfying scrutinising the allegations that resulted in his arrest to see whether or not it constitutes and whether the offence in question justifies detention.<sup>49</sup> If the offence in question does not justify detention, then the defence can raise this at the next appearance or on his bail hearing. The police may not keep the accused in custody only for the purposes of completing their investigation. Access to dockets serves as an additional safeguard protect the accused from unnecessary inconvenience resulting from detention when there is no prima facie case against him.<sup>50</sup>

With access to the docket in preparation of his bail application, the accused is enabled to detect any form of abuse of power by the state and immediately take an appropriate remedial action. Access to dockets enables both the defence and the prosecution to identify and limit the issues that will be put into dispute during the bail hearing. This will help save time in that the bail hearing will concentrate mainly on the disputed issues. This will eliminate the element of surprise in the bail proceedings.



The need for access to dockets for a bail hearing was illustrated in *Niewoudt v Prokureur-Generaal van Oos-Kaap*<sup>51</sup> where the court held that the vague claims by the state of intimidation could not outweigh the need by Niewoudt and co- applicants for access to information sought to enable them to apply for bail. With access to dockets the accused is protected against ambush by the prosecution. Access to dockets empowers the accused by making the information required to support his bail application, accessible to him. This eliminates the element of surprise and gives the accused an opportunity to prepare material necessary to cross- examine state witnesses. When the element of surprise is eliminated in the proceedings, the accused will know beforehand the

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<sup>49</sup> *S v Stanfield supra*.

<sup>50</sup> See *S v Scholtz* 1997 (1) BCLR 103 (NmS) 118 G - H.

<sup>51</sup> 1996 (3) BCLR 314 (SE).



evidence he must adduce for the bail application. He is also enabled to determine beforehand whether the evidence that he has in his disposal will be sufficient to discharge the onus that rests upon him in order to secure his release on bail. Non disclosure for bail purposes will place the accused at a disadvantage that is not compatible with the values enshrined in the Constitution.<sup>52</sup> This unfair advantage stems from the imbalance in resources between the accused and the state. Most accused persons are either unrepresented or are represented by practitioners appointed by the Legal Aid Board<sup>53</sup> who are paid reduced tariffs and are generally indifferent to the plight of the accused.

In most cases they are represented at the bail hearings by inexperienced candidate attorneys while the state prosecutor is a full time official who dedicates all his time to criminal work. Furthermore, unlike the police who are usually well informed about the case during the bail application, the defence attorney usually attends the bail application with very little information in his possession. He will depend on the information advanced to him by the accused in preparation of the bail application. Access to dockets will help correct this imbalance by making the relevant information available to the accused and thus assisting him in preparing for his bail application.

Unlike the police, the defence attorney was not present at the scene of crime or at the time of the arrest. The defence attorney would therefore not be in a position of knowing, for the purposes of bail application, the extent to which the accused has incriminated himself or the circumstances under which he incriminated himself unless he gets insight to the docket. The defence, unlike the state, is not in a position to make deals with witnesses or to induce witnesses by means of rewards to testify on behalf of the accused. Without access to docket, the efforts of the accused in adducing evidence in support of his bail application will be restricted.

The need for access is strengthened by the fact that the accused bears the onus of furnishing enough evidence to secure his release.<sup>54</sup> It is submitted that the overall object of disclosure, which is affording the accused a fair hearing, applies to bail proceedings.<sup>55</sup> Access to police dockets during bail stage will have the effect of bringing the equality of arms between the

<sup>52</sup> See *Molapo v Director of Public Prosecutions* 1997 (8) BCLR 1154 (Lesotho) p 1161 I - J.

<sup>53</sup> Established in terms of section 2 of Legal Aid Act 22 of 1969.

<sup>54</sup> See *S v Mbele* supra 221b.

<sup>55</sup> See *S v Scholtz* supra p 120 C- D.

prosecution and the accused even at the bail proceedings.<sup>56</sup> The police dockets normally contain state witness statements, statement made by the accused, expert reports and investigating officer's diary. Information contained in dockets may contain exculpatory evidence which may be decisive in securing the release of the accused on bail. Dockets may also contain information that may prove that there is no prima facie case against the accused.

By denying him access to dockets, the accused is denied access to any exculpatory information that may assist in his bail application. It submitted that the failure by the prosecution to disclose to the defence material information contained in police dockets in order to prepare for his bail application, when requested to disclose by the defence, amounts to misrepresentation. This gives a false impression to the defence that at the bail hearing the state was not in possession of any exculpatory evidence that may assist the accused in advancing his bail application.<sup>57</sup>

Even if it is proved that there is no prima facie case against the accused or that exculpatory evidence is revealed at the main trial, it is usually too late for the accused who has spent a long time in prison awaiting the finalisation of the main trial, to undo the hardship and stigmatisation experienced during his incarceration. It is submitted that denying the accused access to dockets amounts to an unjustified violation of his right to a fair trial because he is prevented from having access to information that may be necessary to support his bail application.<sup>58</sup>

When the prosecutor is in possession of evidence that is favourable to the accused but does not disclose it, he is not only depriving the accused a fair chance to state his case before the court but also denies the court an opportunity of reaching a fair and informed decision. The accused requires the information in the dockets to prepare for the cross examination of state witnesses and

<sup>56</sup> See for example *S v Scholtz* supra 121E - D where the court held that any system of justice which tolerates procedures and rules that put the accused persons appearing before courts at the disadvantage of allowing the prosecution to keep all the relevant material close to its chest in order to spring a trap in the process of cross - examining the accused and thereby secure a conviction cannot be said to be fair and just.

<sup>57</sup> See *R v Ward* supra a case dealing with disclosure for the purposes of the main trial, it was held that the prosecution has a common law duty to disclose to the defence the relevant evidence in its possession which tend to weaken its case or which strengthened the defence case. It was held further, that the duty to disclose this evidence continued during the pre- trial stages and held throughout the trial.

<sup>58</sup> *S v Scholtz* supra 120 F- H.

to expose any discrepancies that may exist in their evidence. With access to the dockets, he can attack the credibility of state witnesses and bring his own witnesses in support of his bail application. The accused is put in a better position to prove in cross-examination that a particular state witness has departed from his earlier statement or that a particular witnesses is biased against the accused. Refusal to grant him access to dockets will hamper his right to cross-examine state witnesses.

On the secondary level disclosure is required for preventing the accused from inadvertently incriminating himself in his bail application. The record of the bail application now forms part of the main trial.<sup>59</sup> Any statement made by the accused to the police is normally contained in the docket. If the accused has made an incriminating statement to the police, the statement can be used against him when the bail is opposed. Without access, his legal adviser will not be in a position to investigate the circumstances under which the statement was made and the extent to which the accused has incriminated himself.

Access is important to protect the accused from inadvertently deviating from his earlier statement during the bail application. With access to dockets the accused will be able to refresh his memory on the statement he has made to the police and also protect himself from inadvertently incrimination himself. He may have made the earlier statement while he was in shock or in an extremely emotional state without any intention of incriminating himself. Should the accused deviate from his earlier statement during his bail application, he risks committing perjury and have his bail application turned down even though the earlier statement was made while he was emotionally distressed.

If he is denied access to dockets, he is denied an opportunity of explaining his deviation from the earlier statement. Access to dockets will enable the defence counsel to investigate the circumstances under which the statement was made, advise the accused accordingly and take an appropriate remedial action on behalf of the accused. Since the record of bail proceedings forms part of the subsequent trial, there is no reason why the admissibility of an involuntary made statements cannot be tested during the bail application, especially if the state in opposing the bail

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<sup>59</sup> See section 60(11B)(c) of the Act which provides that the record of the bail proceedings, excluding the information regarding the accused persons 's previous conviction shall be part of his subsequent trial record following upon these bail proceedings

application, relies on the contents of the adverse statement made by the accused to the police.<sup>60</sup> Disclosure will also give effect to the protection that the accused has always enjoyed both under common law<sup>61</sup> and statute which recognises the right of the accused to his statement.<sup>62</sup> In bail applications the accused is obliged to inform the court of his previous convictions or any cases still pending against him.<sup>63</sup>

The police keeps records previous convictions of every convicted persons in the Country and this record is easily accessible to the prosecutor through investigating officer. This record forms part of the docket and the prosecution usually opposes bail on the strength of the number previous convictions of the accused that are contained in the record. If the list of previous convictions is not furnished to the accused, he will not be able to furnish an accurate account of his previous convictions. The accused may bona-fide confuse his previous convictions of may have forgotten about his minor and long forgotten previous convictions.

His bail application stands to fail and also exposes himself to heavy sanctions for failure to disclose an accurate list of his previous convictions. The prosecutor, who would have these details in his possession, would then spring a surprise on the accused by suddenly cross-examining the accused on the omitted information. This amounts to an ambush which exposes the accused to heavy penalties for inadvertently furnishing inaccurate information. Disclosure will assist the accused to compile an accurate list of his previous convictions.

Access to dockets during the bail stage will save time because it will be possible to advise the accused at the early stage of the prospects of his bail application. Disclosure will eliminate unnecessary delays in finalising bail applications because the issues that will be argued during the bail application would have been clearly defined before hand and that all the parties involved will have had the necessary information at their disposal. The prosecution is more likely not to oppose bail if it knows that the reasons for opposing bail are sketchy and insufficient because of the knowledge that those reasons will be placed under scrutiny by the defence and will also be brought to the attention of the court.

<sup>60</sup> See *S v Scholtz* supra 121 G -H.

<sup>61</sup> *S v Hassim and Others* 1971 (4) SA 121 (N) 123 E - H.

See also *S v Ffrench -Beytagh (1)* 1971 (4) 335 (T).

<sup>62</sup> Section 325 of Criminal Procedure Act.

<sup>63</sup> Section 60(11B)(a) of Act 51 of 1977.

It can be safely concluded that an accused has a right of access to police dockets in preparation of his bail application subject to the justifiable limitations that will be developed and imposed by the courts. Since bail proceedings are inextricably linked to the main trial which follow thereafter, it is submitted that disclosure during bail stage will play a crucial role in ensuring that the subsequent trial is fair.

## 9. Is section 60(14) of the Criminal Procedure Act<sup>64</sup> constitutional ?

Section 60(14) of Criminal Procedure Act<sup>65</sup> provides as follows:

“ Notwithstanding any law to the contrary, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs:

Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for the purposes of his or her trial.”

In assessing the constitutionality of this provision, the starting point should be to investigate the extent to which the limitation affects the fundamental right. The effect of the limitation on the fundamental right must not be so extensive that it nullifies the fundamental right. The Constitution sets out a general standard that must be complied with before any limitation can pass constitutional scrutiny. Any limitation that does not comply with the general limitation test laid down in section 36 (1) of the Constitution is invalid for being an unjustified limitation of the constitutional right to a fair trial.<sup>66</sup> In considering whether the provision complies with the general

<sup>64</sup> Criminal Procedure Act 51 of 1977.

<sup>65</sup> Act 51 of 1977.

<sup>66</sup> Section 36 of the Constitution reads as follows:

- (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
- (a) the nature of right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) the less restrictive means to achieve the purpose.

standard of limitation, a two-staged constitutional analysis is required: firstly, it has to be established whether or not a fundamental right has been infringed. If not, then there will be no need for any further enquiry because no fundamental right has been infringed.

The accused has to show that his right to a fair trial has been infringed by non-disclosure of the dockets in bail proceedings. Once he proves the infringement, then the second stage comes into play. The second stage involves the justification of the infringement of the fundamental right by the state. The state will then have to show that the limitation complies with the requirements set out in section 36 (1) of the Constitution. This means that the state bears an onus of proving that section 60(14) of the Criminal Procedure Act<sup>67</sup> complies with the general limitation test laid down by section 36(1) of the Constitution.

If the law does not conform with the Constitutional requirements for legitimate limitation then provision is null and void for being in conflict with the Constitution. It is submitted that the main function of the limitation clause is to protect and advance the fundamental rights rather than curtail their enjoyment. The overall test used to assess constitutionality of a limitation involves the so called proportionality test. Competing values are weighed up against each other on a case by case bases.<sup>68</sup> The inconvenience caused to the accused by the limitation is weighed up against the potential benefit brought by the limitation. There must be proportionality between the inconvenience caused by the limitation and the benefit derived from the limitation.

The measure of inconvenience caused by the limitation to the individual must not be grossly disproportionate to the benefit brought by the limitation, otherwise the limitation will be unconstitutional for being an unjustifiable limitation. The effect of the prohibition in question is firstly, to prohibit the accused for getting access to any information contained in police dockets for the purposes of bail. Secondly, the provision places the discretion of granting access to dockets in the hands of the prosecution to decide whether or not he can grant access to the accused for the purposes of bail. This provision takes away the role of the court in presiding over the disputes involving disclosure.

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(2) Except as provided in section (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>67</sup> 51 of 1977 as amended.

<sup>68</sup> *S v Makwanyane* 1995 (2) SACR 1 (CC) para 104.

The right to a fair trial applies to bail proceedings. This right to a fair trial lays down a general standard of fairness that has to be complied with in criminal proceedings. The state is required to grant the accused access to dockets in order to prepare for his bail application. Furthermore, the state is required to account to court for refusing to disclose. The prohibition in section 60(14) prima facie infringes on the right to a fair trial in that it denies the accused access to dockets and gives the prosecutor absolute discretion in the granting of access.

Section 36(1) of the Constitution provides that a limitation will be legitimate if it is in terms of a law of 'general application and that such limitation must both be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'<sup>69</sup> A limitation which caused a more onerous burden on the individual will need more persuasive the grounds of justification.<sup>70</sup>

### **i) Nature of the Right**

The nature of the right infringed is generally related to its importance in an open and democratic society. The right infringed by section 60(14) is the right to have access to dockets for the purpose of bail. This right is a component of the right to a fair trial which is of fundamental importance in an open and democratic society. This right enhances the ability of the accused to enjoy other rights protected by the constitution. For example the right to a fair trial gives effect to, among other rights, the right to equality, the right to human dignity and to the right freedom and the security of person. All these rights can be regarded as the cornerstone of our constitution.

The importance of disclosure was aptly stated in the case of *S v Mayiya*<sup>71</sup> where the court stated that duty to disclose the contents of dockets is even more important in the case of unsophisticated and unrepresented accused, for it serves basically two functions. The first function is to place the court in a position of carrying out its own duty more effectively in respect of assisting an unrepresented accused to present his or her own defence. Secondly, it places an

<sup>69</sup> See section 36(1) Act 108 of 1996.

<sup>70</sup> See *S v Bhulwana* 1995 (12) BCLR 1579 (CC) para 18

<sup>71</sup> 1997 (3) BCLR 386 (C) where the conviction and sentence were set aside when it appeared from the record that the prosecutor failed to disclose medical evidence which differed in material respects from the version given by the complainant because the impact of the medical practitioner's statement on the complainant's credibility had not been tested and that the failure to disclose it rendered the trial unfair.

accused in a better position to test the reliability of the state witnesses by means of cross-examination in the interests of a fair trial and a healthy administration of criminal justice. The accused requires the information in police dockets to prepare for his bail application, to protect himself from inadvertently incriminating himself in bail proceedings and also to determine whether there is a prima facie case to justify his continued detention. Access to dockets serves as an additional guarantee to protect the accused from abuse of power by the police and the prosecution.

Access to dockets in preparation of a bail hearing reduces the chances of unjustified pre-trial detention in that the accused and his legal representative can scrutinise the docket and object to any request by the prosecution for his further detention. Disclosure enhances the chances of early detection of the possible abuse of power by the police and prosecution. The defence is placed in a better position to prepare for the bail application by adducing evidence necessary for challenging the reasons advanced by the prosecution for opposing his bail application.<sup>72</sup> Absolute prohibition also denies the accused access to any information in police dockets that may be helpful to his case and for which the prosecutor cannot legitimately claim privilege.<sup>73</sup>

The prosecutor may not justifiably claim privilege when the accused requires access to the copy of his statement or statements of his witnesses. In order to afford the accused a fair bail hearing, the prosecutor is required to disclose to the accused or his legal representative all exculpatory information contained in the dockets.<sup>74</sup> It is submitted that a provision which prohibits disclosure of information at any stage of the criminal proceedings, including bail is an unjustifiable violation of the right to a fair trial. Disclosure plays an important role in a free, open and democratic society based on equality and freedom in that it ensures a transparent and accountable criminal justice system.

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<sup>72</sup>Section 35(3)(i) of the Constitution.

<sup>73</sup> See *Shabalala v Attorney General of Transvaal* supra at para 40 -41.

<sup>74</sup> See *Molapo v Director of Public Prosecutions* supra at 1161 J



## ii) Importance of the limitation

A limitation will be justifiable if it serves a sufficiently important purpose that can justifiably warrant the limitation of a fundamental right. A purpose that is not sufficiently important in an open and democratic society will not qualify as a justifiable limitation. The rationale for this limitation appears to be the protection of state witnesses and police informers from intimidation and to encourage the victims of crime to report offenders.

It also appears that the docket privilege during bail is also meant to safeguard the police investigation by preventing the accused from tailoring evidence and also to prevent delays caused by access to police dockets.<sup>75</sup> It in its attempt to place stringent regulations on the granting of bail, the legislature has over-stepped the mark by introducing measures which deprive the accused access to information that is necessary in bringing an effective bail application.

## iii) Nature and the extent of the limitation

The effect of the limitation on the fundamental right can be used as an indicator of the legitimacy of the limitation. A relatively minor limitation, which amounts to a mere inconvenience, is more likely to be justifiable in open and democratic society. A limitation, on the other hand, that is extensive and out of proportion to the object it seeks to achieve will not be constitutionally justifiable. The prohibition effectively re-introduces the docket privilege which was curtailed in *Shabalala*, in bail proceedings.

The limitation prohibits disclosure of all information, record or document which forms part of the docket for the purposes of a bail hearing regardless of the circumstances. Although the ambit of the prohibition is purportedly limited to bail hearings, it is submitted that the effect of the prohibition will have a bearing on the outcome of the subsequent trial. This is due to the fact that the record of the bail application is now regarded as part of the record of the main trial.

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<sup>75</sup> The long title of the Act lists the regulation of the right of access to any information, record or document during the bail proceedings and the provision for matters connected therewith as some of the objects of the Bill.

The prohibition is so extensive that the accused is denied even access not only to statements of the state witnesses contained in the docket but also to the copy of his own statement contained in the docket. This is in breach of the right to his statement protected both by common law and statute. The accused has a right to the copy of the statement he had made to any Justice of Peace in order to refresh his memory in any criminal proceedings.<sup>76</sup> The prosecutor is given the discretion of controlling the timing, the nature, and the extent of access that must be granted to the accused.

There is a real fear that the prosecutor will not exercise this discretion fairly because he is party to the proceedings and has an interests in its outcome. The intervention of the court is required to ensure that the prosecutor remains accountable for its decisions.

#### **iv) The Relationship between the Limitation and its purpose**

The limitation must promote the object it was designed to achieve. If the prohibition does not promote or contribute towards achieving the purpose it was designed to achieve, then the limitation will not be constitutionally justifiable. A limitation is only legitimate if there is a rational link between the limitation and the objective it seeks to achieve. Even in cases where the limitation does achieve its object, it will not be justified if it adversely affects persons or regulate conducts that have nothing to do with its objects. The measures adopted to achieve the stated objects must be reasonable in a free and democratic society.

The limitation must be able to achieve the purpose it was designed to serve. There must be a logical connection between the measures introduced by the limitation and the purpose for which the legislation was adopted. Section 60 (14) is not rational to the purpose it seeks to achieve. It is over-broad and cover instances that are not rationally linked to the intended its objectives. The deemed purpose of the limitation is the protection of state witnesses from intimidation by dangerous criminals and to prevent the accused from tailoring their evidence.

There is no rational connection between the protection of witnesses and the prohibition because the need to protect witnesses does not arise in all bail proceedings. In addition, the information

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<sup>76</sup> Section 335 of the Criminal Procedure Act.

See also *S v Hassim and Others* supra.

contained in dockets does not always demand protection by means of docket privilege. Intimidation of witnesses does not arise in all cases. The docket may contain a statement made by the accused which can not be privileged against the accused. It is submitted that depriving the accused access to the copy of his statement does not serve any legitimate purpose and that it is not rationally linked to the purpose for which the provision was designed to achieve. There is no rational link between the protection of the state witnesses and the prohibition of access in bail hearings.

Witnesses cannot be protected by denying the accused access to his statement. An accused can apply for bail at all stages of his trial even after conviction and even after the sentence was imposed. It is not clear whether the legislature intended the prohibition to apply to all stages of the trial or is limited to bail applications brought before the trial commences. The full force of the prohibition will only be effective to the accused who applies for bail after his appearance shortly before his arrest. The section will only effective to pre-trial bail.

The prohibition will be ineffective to an accused who applies for bail while the main trial is running and after the further particulars were furnished to him and to whom the access was granted for the purposes of his trial. The prohibition puts the accused who apply for bail at the pre-trial stage at a disadvantage when compared to their counterparts whose trials are up and running.

The whole purpose of protecting the witness is then defeated if access and insight to dockets is granted in proceedings in which bail is considered after the main trial has started. The impact of the provisions can be easily undermined by astute attorneys by advising their clients to wait till the main trial begins and be furnished with further particulars and to gain insight to the docket before he decides to apply for bail. There is no rational link between the object of the limitation and the limitation because the prohibition does not achieve the stated objects. The limitation fails for failing to achieve its object despite being over-broad.

## v) The Less Restrictive Means to Achieve the Purpose

There must be a proportionality between the harm done by the infringement and the intended benefit the limitation seeks to bring.<sup>77</sup> There is no proportionality between the blanket privilege and the intended benefit in that limitation prohibits access to all information in police dockets even though no legitimate grounds may exist for the protection of that information. The limitation is over-broad in that it prohibits disclosure in all circumstances even where prohibition is not justified.

A measure granting the prosecutor an exclusive discretion to infringe upon a fundamental right and which is not subject to the scrutiny of the courts cannot be constitutionally justified.<sup>78</sup> It has been held, in the context of search warrants, that any official who exercises a discretionary power which infringes upon the fundamental right must be independent or his decision must be subject the scrutiny of an impartial arbiter.<sup>79</sup>

Partial prohibition would have been a less restrictive means and would be used to prohibit access only in defined extreme cases. Alternatively, the role presiding over disputes concerning desirability of disclosure in a particular case must be left to the court to resolve.<sup>80</sup> In *Molapo v Director of Public Prosecutions*<sup>81</sup> it was held that the prosecution must always seek the directions from the court which is obliged to exercise its discretion judiciously and not capriciously or arbitrarily. The state is under a general duty to disclose except where there are legitimate grounds for refusing to disclose.<sup>82</sup>

<sup>77</sup> See J De Waal & I Currie 'Limitation' in De Waal, Currie & Erasmus *The Bill of Rights Hand Book* (1997) 125.

<sup>78</sup> See *S v Mbatha, S v Prinsloo* 1996(1) SACR 371 (CC) para 24.

<sup>79</sup> See *Park Ross v Director, Office Of Serious Economic Offences* 1995(2) BCLR 198 (C) 218 - 221 for the need for impartiality and detachment of the decision maker from the actual proceedings.

<sup>80</sup> See *R v Davis & Others* ([1993] All ER 643 (CA)) 648c -d where the court held, in an case where the prosecution based its non-disclosure to the accused of the exculpatory evidence of the science experts on docket privilege, that the prosecution cannot rely on the blanket privilege which gave it a discretion of how and when to disclose because the prosecution cannot be the judge in its own case by deciding which information must be disclosed. The court went on to hold that the role of determining and interpreting the rights must be left to the courts.

<sup>81</sup> *Molapo v Director of Public Prosecutions* at p 1162 D -H.

<sup>82</sup> *Koortzen and Others v Prosecutor-General and Others* supra 1482 A -C.

## 10. Conclusion

The accused has a right to a fair trial which also applies to bail hearings. This right includes the right of the accused to have access to police dockets in preparation of his bail application. The docket privilege in bail proceedings infringes upon the right to a fair trial. It denies the accused access to any information contained in police dockets if the accused is going to use that information in his bail hearing, unless the prosecutor grants permission. The prohibition is over-broad in that it prohibits disclosure even in cases where the docket privilege is not justified. Not all information in police dockets justifies the need for protection.

The prohibition is also unjustified because it does not provide for any procedural safe-guards in whereby the prosecutor can be held accountable for his decisions and thus protect the accused from the abuse of power by the prosecutor. The prosecutor must be able to justify before court why needs to protect the information in police dockets by means of the docket privilege.<sup>83</sup> The section effectively ousts the power of the courts to preside over disputes relating to disclosure. The limitation is out of proportion to the object it seeks to achieve. It infringes on the fundamental rights more than it is required to achieve its purpose.

The legislation was aimed at dangerous criminals charged with serious offence and who pose a threat to witnesses and the administration of justice. The prohibition prohibits disclosure of all information in all cases irrespective of whether or not disclosure is justified in the circumstances. The purpose of the legislation can be achieved using less drastic means. For example, the state can be allowed to prohibit disclosure only in certain categories of cases and that its decision to refuse access be subject to the scrutiny of the courts.

Section 60 (14) is unconstitutional on two grounds. Firstly, it prohibits access to any information in police dockets in all cases regardless of the circumstances. Secondly, the section provides that the right to access is subject to the absolute discretion of the prosecutor who is also a party to the proceedings. The section also fails for not providing for the independent scrutiny by the courts of the decision of the prosecutor when he decides whether or not disclosure is appropriate. Since section 60 (14) cannot be read down in order to restrict its ambit, the whole section should be declared as unconstitutional for being an unjustifiable limitation of the right to a fair trial.

<sup>83</sup> *S v Angula* 1997(9) BCLR 1314 (Nm) supra 1483 F - G.

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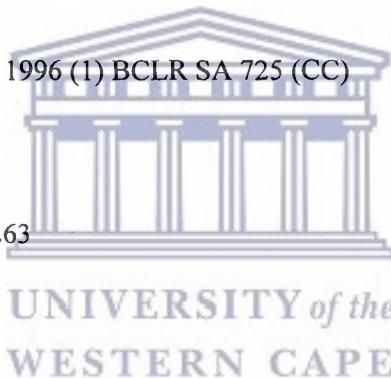
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