**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: SS163/2015**

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

7.6.2017 .....
DATE SIGNATURE

In the matter between:

**SIBONISO, MIYA AND FOUR OTHERS** Applicants/Accuseds

and

**THE STATE**

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**JUDGMENT**

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**MSIMEKI, J:**

**INTRODUCTION**

[1] This judgment concerns an objection which was raised by Mr Gcaba, for the State, when Mr Guarneri for accused 1, wanted to use the affidavit which Mr Grigorov used in his bail application in the case against him referred to as the

"*Sandton case*". Mr Grigorov, initially, in this case, appeared with accused 1, 2, 3 and 4. He was accused 5. The State withdrew the case against Mr Grigorov and made him a **Section 204** witness.

[2] Mr Guarneri submitted that they were entitled to use the statement in the Sandton case as Mr Grigorov was no longer an accused in this case but a **Section 204** witness. In his view, accused 1's right to a fair trial would be compromised if he was not allowed to adduce and challenge evidence by testing Mr Grigorov's credibility using the very statement in question.

[3] Mr Gcaba, for the State, submitted that the defence, first had to satisfy the provisions and the requirements of **Section 60 (11B)(c) of the Criminal Procedure Act, 51 of 1977 (the "CPA")** before they could use the statement. Mr Guarneri, supported by Mr Marais for accused 2, Mr Nkuna for accused 3 and Mr Van Wyk for accused 4 held a different view.

[4] The question, at the end, was whether Mr Grigorov, as a witness, could claim the protection afforded by **Section 60 (11B)(c)**. Mr Gcaba argued that he could while Counsel for the four accused disagreed.

[5] I must, at the outset, mention that the issue does not seem to have come before our courts for adjudication. There will, therefore, be no case law or legal sources on the subject. This was confirmed by Mr Guarneri and Mr Marais.

[6] The resolution of the issue, in my view, lies in the correct interpretation of **Section 60(11B)(c)**.

[7] Resolving the dispute, requires the application of canons of interpretation employed in the interpretation of statutes, as we are here, busy with the interpretation of the section.

[8] Mr Guarneri referred the Court to a few cases dealing with the interpretation of Statutes. In **R v Kirk 1914 CPD 564 at 567** the Court said:

> *" ...But we can only arrive at the intention of the Legislature by construing the actual words used. We cannot import words into the section not to be found therein, so as to arrive at what we may think or assume is the intention of the Act. The Court must interpret and give effect to what the Legislature has actually said, and not to what it may have intended to say, but did not say. We cannot insert words not used by the Legislature to meet what we may conceive was its real intention."*

In **Bulawayo Municipality v Bulawayo Waterworks Ltd 1915 CPD 435 at 445** the Court held:

> *"The intention of the legislature can alone be gathered from what it has actually said, and not from what may have intended to say, but has not said."*

In **Engels v Allied Chemical Manufacturers (Pty) Ltd and Another 1993 (4) SA 45 (NM) at 54A-B**, Hannah J said:

> *"The basic reasoning behind this approach is that by remedying a defect which the Legislature could have remedied the court is usurping the function of of the Legislature and making law, not interpreting it."*

In **Stellebosch Farmers' Winery v Distillers Corporation (S.A) Ltd and Another 1962 (1) SA 458 (A) at 473F**, Van Blerk JA said:

> *"Om agter die werklike betekenis van woorde te kom moet vasgestel word wat die doel was wat die Wetgewer voor oë gehad het, en wat die rede vir die aaname van die artikel was."*

The Constitutional Court in **Arun Property Development (pty) Ltd v Cape Town City 2015 (2) SA 584 (CC) at 595 paragraph [30]** applied **Stellenbosch Farmers' Winery (*supra*)** and said:

*"The meaning of s 28 must be garnered from the plain language of the text, its location in the scheme and the purpose of Lupo. In doing so we must also heed the interpretive injunction that its meaning must promote the objects of the Bill of Rights."*

[9] In interpreting legislation Courts need to:

1. get the meaning of the section from the plain language used in the section;

2. establish the purpose of the legislation; and

3. consider the spirit, purport and objects of the Bill of Rights.

**SECTION 60(11B)(c)**

[10] This section carries the answer to the vexed question whether Mr Grigorov, as a witness and not as an accused, enjoys the protection provided by the section. The Section has to be analysed and interpreted. The Court has been given two interpretations. The state argued that the protection that the Section affords should be extended to cover a witness in a case. The defence holds the view that such interpretation is wrong and absurd because, according to them, the Section only covers those who stand accused.

[11] **Section 60(11B)(c)** provides:

*"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-*

*(11B)*

*...(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings".* (my emphasis).

[12] Mr Gcaba argued that witnesses and accused persons should enjoy *"equal protection and benefit of the law"* (See: **Section 9(1) of the Constitution**). His argument is that Mr Grigorov and accused 2 have been charged together in the Sandton case and that they should receive the same treatment in this case and the Sandton case. This view is not shared by the defence.

[13] Mr Guarneri and Mr Marais informed the Court that there does not seem to be any guidance in the form of case law and written legal work by legal giants dealing with the issue that the Court must determine for the parties.

[14] Mr Gcaba argued that **Section 60(11B)(c)** should be given a wide interpretation which should include and not exclude a witness from its application. The defence argued that the Section clearly excludes a witness as it is meant to cover and protect an accused person who applied for bail but was not warned that whatever he or she said during the course of the bail proceedings *"may be used against him or her at his or her trial"* and that such evidence would become *"admissible in any subsequent proceedings"*.

[15] *"Any subsequent proceedings", according to Counsel for the accused, can only refer to the trial proceedings*", to which the bail application relates. Mr Gcaba, for the State, disagrees. His argument is that the plain language of the statute must be adhered to. His further argument is that we should not import words into the section which should not be there simply in order to arrive at what we may think or assume is the intention of the section. What the Legislature has actually said is, according to him, what must be interpreted and given effect to and not what it may have intended to say but did not say. The Court, **at 567** in **R v Kirk (*supra*)** said, *"we*

*cannot insert words not used by the legislature to meet what we may conceive was its real intention*". **Engels v Allied Commercial Manufacturers (Pty) Ltd (*supra*)**; **Bulawayo Municipality v Bulawayo Waterworks (*supra*)** and **Stellenbosch Farmers' Winery v Distillers Corporation (SA) Ltd (*supra*)** support the view.

[16] Our Constitution clearly and in so many words mentions that the plain language and the purpose of the legislation as well as the spirit, purport and objects of the Bill of Rights are key in the interpretation of legislation. The language used and the purpose of the legislation must be determined while regard is had to the spirit, purport and the objects of the Bill of Rights. This also seems to be common cause.

[17] Indeed, as Mr Guarneri correctly argued, **Section 60(11B)(c)** can be divided into two parts which are as follows:

> *"17.1. The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings:*
>
> *17.2. Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that*

*anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings".* (my emphasis).

[18] The first part, of the section, in my view, presents no problem in its interpretation. Simply put the record of the bail proceedings is not excluded from the record of the trial of the accused "*following upon such bail proceedings*". The second part, however, is not easy to interpret. This is the part which has brought about the disagreement between the State and the defence.

[19] The first part of paragraph 17.2 mentioned above, in my view, seems to be understandable enough. Indeed, even the parties are *ad idem* regarding its interpretation. The crux of the matter is that the Court must inform the accused of the fact that anything he or she says may be used against him or her when his or her matter is heard by the Court. The warning has the effect of advising the accused that he or she must take an informed decision namely to testify or not to in the bail proceedings. Having so decided the accused cannot later blame anybody for the decision which he or she arrives at after he or she is so warned.

[20] Once warned, the evidence that he or she gives becomes admissible in his or her trial which follows the bail proceedings. Most importantly, the failure by the Court to so warn the accused results in the evidence of the bail proceedings becoming inadmissible against the accused. The bail record is automatically excluded insofar as it relates to the accused in his or her trial. The bail record is admissible against the accused who has received the required warning. This warning must be done by the Court and no one else. (See: **S v Agliotti 2012 (1) SACR 559 (GSJ)**; **S v Sejaphale 2000 (1) SACR 603 (T)** and **S v Nzima and Another 2001 (2) SACR 354 (C)**).

[21] Mr Guarneri submitted that **S v Agliotti (*supra*)** was a decision of a single Judge while **S v Madlala 2015 (2) SACR 247 (GJ)** was a decision of two judges. Mr Guarneri argued that in light of the decision of **S v Madlala (*supra*)**, the court, in this case, ought to allow the defence to cross-examine Mr Grigorov on his affidavit of the bail proceedings in the Sandton case. Mr Guarneri in particular relied on **paragraph [13] of S v Madlala (*supra*)** where the Court said:

> *"[13] In my view, trial fairness in terms of ss 35(5) of the Constitution will not always require that evidence admitted into the trial record contrary to s 60(11B)(c) be excluded. Section 35(5) of the Constitution stipulates that '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair…'. Subsection 35(5) is flexible enough,*

*to allow the trial court the discretion to determine fairness with reference to the factual matrix of the particular case. Factors that the trial court may take into account in determining trial fairness, include the nature and extent of the constitutional rights violation, whether there is prejudice to the accused, the need to ensure that exclusion of evidence does not unduly compromise crime control in favour of due process, societal interests, and public policy."*

[22] The Court in the **Madlala case (*supra*)**, to repeat, said:

"*[13] In my view, trial fairness in terms of ss 35(5) of the Constitution of the Republic of South Africa Act 108 of 1996 will not always require that evidence admitted into the trial record contrary to s 60(11B)(c) be excluded".* (my emphasis).

This in my view, seems to mean that depending on the decision of the Court, evidence admitted into the trial record contrary to **Section 60(11B)(c)**, in certain cases, may be admitted. My understanding of this statement is that there is no hard and fast rule that such evidence be admitted. The facts of the case, in my view, according to how I understand the statement, will give an indication as to whether such evidence should be excluded or not. The statement, in my view, does not mean that where the accused has not been warned, the bail record should simply be excluded for unsound reasons. However, the law currently is that where the accused has not been warned in the bail proceedings the record thereof should not be admitted into the trial record.

[23] The statement in the **Madlala case (*supra*)**, that I refer to in paragraph 22 above, leads to an interesting debate. The debate and the vexed question is whether Mr Grigorov's affidavit should be used by the defence to cross-examine him in this case. The answer, as I said earlier lies in the interpretation of **Section 60(11B)(c)**.

[24] I now have to consider the section and try as hard as I can to give it the meaning which I think will answer the vexed question. We should never lose sight of the fact that Mr Grigorov is an accused in the Sandton case which is still pending and a **Section 204** witness in this matter.

[25] It has been conceded that Mr Grigorov was not warned in accordance with the provisions of **Section 60(11B)(c)** in the Sandton matter. The effect of the failure to warn him means that his bail record in the Sandton matter cannot be used against him in that matter.

[26] I, above, in paragraph 17.2 indicated that the first part of the second portion of **Section 60(11B)(c)** presents a problem because the words "*in any subsequent proceedings*" have to be interpreted. The second portion says that once warned the

bail record becomes admissible against Mr Grigorov at his trial. The same bail record becomes admissible "*in any subsequent proceedings*".

[27] Mr Guarneri argued that the first part of **Section 60(11B) (c) of the CPA *(supra)*** creates an evidentiary inclusionary rule of the record of the bail proceedings. This is correct. Mr Guarneri refers to **paragraph [18]** of the **Agliotti case (*supra*)** to support his view that the trial referred to in the section is qualified and refers to the accused's trial and no other proceedings. For purposes of a proper understanding of **paragraph [18]** of the **Agliotti case (*supra*)** I need to quote the paragraph. It reads:

> *"[18] Section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 provides as follows:*
>
> *'The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any <u>such</u> subsequent proceedings'".* (my emphasis).

[28] A proper reading of the section quoted by the Court in paragraph 27 above reveals that the court when quoting the section added "*such*" between "*any*" and

"*subsequent proceedings*". The word "such" does not, in fact, appear in **Section 60(11B)(c).** Its inclusion changes the meaning of the section which, in my view, is very clear. Here the Court said what the section does not say.

[29] What is to be interpreted are the words "*in any subsequent proceedings*" and not "*in any <u>such</u> subsequent proceedings*". (my emphasis). The words "*in any subsequent proceedings*" should not be restrictively interpreted. If the legislature intended to only refer to the accused's trial proceedings it would have clearly said so. This, in my view, simply means that a wide interpretation is called for in the interpretation of the words. All they mean is just what they say namely that the evidence becomes admissible where the accused has received due warning. Again, it must be noted that the accused's trial is joined by "*and*" to read: "*against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.*" Reading the words properly demonstrates that the "*and*" takes us to "*any subsequent proceedings*" which does not restrict us to a case where the person protected is the accused only. If the Legislature intended to exclude a witness such as Mr Grigorov it would in so many words have said so. It would be absurd to only protect Mr Grigorov in the Sandton matter and not in this case. The meaning of the words is clear. They refer to "*any subsequent proceedings*". It must be remembered that Mr Grigorov is the one who is protected as an accused in the Sandton matter.

To say let him be exposed now that he is a witness in this case becomes absurd in the extreme particularly if regard is had to the fact that the Sandton matter has not been finalised. Indeed, allowing the affidavit to be used in the cross-examination of Mr Grigorov in this matter would remove him from the protection of **Section 9 (1) and (2) of the Constitution** which says:

> *"9 Equality*
>
> *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken"*

[30] As Mr Gcaba correctly submitted, why should, accused 2 be protected in the Sandton case and in this case while Mr Grigorov, according to the argument, should only be protected in the Sandton case and not in this case. The issue is not whether Mr Grigorov is a witness or an accused as the protection is derived from **Section 60(11B)(c)**. Whether or not Mr Grigorov is protected by **Sections 203** and **204** is not the issue. The issue is whether or not he should enjoy the protection embodied in

**Section 60(11B)(c)**. My interpretation of **Section 60(11B)(c)** tells me that he is entitled to such protection. That the protection will be over and above the protection accorded by **Sections 203 and 204 of the CPA** is irrelevant. This is because **Section 60(11B)(c)** does not distinguish or discriminate between a witness and an accused covered by it.

[31] It would be very unfortunate if **Section 60(11B)(c)** was interpreted in such a way that would have the effect of removing Mr Grigorov from the protection which he should enjoy regardless of whether he is an accused or a witness. This is based on my interpretation of **Section 60(11B)(c)** which, according to me, is that Mr Grigorov, by reason of the protection he enjoys in the Sandton case is also equally protected in this case even though he is a witness. He was not warned in the bail proceedings in the Sandton case which is still to be heard and concluded.

[32] Even if one applied the observation that the Court made in the **Madlala case (*supra*)**, the circumstances of this case are such that by allowing the defence to cross-examine Mr Grigorov on his affidavit in the bail proceedings, would not be in the interest of justice. The protection that he enjoys in the Sandton case would be compromised and rendered meaningless. How do you protect Mr Grigorov and still expose him?

[33] It was argued that the rights of the accused in this case far outway those of Mr Grigorov simply because Mr Grigorov in this case faces no risk of imprisonment for life which the accused are said to be facing should they be convicted. I do not think that the fact that Mr Grigorov is protected by **Sections 203** and **204** warrants the taking away of his protection which **Section 60(11B)(c) of the CPA** accords him. He was not warned and remains protected by **Section 60(11B)(c) of the CPA** whether as an accused or a witness.

[34] Mr Marais submitted that the subsequent proceedings can only refer to criminal proceedings as defined in **the CPA** where the accused who testified during the bail hearing is now an accused. This would be correct if **Section 60(11B)(c)** did not further say *"in any subsequent proceedings*". In *"any"* subsequent proceedings says and means what it says. It does not distinguish between two scenarios i.e.: where the accused is a witness or an accused. The Legislature would have said so if such distinction had been intended. This, in my view, implies that the protection accorded by **Section 60(11B)(c)** is meant to be enjoyed by the accused and Mr Grigorov as a witness. This then covers Mr Grigorov who was not warned at the bail hearing.

[35] The issue, it must be remembered, is whether Mr Grigorov ought to be cross-examined on the statement that he made during the bail hearing if he was not duly warned and not whether bail applications are criminal proceedings as submitted by Mr Marais.

[36] Mr Marais further argued that an accused who had not been warned, in terms of **Section 60(11B)(c)**, could be used to assist another accused and that the accused could be cross-examined on the contents of the affidavit. He relied on **S v Aimes and Another 1998 (1) SACR 343 (C)**. Mr Marais, in my view, correctly submitted that the Court in this case, at the time, did not have the benefit of **Section 60(11B)(c)** which had not yet come into operation. The position is now settled because the section is clear.

[37] The protection that Mr Grigorov enjoys in terms of **Section 60(11B)(c)** is not taken away by the fact that he is a competent and a compellable witness.

[38] Mr Guarneri argued that the meaning of the words "*his or her trial*" and "*subsequent proceedings*" could only be determined by reference to the inclusionary rule mentioned in the first part of **Section 60(11B)(c)**. He restricted the meaning of "*the trial of the accused following upon such bail proceedings*". Mr Gcaba argued

differently saying that "*in any subsequent trial*" meant in any proceedings whether Mr Grigorov is a witness or an accused in the proceedings. In substantiation he referred to **S v Nzima and Another 2001 (2) SACR 354 (C) at 356f**. There the Court said:

> *"If one reads s 60(11B)(c) it is clear that the Legislature placed the obligation on the court to advise the accused of the fact that the evidence he gives during the bail proceedings may subsequently be used against him in any proceedings."* (my emphasis).

[39] Mr Guarneri argued that "*in any subsequent proceedings*" referred only to the case to which the bail proceedings relate i.e. the Sandton case and no other cases. One wonders why the Legislature would have said that once warned, anything that the accused said might "*be used against him or her at his or her trial*" and then add that such evidence becomes admissible *"in any subsequent proceedings"* if this only referred to the case in which there was a bail hearing namely the Sandton case. The added words would not have been necessary because the Section is clear enough without them.

[40] The Legislature, if its intention was to restrict the applicability or admissibility of evidence to the trial to which the bail record relates, in my view, would not have

added the words *"in any subsequent proceedings"*. Mr Grigorov, in my view, enjoys the protection even though he is a witness.

[41] Mr Gcaba argued that Mr Grigorov's right to a fair trial in the Sandton matter should be respected. The argument, according to Mr Guarneri, has no merit. This, because Mr Grigorov, in this trial, does not risk being convicted of any crime by the Court. The issue, in my view, is not whether he could be convicted in this matter. The issue is whether the protection he enjoys in the Sandton case extends to this case where he is a witness. Incidentally, the affidavit that Mr Guarneri intends to use to cross-examine Mr Grigorov is the same affidavit which could be used in the Sandton case. It would, in my view, not be proper to prevent the use of the document in the Sandton case and not in this case where the accused was not warned. I do not think that the protection that **Sections 203 and 204 of the CPA** afford Mr Grigorov should lead to the use of the affidavit in this matter. Mr Grigorov is either protected or not protected by **Section 60(11B)(c)**. Protecting him in the Sandton case and exposing him in this case does not seem right.

[42] For completeness sake I shall quote **Sections 203 and 204 of the CPA**. **Section 203** provides:

> ***"203 Witness excused from answering incriminating question***

*No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge".*

**Section 204** provides:

"***204 Incriminating evidence by witness for prosecution***

*(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-*

*(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-*

*(i) that he is obliged to give evidence at the proceedings in question;*

*(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;*

*(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;*

*(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and*

*(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.*

*(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-*

*(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and*

*(b) the court shall cause such discharge to be entered on the record of the proceedings in question".*

If **Section 60(11B)(c)** protects Mr Grigorov he must be protected even in this case otherwise there will be no point, in protecting him in the Sandton case.

[43] Mr Marais, Mr Nkuna and Mr Van Wyk support Mr Guarneri's arguments and submissions.

[44] For the reasons given in this judgment, the objection raised by Mr Gcaba, should be sustained and is hereby sustained.

**ORDER**

[45] The use of Mr Grigorov's affidavit for purposes of cross-examining him is not permitted.

**M. W. MSIMEKI**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION,**

**JOHANNESBURG**

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|---|---|
| Counsel for the 1st Applicant/Accused: | Advocate E. Guaneri |
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| Counsel for the State: | Advocate L. Gcaba |
| | |
| Date of Hearing: | 26 May 2017 |
| Date of Judgment: | 7 June 2017 |