CASE NO. A 63/97

JOHANNES KOORTZEN & 5 O -vs- THE PROSECUTOR GENERAL & 2 O

TEEK J, et

HANNAH.J

1997/09/05

Disclosure by State of statements of prosecution witnesses. State has burden of proving that discovery is unnecessary. State can outline it's case to the court. The court can call for sight of the statements. Where State relies on interference with its witnesses as a ground for refuse^ to disclose the best possible evidence should be placed before the Court.

Method of challenging lower court's decision not to order disclosure. Application for review of the decision should be made.

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

Sixth Applicant

First Respondent

Second Respondent

CORAM: HANNAH, J et TEEK J-

Heard on: 1997.08.08 Delivered

on: 1997.09.05

JUDGMENT

HANNAH, J.: We have before us a notice of motion in which the following relief is sought:

"1. That the order made by the Second Respondent on 14 October 1996 dismissing the Applicants' application for discovery of the Police Investigation Docket 61/9/95 is hereby set aside.

2. Directing the First Respondent to provide the Applicants (or their legal representative) within 7 days of this order with copies of all State Witnesses' statements as well as documentary evidence contained in the Police Investigation Docket CR 61/09/95 and/or in possession of the State and/or the Police pertaining to the charges against the Applicants.

3. Costs of this application (including the costs of the initial application brought in the Regional Magistrate's Court for Keetmanshoop on 14 October 1996)."

The background to the application is as follows. The applicants were first brought before the Luderitz Magistrate's Court to face five criminal charges. The case was then transferred to the Regional Magistrate's Court at the instance of the first respondent and the charges were increased in number to thirty three. Ten of these charges alleged that the applicants unlawfully hunted varying numbers of ostriches during the period from 8th September, 1995 to 20th September, 1995 and two other charges alleged that they unlawfully hunted oryx and springbok during the same period. In all it was alleged that the applicants unlawfully hunted seventy two ostriches, seven oryx and two springbok. The State also alleged that the hunting took place on government land and this accounted for twelve further charges of

contravening section 28 (1) (a) of Ordinance 4 of 1975. Another charge alleged unlawful use of vehicles when hunting. Another alleged unlawful destruction of ostrich eggs. Another alleged unlawful presence in a Diamond Area. Another alleged unlawful possession of ammunition. And finally there were three charges of unlawful possession of a fire-arm. All these charges related to the same period, namely 8th September, 1995 to 20th September, 1995.

Prior to the applicants' appearance before the Luderitz Magistrate's Court their legal representative wrote to the local State prosecutor asking for copies of all the State witnesses' statements as well as all documentary evidence which was to be used at the trial. This request was refused by the State prosecutor and on 14th October, 1996 the applicants brought a formal application before the Regional Magistrate's Court asking that the State be ordered to make discovery. That application was dismissed and in consequence the present application was launched.

The State prosecutor opposed the application for discovery in the Regional Magistrate's Court on two grounds. One of the grounds was that there had been interference with one or more persons whom the State intended to call as witnesses at the trial and, so it was contended, in these circumstances the identity of these person should not be disclosed to the defence. The other ground was that the case was so simple and straight-forward that there was no need for the defence to have copies of the witness statements.

In support of the first ground the State prosecutor called the investigating officer and

he testified to three alleged incidents of interference with State witnesses. He said that at a certain stage of the investigation one of the applicants approached a farm labourer and asked about a visit by the police to a certain farm. He wanted to know from the labourer what the police were looking for and what questions they had asked. And when the labourer told this particular applicant that he had answered some of the questions which had been asked he was told not to say anything to the police. That was the first incident. The second incident also involved a farm labourer but it is not clear whether it was the same one. One of the applicants, it was alleged, instructed that labourer to give certain information to the police. The third incident involved one of the applicants ordering a certain hotel employee to clean his vehicle and to dispose of certain objects that were in the vehicle in a rubbish drum. The hotel employee was instructed not to mention that the vehicle had been washed or that the objects had been disposed of. Presumably these three persons were potential State witnesses. The investigating officer also made reference to an incident when one of the applicants allegedly hid some fire-arms which the police were searching for in a field. That incident did not involve potential witnesses.

The investigating officer went on to say that about twenty seven to thirty witness statements had been taken and that most of the witnesses were employed by the applicants who were therefore in a position of authority over them. That, as I understand it, was advanced as a general ground for concealing the identity of the witnesses. Other witnesses, so it would appear from the investigating officer's testimony, included expert witnesses dealing with ballistic and other scientific matters.

As for the second ground for opposing the application for discovery the State prosecutor relied on the charge sheet which, he contended, spoke for itself. It was clear from the nature of the charges that the case was a simple one presenting the applicants with no difficulty in the preparation of their defence.

The magistrate dismissed the application taking the view (a) that there cannot be a fair trial if only the State is required to disclose the evidence in its possession; (b) that if an accused is supplied with copies of the statements of the State witnesses he may "work out a defence and plea"; (c) that if an accused exercises his right to remain silent until he has been given discovery of the State's case he is "forcing for an unfair trial"; (d) that unless an accused has disclosed his defence he is not entitled to discovery; and (e) that even if one accused has disclosed his defence he is not entitled to discovery if co-accused represented by the same counsel have not.

Mr Small, who appeared on behalf of the first respondent but who did not appear in the Court below, understandably did not seek to support the magistrate's view of the law which, in the light of recent decisions of the Supreme Court and this Court, is hopelessly wrong: *S* **v** *Scholtz 1996 (2) SACR 426 (NMS); Angula & Others* **v** *the State; Lucas v The State* **(unreported judgment of the High Court delivered on 6th August, 1996) (Case Nos CA 14/95 and CA 59/95). Nor did did Mr Small seek to argue that there was any real merit in the contention advanced by the State prosecutor before the Regional Magistrate's Court that the case was clearly a simple one which would necessarily present the applicants with no difficulty in the preparation of their defence. Mr Small's concern was that this Court should lay down some guide-lines**

as to how applications for discovery should be dealt with in criminal cases and how the State might overcome the difficulties arising from advance disclosure of the identity of witnesses when there exists a real fear of interference with such witnesses.

In the *Angula* case (supra) Strydom J.P., referring to discovery in the lower courts, said:

> **"In respect of minor offences involving no complexities of fact or law in which there is no reasonable prospect of imprisonment, and in which the accused can easily adduce and challenge the State's evidence, disclosure should not necessarily follow. The same is applicable to routine prosecutions such as most traffic offences e.g. illegal parking, etc."**

The learned judge then went on to list certain specific instances when the State would be entitled to refuse disclosure where it is shown, on a balance of probabilities, that such disclosure might reasonably impede the ends of justice or otherwise be against the public interest, instances such as the need to withhold the identity of an informer or the need to protect the safety of a witness. As Strydom J.P. pointed out, the burden of proving that it is entitled to refuse disclosure in these instances falls on the State and, in my view, the same applies when it is contended that discovery is unnecessary because the offence charged is a minor one involving no complexities of fact or law and in which there is no reasonable prospect of imprisonment.

Obviously one can have a very simple and straight-forward case of unlawful hunting

but one can also have a complex one or, at least, one which is potentially complex. The case involving the applicants is in my view, a prime example. Seen from the defence point of view, instructions will have to be taken from six accused with regard to numerous offences allegedly committed over a period of twelve days. Without knowledge of the State's case this exercise could, and probably would, present a veritable nightmare. In terms of Article 12 (1) (d) of the Constitution all persons charged with an offence shall be presumed innocent until proven guilty and, applying that presumption, one can expect numerous conflicts between the evidence of the State witnesses who, according to the testimony of the investigating officer, number no less than twenty seven and that of the respective accused; and to take full instructions so as properly to cross-examine and generally to prepare the defence case without access to the statements of State witnesses would be likely to prove most difficult. And the difficulties are compounded by the fact that the State intends to call expert witnesses. It may be that the evidence of these witnesses will go unchallenged but as a matter of basic fairness the defence should have an advance opportunity to consider the evidence to be adduced and, if necessary, to consult with their own experts.

The comments I have made thus far are based on the bald allegations contained in the charge sheet and it may be that when regard is had to the State case, as set out in the statements of its witnesses, that a different picture altogether emerges. It may emerge that the case is indeed a simple, straight-forward one and that the applicants will have no difficulty in challenging it and adducing their own evidence. And it is for that very reason that I consider the burden must lie on the State to show that the offence or offences charged involve no complexities of fact or law. The State knows what its

case is. The defence does not. If the State contends that its case is such that discovery is unnecessary then it is for the State to show this to be so. And it can do this relatively easily by outlining its case to the Court to whom application for discovery is made so that that Court is in a position to make an informed decision. And in an appropriate case that Court can itself call for sight of the statements so as to inform itself more fully. But that course should be avoided, if at all possible, because it would probably result in that Court disqualifying itself from adjudicating at the actual trial.

It must follow from what I have just said that I am of the view that on the scant information placed before it the Regional Magistrate's Court would not have been justified in dismissing the application for discovery on the basis that the case against the applicants necessarily involved no complexities of fact, that it was necessarily one in which the applicants could easily challenge the State's evidence and that they could easily prepare their own defence even had that been one of the grounds of dismissal.

I come now to the question of alleged interference with State witnesses and the stance adopted by the State prosecutor that the identity of all State witnesses should not be disclosed to the defence. Firstly, it need hardly be said that this stance was wholly unjustified when it came to the identity of expert witnesses. There was no question of any interference with these. This perhaps illustrates the irrational approach which was taken by the State prosecutor to the whole question of discovery in the Regional Magistrate's Court. But assuming that a proper case was made out that there had been interference with witnesses, that there was a well-founded fear that there would

be further interference and that the risk of interference would be increased if the identity of witnesses were to be disclosed then I accept that that might constitute a good ground for refusing discovery of the statements of those witnesses prior to the trial. I put it no higher than that because at the end of the day the judicial officer would have to exercise his discretion having regard to all the circumstances of the case before him. In particular he would have to weigh the possibility of damage being done to the State's case by unlawful interference by an accused with its witnesses against the possibility of an accused having an unfair trial due to inadequate facilities being afforded to him for the preparation of his defence. The judicial officer would have to decide on which side the scales fell.

In order for the judicial officer to decide the questions just mentioned the best evidence possible should be placed before him. Obviously the witness whose identity it is sought to conceal will not give evidence about any alleged interference. That would defeat the whole purpose of the exercise. But a statement made by him dealing with the alleged interference should be placed before the judicial officer for his consideration. And if other evidence is available then that should also be called. For example, evidence of admissions made by an accused with regard to the alleged interference. In that way the judicial officer can make an informed decision.

In the present case the only evidence placed before the magistrate was the evidence of the investigating officer that most of the State witnesses were employed by the applicants and his vague, hearsay evidence of three instances when one or other of the applicants had interfered with a potential witness. It was not even disclosed whether

it was the same applicant and the same witness or several applicants and several witnesses. The evidence of the interference was, in my view, wholly unsatisfactory. But quite apart from that one is left with strong misgivings about its credibility. I should have thought that if witnesses were actually interfered with or if there was a genuine fear of interference then at very least steps would immediately have been taken to add an appropriate condition to bail: but no such steps were taken. I find this astonishing.

In my judgment, the State did not make out a proper case in the Regional Magistrate's Court for non-disclosure of witness statements and the order for discovery which was sought should have been made.

That leaves for consideration the question of the applicants' proper remedy. In *Angula's* **case (supra) the applicants were refused discovery in the magistrate's court and then took the matter on appeal. Their appeal was allowed. Their trial was postponed pending the outcome of the appeal and the appeal was therefore in the nature of an interlocutory appeal. I therefore raised with counsel the question whether that was not the course which should have been followed in the present case. Both Mr Small and Mr Maritz, who appeared on behalf of the applicants, submitted that an interlocutory appeal is not the correct procedure. They based this submission on Article 80 (3) of the Constitution and sections 65 (1) (a), 309 and 310 of the Criminal Procedure Act 51 of 1977.**

Article 80 of the Constitution deals with the jurisdiction of the High Court and the

jurisdiction of this Court with regard to appeals is set out in sub-article (3) as follows:

> **"(3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament."**

The Act of Parliament which governs appeals to the High Court in criminal matters is the Criminal Procedure Act. Section 65 (1) (a) deals with an appeal against a refusal of bail or the imposition of certain conditions of bail and section 310 deals with an appeal against any decision favourable to an accused. The only other section of any relevance is section 309 (1) (a) which provides:

> **"(1) (a) Any person convicted of any offence by any lower court (including a person discharged after conviction), may appeal against such conviction and against any resultant sentence or order to the provincial or local division having jurisdiction."**

By virtue of section 40 (2) of the High Court Act 16 of 1990 the reference to provincial or local division must be construed as a reference to the High Court.

The position is, therefore, that except in the case of bail this Court does not have jurisdiction to entertain an appeal from a lower court in a criminal matter before conviction. An accused seeking to challenge a decision made by a lower court before his trial has run its full course must therefore seek another remedy. This matter was not raised in *Angula's* **case (supra) and in these circumstances I do not consider that**

we are in any way bound by the procedure followed in that case.

The problem is a procedural one and it is one which has confronted the courts in the past. In *S v Rosslee* **1994 (2) SACR 441(C) at 446 e Marais J said:**

> **"The matter is before us in the guise of an appeal. Section 309 of the Criminal Procedure Act 51 of 1977 makes no provision for the noting and hearing of an appeal by an accused in a criminal case unless he has been convicted. However, there is high authority for the view that the Supreme Court may allow procedural remedies more familiar in civil law, such as review, interdicts, mandamus and the like, to be invoked in criminal cases at a time when an appeal would not lie, and when it is necessary to restrain an illegality in the court below. See** *Sita and Another v Olivier No and Another* **1967 (2) SA 442 (A) at 447 D-H."**

And Mr Maritz submitted that in a case such as the present where grave injustice might result if the applicants were to be required to stand trial without having been given discovery three remedies are available. The first is the right conferred on an aggrieved person by Article 25 (2) of the Constitution to approach a competent court to enforce or protect constitutional rights or freedoms which have been infringed or threatened. The second is the inherent review jurisdiction of this Court to intervene in the proceedings of a lower court to prevent a grave injustice or a grave irregularity in criminal proceedings before that court. And the third is a mandatory interdict to compel performance of a specific statutory or constitutional duty or to remedy the

effects of unlawful action already taken.

The applicants have not sought a mandatory interdict in the application before us and I therefore find in unnecessary to consider whether that particular remedy is available. Nor do I find it necessary to consider whether, in the circumstances of the present case, a remedy lies in terms of Article 25 (2) of the Constitution. I think that an applicant relying on that Sub-Article when approaching the Court by way of application should make it clear on the papers that he is doing so. And that the applicants have not done. However, it seems to me clear from the authorities that a Superior Court such as the High Court does have an inherent jurisdiction in review to intervene in a case such as the present if grave injustice might otherwise result or where justice might not by other means be attained. See *Gardiner and Lansdown* **(6th ed., vol I at 750 where the following is stated:**

> **"While a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might by no other means be attained ... In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."**

This passage was cited with approval in *Wahlhaus and Others* **v** *Additional Magistrate, Johannnesburg and Another* **1959 (3) SA 113(A) at 120 A where the Court also observed at 119 H:**

> **"It is true that by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or mandamus - against the decision of a magistrate's court given before conviction."**

The reference to "illegalities in inferior courts" is a broad statement and, although not necessarily embracing every mistake or error, when read in the context of the judgment as a whole clearly embraces mistakes or errors which might result in grave injustice.

In my opinion, this Court should entertain the challenge made to the Regional Magistrate's Court's decision to refuse discovery at this stage of the proceedings. Although the application has of necessity delayed the commencement of the trial it has not interrupted the continuity of the trial. But more importantly the decision not to order discovery may well cause a grave injustice to the applicants. Discovery is reasonably required in a case such as the present in order to inform the applicants of the case against them and to enable them properly to prepare their defence. To put them in a position of having to defend themselves in the dark may well, as I have said, result in grave injustice. And that would not necessarily be met by an appeal or review when the proceedings are completed in the event that the applicants or one or

other of them are convicted.

Giving approval to the procedure adopted in this case does not, in my view, conflict with what was said in *S v Bushebi* S.C. Review 1/95 (unreported) (12th February, 1996), a case referred to by Mr Small. In deciding that the Supreme Court does not have the same inherent jurisdiction to review cases as the Supreme Court of South Africa Leon A.J.A. equated the Supreme Court with the Appellate Division of the Supreme Court of South Africa and then went on to distinguish the inherent jurisdiction of the latter Court, which is very limited, from the inherent jurisdiction of Provincial Divisions (the equivalent of this Court) to review the decisions of inferior courts. The latter jurisdiction is wider and I see no reason why this Court should not stand in the same position.

Finally there is the question of costs. Mr Small conceded that in the event of this application succeeding the applicants would be entitled to the costs of the application. However, he submitted that the applicants are not entitled to the costs of the application in the Regional Magistrate's Court. The Regional Magistrate had no power to make such an order and therefore this Court should not make such an order. Mr Maritz accepted that the Regional Magistrate had no power to award costs but submitted that an award should nonetheless be made by this Court in exercise of its power to award monetary compensation as set out in Article 25 (4) of the Constitution. The thrust of this submission is that the applicants were put to the expense of making the application to the Regional Magistrate's Court by the refusal of the first respondent to make discovery and the applicants would, in any event, have been entitled to

approach this Court, as aggrieved persons in terms of Article 25, for monetary compensation in respect of that expense. I have very strong doubts whether the applicants would have been so entitled but the fact of the matter is that there is no application in terms of Article 25 before us. On that basis alone I would decline to make the extended costs order which is sought.

For the foregoing reasons the following order is made:

4. **The order made by the second respondent on 14th October, 1996 dismissing the applicants application for discovery of the police investigation docket CR61/09/95 is hereby set aside;**

5. **The first respondent is directed to provide the applicants (or their legal representative) within seven days of this order with copies of all State witnesses' statements as well as documentary evidence contained in the police investigation docket CR61/09/95 and/or in the possession of the State and/or the police pertaining to the charges against the applicants.**

3. The first respondent is ordered to pay the applicants costs of this application including the costs consequent upon the employment of three counsel.

I agree.