

SOUTH AFRICA / JUDGMENT

Lethoko and Another v Minister of Defence and Another (4338/2019) [2021] ZAFSHC 160; 2021 (2) SACR 661 (FB) (16 August 2021) [2021] ZAFSHC 160

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

4338/2019

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: 4338/2019

In the matter between:

MOHAU JOSEPH LETHOKO

First Applicant

MOHALE SAMUEL MARUTHA

Second Applicant

and

THE MINISTER OF DEFENCE

AND MILITARY VETERANS

First Respondent

DIRECTOR OF PUBLIC PROSECUTIONS:

FREE STATE

Second Respondent

CORAM: Opperman, J

HEARD ON: 22 July 2021

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII

on 16 August 2021. The date and time for hand-down is deemed to be 16 August 2021 at 15h00.

INTRODUCTION

- [1] On 17 September 2019 an application was issued in terms whereof the applicants seek:
- a) an immediate permanent Stay of Prosecution for charges against them and
 - b) ordering the first respondent to pay the costs of this application.
- [2] The matter for the Stay of Prosecution only ended on the court roll and on the Unopposed Motion Court Roll on 20 May 2021; 1 year and 8 months later. The finalisation of the criminal case was delayed for 1 year and 8 months by the applicants. The delays are the trend of the case from both sides as will be shown later.
- [3] The case that caused this application for an order for Stay of Prosecution is just as disconcerting and a humiliation for the Administration of Justice and for the Rule of Law. The undisputed evidence shows that it malfunctioned on many levels. All the Officers of Court involved are to blame for it; from the Presiding Officers to the Legal Practitioners that prosecuted the case and defended the applicants. Simple justice to honour democracy and therefor our Constitution, The Constitution of the Republic of South Africa, 1996, failed.
- [4] The Chief Justice has issued a number of directives aimed at the efficient functioning of the courts and the speedy finalisation of cases of which the "Norms and standards for the performance of judicial functions" GN 147 in GG 37390 of 28 February

2014. The objectives of the directives are stated as follows:

These norms and standards seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable. These objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. (Accentuation added)

- [5] The recommendation of the South African Law Commission contained in the Interim Report on the Simplification of Criminal Procedure (Project 73 August 1995) concluded in the promulgation of Section 342A of the Criminal Procedure Act 51 of 1977.[1]

[6] The tests for Unreasonable Delays and an order for Stay of Prosecution must first and foremost be depicted in casu. The law has evolved in our courts after the promulgation of section 342A of the Criminal Procedure Act, both on typification of Unreasonable Delays and the adjudication of an application for a Stay of Prosecution. The judgment will first

deal with the law. A detailed exposé of the events in the case that is the cause of the action is crucial and it goes to the core of the matter. The arguments of the parties will be applied on both the facts and the law in conclusion.

THE PARTIES

[7] The first applicant is employed by the South African Defence Force. He is 51 years old. The second applicant is similarly employed and 45 years old. The first respondent is the Minister of Defence and Military Veterans cited in his official capacity with its place of business situated in Pretoria and represented by the State Attorney, Charlotte Maxeke Street, Bloemfontein. The second respondent is the Director of Public Prosecutions: Free State situated in Bloemfontein and also represented by the State Attorney, Charlotte Maxeke Street, Bloemfontein.

[8] The second respondent filed a Notice to Abide on 30 September 2019 and did not join the litigation. On the 3rd day of October 2019, the Minister of Defence as the first respondent, gave Notice to Oppose the application in terms of the provisions of Rule 6. The Minister had to file their Answering Affidavit within 15 days after service of the Notice to Oppose, but neglected to do so.

Rule 6(5)(f) provides that the applicant may set the matter down after the expiry of five days from the last date which the Answering Affidavit had to be filed. It is not necessary to file a Notice of Bar.

[9] A Notice of Set Down was served on the first respondent for hearing of the matter on 20 May 2021. This prompted the first respondent's attorney to file another Notice to Oppose.

[10] Since the matter became opposed on the Unopposed Motion Court Roll it was to be transferred to the Opposed Motion Court Roll there and then. The practitioner for the applicants demanded to be heard on the merits of the matter on the Unopposed Motion Court Roll.

[11] Counsel for the first respondent opposed this vehemently. The attorney for the applicants maintained that the delay in this matter prejudices the applicants and was caused by the first respondent. I accepted it and made an order that the matter be transferred to the Opposed Motion Court Roll. I accepted his frustration and ordered a punitive costs order against the first respondent.

[12] They could not decide on the dates for the filing of the relevant affidavits and I indicated that they must then decide it by themselves since the court cannot wait and delay the roll further for them to decide. I trusted their professional ability to do so since they are both experienced officers of the court. The matter was postponed to the 10th of June 2021 to accommodate the urgency of the matter. The matter could not proceed on said date because the parties did not comply

with the Rules. It was postponed to the 22nd of July 2021. The issue of costs for the 10th of June 2021 stood over and I will deal with it later. I now turn to the law on the issue and the facts of the matter.

THE LAW

[13] Section 342A Unreasonable delays in trials

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial

prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

- (a) The duration of the delay;
 - (b) the reasons advanced for the delay;
 - (c) whether any person can be blamed for the delay;
 - (d) the effect of the delay on the personal circumstances of the accused and witnesses;
 - (e) the seriousness, extent or complexity of the charge or charges;
 - (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g) the effect of the delay on the administration of justice;
 - (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i) any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order—

- (a) refusing further postponement of the proceedings;
- (b) granting a postponement subject to any such conditions as the court may determine;
- (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
- (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
- (e) *Added by Act 86 of 1996. Subsections 3(e) and (5) are not yet in force.

(4)

- (a) An order contemplated in subsection 3(a), where the accused has pleaded to the charge, and an order contemplated in subsection (3)(d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
- (b) The attorney-general and the accused may appeal against an order contemplated in subsection 3(d) and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply mutatis mutandis.
- (5) [Added by Act 86 of 1996. Subsections 3(e) and (5) are not yet in force.]
- (6) If, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed

unreasonably in a lower court which is seized with a case but does not have jurisdiction to try the case, that superior court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.

(7)

- (a) ...

[14] The word “shall” in section 342A (1) does not give a Presiding Officer a choice to inquire into unreasonable delays; it is a non-discretionary decree. In *S v Steward* 2017 (1) SACR 156 (NCK) at

- [6] the law was outlined. The slovenly lassitude with which the matter in casu was allowed to become completely out of control is the cause of the dilemma and the disgrace lies at the door of the Presiding Officers.
- [6] Some of the postponements were totally unjustified and amounted to delaying tactics and an abuse of the process of court. Going into the reasons or lack thereof for these shenanigans would be unhelpful and encumber the judgment needlessly. However, the presiding officer should have directed the proceedings before him with a firmer, but fair, hand. Such an approach would obviate uncalled-for applications for permanent stays of prosecution. See *Bothma v Els and Others* 2010 (1) SACR 184 (CC) (2010 (2) SA 622; 2010 (1) BCLR 1; [2009] ZACC 27); and *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675; [1997] ZACC 18). Needless enquiries in terms of s 342A of the Criminal Procedure Act 51 of 1977 (the CPA), into inordinate delays in disposing of or completing cases would also be avoided. See *S v Thenga* 2012
- (2) SACR 628 (NCK) and cases cited therein, particularly *S v Maredi* 2000 (1) SACR 611 (T) and *S v Jackson and Others* 2008 (2) SACR 274 (C). What happened in this case is strongly deprecated and should not be repeated. Those who are culpable should account to the bodies to which they belong. (Accentuation added)
- [15] An unreasonable delay can cause an unfair trial. In *S v Maredi* 2000 (1) SACR 611 (T) the conviction and sentence were confirmed but the matter was referred to the Magistrates Commission and other responsible bodies for inquiry into the circumstances of the case.
- [16] In *S v Jackson & others* 2008 (2) SACR 274 (C) Moosa J (Griesel and Motale JJ concurring) the three basic forms of prejudice which can be caused by unreasonable delays was identified to be:
1. A loss of personal liberty;
 2. impairment of personal security; and
 3. trial-related prejudice, such as witnesses becoming unavailable.
- [17] The United States case of *Barker v Wingo* [1972] USSC 144; 407 US 514 (1972) stated the four factors to be considered:
1. The length of the delay before the institution of the prosecution;
 2. the reasons for the delay;
 3. the assertion by the accused of his rights; and
 4. the prejudice to the accused.
- [18] In *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC) the Constitutional Court held that the three most important factors to consider are:

1. The nature of the prejudice suffered by the accused;
2. the nature of the case; and
3. the systemic delay.

[19] In *Dimov v Director of Public Prosecutions, Western Cape* (unreported, WCC case no 5376/16, 6 March 2017) at [26] Henney J (Salie-Hlophe J concurring) observed that the grant of a Stay of Prosecution “is not a right but a matter of a discretion exercised by the court based on individual circumstances and the merits of a particular case before it”.

[20] In *S v Brooks & others* 2019 (1) SACR 103 (NCK) the court (following *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC)) granted a permanent Stay of Prosecution on the grounds that the trial had to commence de novo, the State’s case was compromised, and that the accused had suffered substantial prejudice. In this case it turned on social and financial prejudice.

[21] A recent decision of the Constitutional Court setting out the considerations to be taken into account and the nature of the test, is *S v Ramabele & others* 2020 (2) SACR 604 (CC) at [59]:

This court has proffered guidance to determine whether a particular lapse of time is reasonable. With reference to foreign law, including American jurisprudence, such as *Barker v Wingo*, this court in *Sanderson* stated that the inquiry requires a flexible balancing test. However, the court accepted that the specific South African context requires its own home-baked approach. Therefore, the approach is as follows: Courts ought to consider whether a lapse of time is reasonable by considering an array of factors, including:

- (a) The nature of the prejudice suffered by the accused;
- (b) the nature of the case; and
- (c) systemic delay.

[22] The law on the issue lies, first and foremost, in the Constitution of the Republic of South Africa of 1996 and specifically at section 35(3)(d) that states that:

...every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.

[23] As recently as on 21 June 2021 the Supreme Court of Appeals ruled in *Rodrigues v The National Director of Public Prosecutions and Others* (1186/2019) [2021] ZASCA 87[2] the law to be:

[31] It is firmly established that an application for the permanent stay of prosecution should not be easily granted. In *Sanderson v AG Eastern Cape*, the Constitutional Court pointed out that such an application has the effect of depriving society of presenting a complaint against someone who has transgressed its rules. This is such a central feature of any functioning democracy that it should never become diluted or distorted. On the contrary, any

application for a stay must be considered in the context of how it impacts on the ability and the imperative of the State to carry out this important function.

[32] In *Bothma v Els*, the Constitutional Court reiterated the approach taken in *Sanderson*. It held that in determining relief for a permanent stay of prosecution, the court is required to engage in a balancing exercise in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay, the reasons the government assigns to justify the delay, the accused's assertion of a right to a speedy trial and prejudice to the accused. The Constitutional Court, however, did not regard these factors as constituting a closed list and indicated that the nature of the offence and the public policy considerations that may be attached to it would also be a relevant consideration. It is ultimately a value judgment the court brings to bear after a proper consideration of the evidential material relating to the relevant factors. (Accentuation added)

[24] And further at [24] with further reference to the ruling of the Constitutional Court in *S v Basson*

[2004] ZACC 13; 2005 (1) SA 171 (CC) at paragraphs 31 to 33:

The question that arises is whether the quashing of the charges gives rise to a constitutional matter. In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the rights to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime.

The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. The effect of the High Court's judgment in this case, given the interpretation of s 319 by the SCA and its previous jurisprudence, is that the State will be prevented from prosecuting the accused on the charges which were quashed, without the State being given an opportunity to appeal the correctness of that decision. This case is different from those in which a charge is quashed, but where the State is able to supplement the charge-sheet in a manner that enables the prosecution to take place. This course is not open to the State here.

The importance of the State's duty to prosecute crime is implicit in s 179(2) of the Constitution, which provides that:

"The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings."

By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the State cannot prosecute that accused for

that offence, the constitutional obligation of the prosecuting authority and the State, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the State is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter.’ (Accentuation added)

THE COMMON CAUSE FACTS

- [25] The source of the application is the arrest of the two applicants on 13/14 December 2006. They were caught red handed stealing fuel to the value of R1715.23 at about 02h00 in the morning at 1 SA Tank Regiment Transport. It is common cause that the evidence against the two perpetrators is damning. The aggravation of the situation is the fact that they with calculated planning, stole from their employer and indirectly from the tax payer. Although the value of the fuel is relatively low the deed itself is deplorable.
- [26] They were convicted by a Court of Military Judge on 15 July 2010. Following the convictions, the applicants were sentenced to fines of R3000-00 each and detention of 180 days coupled with the reduction of their ranks. The detention and rank demotion sentences were wholly suspended for a period of 3 years on conditions that the applicants are not found guilty of theft or section 20 of the Military Discipline Code (“MDC”). The applicants accepted their convictions and punishment and paid their fines.
- [27] On 26 November 2010 the Director Military Reviews set aside the convictions and sentences based on procedural irregularities with a recommendation for de novo prosecution. The case was re-enrolled and delayed and postponed until 2018 and then further delayed for the Stay of Prosecution application.

CHRONOLOGY OF EVENTS

- [28] The chronology of the events and as it happened is important:

13 and 14 December 2006: Applicants were arrested.

20 December 2006: The matter was postponed to 27 December 2006 for the representative of the applicants, Mr Steenkamp. The rest of the reasons for the postponement is not clear from Annexures C1 and C2 to the Founding Affidavit. What is however clear is that the investigations by the first respondent were not finalised.

21 December 2006: The applicants were released. Important to note is that the applicants were only deprived of their freedom from 14 December 2006 to 21 December 2006. The issue of freedom of person does not play any role in the adjudication of the matter.

27 December 2006: The matter was postponed to 3 January 2007 because the Military Defence Counsel, Major Vanara, now represented the applicants and for further investigations.

3 January 2007: The case was postponed to 23 January 2007 because Major Hlazo now became the Legal Representative to the applicants and for further investigations.

23 January 2007: The case was postponed to 12 February 2007 for further investigation of the charges.

12 February 2007: The matter was postponed to 5 March 2007 for Senior Prosecuting Counsel to be appointed to make the prosecutorial decision and further investigations.

14 March 2007: The case was postponed to 29 March 2007 since the docket was only received on 13 March and the Senior Prosecuting Counsel still had to peruse it and decide the matter.

29 March 2007: The case was postponed to 5 April 2007; one Lieutenant Colonel Stemmet was appointed as the recording officer for the Preliminary Investigations.

16 April 2007: The case was postponed for the applicants to consult with their Counsel. From Annexure K1 at page 52 attached to the Founding Affidavit it seems as if the investigations were only finalised in April 2007.

4 May 2007: The matter was again postponed to give the applicants the opportunity to consult with their Counsel. Only the second applicant appeared.

16 May 2007: The matter was postponed for trial and again only the second applicant was present. The Preliminary Inquiry was completed by this time and the matter was now trial-ready and postponed for this purpose to 3 July 2007.

3 July 2007: The case was again postponed for trial because only the second applicant appeared.

3 July 2007: The matter was postponed to either 10 and 11 July 2007 or 10 and 11 September 2007. N1 and N2 on page 62 of the bundle is not clear on that or the reason for the postponement.

10 September 2007: The matter was postponed to 12 and 13 November 2007 for trial. Mr Khang now came on record for the applicants and still only the second applicant appeared. The matter had to be postponed to give Mr Khang the opportunity to prepare the case.

12 November 2007: The matter was postponed to 26 and 27 February 2008 because only the second applicant appeared.

17 January 2008: The matter was postponed to 21, 22, 28 and 30 January 2008. The matter now became partly heard. The applicants were in attendance and the Prosecutor indicated that there was not an interpreter available.

27 February 2008: The case was postponed to 12 and 13 May 2008 for further trial because only the second applicant was available.

12 May 2008: The Prosecutor requested a postponement on account of a nolle prosequi application. The matter was postponed but with a caution in terms of section 342A of the Criminal Procedure Act.

15 July 2010: The matter was at long last finalised.

9 December 2010: The above was followed by a letter from the Review Counsel (Lt. Col Coetzer) that the matter was set aside on automatic review.

March 2011: The Combined Court Register (“CCR”) reflects that the applicants were suspended indefinitely, though the only name appearing is that of the 1st applicant.

During 2011: Lt Col Mhlauli granted a nolle prosequi application on the basis that the necessary witnesses for prosecution were no longer available. However, this view was later found to be inaccurate.

July 2011: Discussions around the suspension and/or the dismissal of the applicants followed. It was decided that they should be re-prosecuted (trial de novo) after the correct Preliminary Inquiry process would have been followed.

11 November 2011: The case was re-enrolled and was postponed to the next day of the 12th November 2011. Lt. Col. J.M. Bezuidenhout was appointed as the Acting Senior Prosecuting Counsel (SPC) and she decided to proceed with the prosecution of the applicants.

2012: There were a number of interventions and further investigations undertaken after the decision to prosecute was taken.

18 July 2013: The matter was postponed to 22 July 2013, for the applicants to consult with their private lawyer and continuation of the Preliminary Inquiry.

22 July 2013: The case was postponed to 12 August 2013, for the applicants to consult with their attorney.

12 August 2013: The case was postponed to 20 August 2013 for legal representation of the applicants.

21 August 2013: The applicants’ current legal representative, Mr, Khang, again came on record for them. The case was then postponed to 11-12 November 2013. The Judge did not specify the reason for postponement.

11 November 2013: The case was, by agreement, postponed to 1-4 April 2014 for trial. At this stage the Prosecutor was Lt. Col Mtshali. It should be further noted that only the 1st applicant appeared.

1 April 2014: The applicants’ legal representative did not appear. The Prosecutor was Lt. Col. M. Botha (SPC). She requested the applicants to ensure the presence of their lawyer the next day (02 April 2014). However, on 2 April 2014, neither the applicants nor their lawyer was present.

24 April 2014: The said prosecutor caused a letter to be addressed to the applicant’s lawyer in which further dates were sought. However, the Prosecuting team did not receive a reply in this regard. Lt. Col M. Botha endeavoured to secure dates suitable to the applicants but to no avail. She became indisposed due to ill – health around June 2014 and was to return around August 2014. During Lt. Col Botha’s absence, the case was then allocated to Captain Chiloane.

11 March 2015: The case was postponed to 19 – 22 May 2015, for the completion of the long Preliminary Inquiry. The Preliminary Inquiry was set down between 19 and 21 May 2015. These dates were set after several failed attempts to secure a date with the applicants' attorney.

Upon completion of the Preliminary Inquiry the Senior Prosecuting Counsel held a view that successful prosecution against the applicants can still be attained as there were about seven witnesses still available to testify. Moreover, the case against the applicants is based on fingerprints and circumstantial evidence which was still available.

01 April 2015 to 14 June 2016: There were no Military Judges appointed and therefore a new trial date could not be set.

26 June 2016: The Military Court resumed and at that time the Prosecutor, Captain Chiloane, was out on deployment in the Democratic Republic of Congo (DRC), with effect from February 2016. The case was then allocated to Lt Col Venter, who could not do the matter due to operational reasons. In order to afford the matter the urgency it required then; it was reallocated to Lt Mundalamo upon her return from deployment on 22 September 2016.

29 November 2016: The case was postponed to 19 – 21 April 2017, to obtain a date for trial by a Court of a Military Judge/Senior Military Judge/Disciplinary hearing.

20 November 2017: The matter was remanded to 12 – 16 March 2018 for trial.

20 November 2017: The current legal representative of the applicants wanted to withdraw from the matter due to lack of financial instructions. Then the applicants requested postponement for a period of 3 months to comply with their financial obligations to their attorney. This was opposed given the history of the matter.

22 November 2017: The applicants' lawyer confirmed his financial instructions. The case could not be proceeded with due to ill – health of the Judge. There were no other Judges available then and the case was postponed to 13 – 16 April 2018 for trial. The applicants' legal representative had indicated that he was fully booked until the middle of March 2018.

22 May 2018: The matter was postponed to 12 June 2018.

08 June 2018: A sick note was received in which it was indicated that the applicant's attorney was booked off from that day to 30 June

2018. The Judge perused the sick note and gave it back to Mr Khang.

12 June 2018: The matter was then postponed to 28 September 2018. No indication of the reason for postponement was provided.

28 September 2018: The applicants' lawyer was still not available and the case was postponed to 22 October 2018. The applicants were warned to visit the practice of their lawyer and get the confirmation that the High Court application (permanent stay of prosecution) has been lodged, failing which a trial date would be set at the next appearance.

22 October 2018: The case was postponed to 17 January 2019, on which date the applicants' legal representative appeared and explained his medical condition.

4 March 2019: The case was postponed to 30 and 31 May 2019 for trial. Only the 2nd applicant appeared.

30 May 2019: The case was postponed to 17 and 18 September 2019 for trial, the prosecutor was on sick leave.

17 September 2019: The matter was postponed to 14 November 2019. At this stage the matter was stayed pending the outcome of the application at hand.

It took the applicants from September 2019 to May 2021 to set the matter down on the High Court Roll; one year and eight months. Their legal representative was medically indisposed and the Covid pandemic struck but if a year is deducted the delay is still unacceptable. The High Court was in session during the Covid Lockdown with protocols that were observed. Virtual hearings were held to accommodate cases of this nature.

20 September 2019: The Notice of Motion was served on the Office of the State Attorney.

27 September 2019: A Notice of Intention to Oppose was filed on behalf of the respondents.

1 October 2019: A Notice to Oppose and Notice to Abide was filed on the offices of the attorney for the applicants. The Notice to Abide, dated 17 September 2019 was from the Director of Public Prosecutions: Free State; the Second Respondent. The Notice to Oppose dated 3 October 2019 purports to be from the First Respondent but reads: "Kindly take notice that the Respondents hereby gives notice of their intention to..." The Notice was served by the Office of the State Attorney.

4 October 2019: The Notice of Motion was sent to the first respondent. The Office of the State Attorney did not receive any immediate instructions thereafter.

23 October 2019: The Office of the State Attorney sent a letter to the first respondent requesting instructions.

6 November 2019: The first respondent gave the mandate to oppose.

13 December 2019. The first respondent requested an update and Mr Chauke from the Office of the State Attorney was not able to respond.

15 December 2020 to 19 January 2020: The attorney of record from the Office of the State Attorney was on annual leave.

13 January 2020: The attorney of record from the Office of the State Attorney informed that he was bogged down with work that accumulated during his absence and the file pertaining to this case could not be attended to immediately.

24 March 2020: The attorney for the applicants enquired about the outstanding Answering Affidavit from the first respondent.

25 March 2020: The Office of the State Attorney replied with a letter informing that due to the Covid epidemic they will only be able to file the Answering Affidavit on 30 April 2020.

26 March 2020: The country went into National Lockdown.

2nd Week of June 2020: The attorney of record from the Office of the State Attorney returned to office. Upon his return he was swamped with work. At the time he had about 400 matters of various Departments and could not give immediate attention to this matter. As soon as he wanted to attend to the file it could not be traced. The situation was exasperated by the transfer of his secretary in December 2019.

September – October 2020: The file was located. At this time the applicants' attorney was indisposed due to ill-health.

Despite the lapse of time, it was always the intention of the first respondent to oppose the matter. The attorney from the Office of the State Attorney found it challenging to coordinate, collate and consult with the various officials of the first respondent in order to draft the Answering Affidavit.

9 March 2021: Another Notice of Bar was filed by the applicants and served on the first respondent.

12 May 2021: A Notice of Set Down was filed and served on the first respondent.

14 May 2021: Advocate Chauke from the Office of the State Attorney directed a letter to Mr Khang requesting the matter to be removed from the roll by agreement and tendering the costs for the removal. Mr Khang refused to settle to a removal on 17 May 2021 in writing.

20 May 2021: The matter served on the Unopposed Motion Court Roll. Mr Khang appeared for the applicants and Advocate Nkhahle represented the first respondent. I presided in the matter and was informed by Advocate Nkhahle that the matter has become opposed and it was requested that the matter be remanded to the Opposed Motion Court Roll.

Mr Khang objected and wanted for me to hear the matter on the merits there and then. It is imperative to note that, after hearing counsel, there was a dispute as to whether the matter was properly opposed or not and the merits were in dispute in toto. The matter was number 34 on a roll of about 79 cases. I ruled that it will be procedurally improper for me to hear the case. It was clear that the parties could not even agree whether the application was opposed or not.

Mr Khang argued that the matter was urgent and I recommended a postponement to 10 June 2021. The parties could not immediately agree on when to file their affidavits; if any, and I ordered that they decided the dates between themselves given the fact that they are seasoned and trusted legal practitioners. They were also causing a delay to the rest of the roll and were inconveniencing their colleagues.

7 June 2021: The first respondent filed their Answering Affidavit. The applicants could, of course, not file any Replying Affidavits in time for 10 June 2021 nor could any party prepare Heads of Arguments.

10 June 2021: The matter served before my brother, Judge Daffue, and the parties could not explain why the Answering Affidavit was only served on 7 June 2021. He postponed the matter to 21 July 2021 with orders as to the filing of papers and that the costs order for the 10th of June 2021 shall stand over. The parties were also to file Explanatory Affidavits for the neglect to file their Answering and

Replying Affidavits timeously and the neglect to file any Heads of Arguments as per the Directives of this Court.

21 July 2021: The hearing was concluded on the Opposed Motion Court Roll.

ARGUMENTS AND FINDINGS

Arguments

[29] It is the case for the applicants that the conduct in the delay of the matter is unlawful in that it is in contravention of the Constitution and prejudicial on the following grounds:

1. The applicants were suspended from the time of their arrest;
2. Although the suspension of the first applicant was uplifted the second applicant is still on suspension;
3. The applicants did not and still do not enjoy the benefits that they are “entitled to and should have been getting, such as promotion and training, lack of training which affects our ranking or ranks.”
4. The mentioned prejudice above is directly linked and connected to the trial.

[30] The first respondent prayed for condonation of the late filing of the Answering Affidavit and held that the applicants failed dismally to make out a case for the permanent Stay of Prosecution. They maintain that the interest of justice would be better served if the applicants stood trial for the serious offences they committed. The applicants admit that they were convicted and paid the fines. Furthermore, the blame for the delay in the finalisation of the case can be apportioned equally between the parties and the common cause evidence directs to the finding. The application in the High Court was delayed

for two years by the applicants.

[31] The first respondent went on to argue that the applicants failed dismally to make a case for permanent Stay of Prosecution. The interest of justice would, according to them, be better served if the applicants stand trial for the serious offence they committed. The allegations they are facing are serious.

Finding

[32] The history of this matter shows beyond any doubt that the cause of the repulsive delay from 2006 to 2021 in the finalisation of this case lies at the door of the Presiding Officers, the applicants and the first respondent. They brought the administration of justice into disrepute and they could have done much better to serve their duty to ensure expeditious finalisation of the case. The charges against the applicants are serious. It was committed against their employer and the theft was blatantly committed in relation to the property of the taxpayer and law-abiding citizens of the country. The evidence against the applicants is strong. On the other hand, the applicants are represented by sturdy and experienced Counsel; they face no trial

prejudice. Prejudice on other levels such as training and promotion opportunities can be addressed on other points of law. It is high time for the matter to go on trial and for justice to take its course. A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals may not cause the Rule of Law to fail the country.

[33] This brings me to the issue of costs. Costs must follow the cause but for the wasted costs on 10 June 2021. Reading of the Explanatory Affidavits; and to give two experienced legal practitioners the benefit of the doubt, brings me to the

conclusion

that there was a misunderstanding between the parties. I also learned a lesson not to trust that litigators are able to fix dies for filing among each other on a collegial basis but to order the dates for filing of papers specifically. But, to file an Answering

Affidavit on 7 June when the matter should be heard on 10 June is inexcusable. The first respondent will have to carry the wasted costs for the 10th of June 2021.

[34] ORDER

1. Condonation is granted for the late filing of the Answering Affidavit of the first respondent.
2. The application for an order for a Stay of Prosecution is dismissed with costs except for the costs incurred on 10 June 2021. The wasted costs of the 10th of June 2021 must be carried by the first respondent.
3. A copy of this judgment must be forwarded by the Registrar of this Court to the Presiding Judge of the Military Court, Bloemfontein, Free State.

_____[3]

M OPPERMAN

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REF: 619/201901154/P16L

[1] Section 342A was inserted by section 13 of Act No. 86 of 1996. Subsection

(7) was added by section 7 of Act No. 55 of 2003.

[2] Bothma v Els and others 2010

(1) SACR 184 (CC), Broome v Director Of Public Prosecutions, Western Cape and Others 2008 (1) SACR 178 (C), S v Zuma and Another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and Others (CCD30/2018, D12763/2018) [2019] ZAKZDHC 19; [2019] 4 All SA 845 (KZD); 2020 (2) BCLR 153 (KZD) (11 October 2019), Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), Wild and Another v Hoffert No and Others

[1998] ZACC 5; 1998 (3) SA 695 (CC) and Zanner v Director of Public Prosecutions, Johannesburg

[2006] ZASCA 56; 2006 (2) SACR 45 (SCA) also give direction in the adjudication of an order for a Stay of Prosecution.

[3] The signed hard copy of the judgment is available on the File.

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