

SOUTH AFRICA / JUDGMENT

Matsepe and Another v Director of Public Prosecutions and Others (CC11/2021)

[2024] ZAGPPHC 893 (6 September 2024)

[2024] ZAGPPHC 893

COURT

North Gauteng High Court, Pretoria

BEFORE

PM Mabuse

CASE / FILE NUMBER

CC11/2021

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Date: 2024.09.06

CASE NO: CC11/2021

In the matter between KABELO JOHN MATSEPE First Applicant MAMPHE DANIEL MSIZA Second Applicant VS THE DIRECTOR OF PUBLIC PROSECUTIONS First Respondent ANDILE MALUSI RAMAVHUNGA Second Respondent PHOPHI LONDOLANI MUKHODOBWANE Third Respondent MULIMISI SOLOMON MAPOSA Fourth Respondent NHLANNHLA KELVIN SIPHO MALABA Fifth Respondent PHALAPHALA AVSHONI RAMIKOSI Sixth Respondent THIFHELIBILU ERNEST NESANE Seventh Respondent PAULA MAGULA Eighth Respondent MMBULAHENI ROBERT MADZONGA Ninth Respondent RALLION RAZWINANE Tenth Respondent TAKUNDA EDGAR MUCHEKE Eleventh Respondent TSHIANEO MADADZHE Twelfth Respondent In re:- THE STATE VS ANDILE MALUSI RAMAVHUNGA First Respondent PHOPHI LONDOLANI MUKHODOBWANE Second Respondent MULIMISI SOLOMON MAPOSA Third Respondent NHLANNHLA KELVIN SIPHO MALABA Fourth Respondent PHALAPHALA AVSHONI RAMIKOSI Fifth Respondent THIFHELIBILU ERNEST NESANE Sixth Respondent PAULA MAGULA Seventh Respondent MMBULAHENI ROBERT MADZONGA Eighth Respondent KABELO JOHN MATSEPE Ninth Respondent MAMPHE DANIEL MSIZA Tenth Respondent RALLION RAZWINANE Eleventh Respondent TAKUNDA EDGAR MUCHEKE Twelfth Respondent

TSHIANEO MADADZHE Thirteenth Respondent

JUDGMENT

MABUSE J

[1] This matter conflates two applications, both by the Ninth and Tenth Applicants, for the following orders:

“[1] That the Criminal Trial in State vs Andile Malusi Attwell Ramavhunga and 12 Others, Gauteng High Court, Case Nr. CC21/2021, be stayed or held in abeyance temporarily, pending the determination of the final outcome of the prosecution of the

appeal by Kabelo John Matsepe and Mande Daniel Msiza, against the whole of the judgments of Justice PM Mabuse, delivered on 26 April 2024 and 27 June 2024 in State v Tshifiwa Calvin Matodzi and thirteen Others, Gauteng High Court, Case Nr. CC21/2021;

[2] that the criminal trials of Kabelo John Matsepe and Mamphe Daniel Msiza, as per the respective charges delineated in the

indictment in State vs Andile Malusi Attwell Ramavhunga and 12 Others, Gauteng High Court, Case Nr. CC21/2024, be separated

from that of the rest of the co-accused or Respondents.”

[2] These two applications are opposed by the First, Fifth and Eighth Respondents while the other Respondents support the relief sought by the Applicants for the separation of the trials in terms of Section 157 of the Criminal Procedure Act No. 51 of 1997 (the Act). For purposes of easy reference, I will refer to the 1st Respondent as the “First Respondent” and the 2nd to the 13th respondents as “the Respondents”.

[3] The History of the Application:

[3.1] Trial in the criminal matter was, in terms of a court order-, scheduled to commence on 6 May 2024. On that specific date, trial could not commence because counsel for the applicants applied for a postponement of the matter in order to enable them to file an application for leave to appeal against the judgments of the court in which the court dismissed their applications to be furnished with further and better particulars. The State opposed those applications. The court made a further order that the trial of the matter should commence on 8 May 2024.

[3.2] On 7 May 2024 the Applicants brought an application for leave to appeal against the order of the Court made on 6 May 2024, that the trial should commence on 8 May 2024. The application for leave to appeal the order of 6 May 2024 was dismissed on 7 May 2024.

[3.3] On 8 May 2024 Ms Vuma, who was appearing for Mr Tshifiwa Calvin Matodzi (Mr Matodzi) and the Second Respondent (that is accused two at the time) informed the Court that Mr Matodzi had instructed her to enter a plea of guilty on his behalf. Ms Vuma further informed the Court that she would not be in a position to continue as the legal representative of the Second

Respondent because of a conflict of interest that arose from Matodzi's instructions. In light of the new development, the matter needed to be postponed in order for Ms Vuma to formalize the plea in respect of Matodzi and also to allow the Legal Aid Board South Africa to appoint a new legal representative for the Second Respondent. Accordingly, the matter in respect of Mr Matodzi and the Second Respondent was postponed to 5 June 2024 for the purposes of a guilty plea and the appointment of a new legal representative. The matter against the Applicants and the Respondents was postponed

to 22 July 2024 for trial.

[3.4] On 26 June 2024 the application for leave to appeal in respect of the dismissal of the application to compel the State to provide further and better particulars and disclosure was argued. That application was refused on 27 June 2024.

[3.5] On 10 July 2024 the matter against Mr Matodzi was separated in terms of Section 157 of the CPA from that of his co-accused. Mr Matodzi had pleaded guilty in terms of s 105 of the Act before Judge Mosopa.

[3.6] On 11 July 2024 the State provided a witness statement as well as the plea agreement of Mr Matodzi to the legal representatives of the respondents in the matter. It was noted that Mr Matodzi would be a witness in the trial of his former co-accused and that his name would be added to the list of witnesses. On 13 July 2024 a revised indictment was served on the legal representatives of all the accused in the matter. The indictment removed Mr Matodzi as accused 1 and the remaining accused persons had been adjusted accordingly. All the counts that were only applicable in respect of Mr Matodzi had also been removed and the counts had been renumbered accordingly. One new count, namely 165, had been added and it only was in respect of Mr Nesane as accused no. 6.

[3.7] On 22 July 2024, another date on which there was a majority agreement that trial would commence, the Applicants, who were now accused 9 and 10 respectively in the new matter, out of the blue delivered on all the Respondents and the Court copies of their current application. Because the current application came as a bolt from the blue to all the Respondents, the First Respondent requested time to enable him to peruse the application and respond to it accordingly. Because all the other Respondents were caught on the hop, the Court ordered a timeline within which the Respondents had to file their answering affidavits, and the Applicants had to file their replying affidavits, and the parties had to file their heads of argument.

[3.7] It was with some disappointment to know that when the matter was heard, only the First, Fourth and Eighth Respondents had filed proper papers and heads of argument. When the Court enquired from counsel, one-by-one, some informed the Court that they had filed notices to abide, which the Court did not see, others told the Court that they had not obtained full instructions from their clients about the applications. I attribute this to the lackadaisical and supine of counsel. It is clear that these counsel regarded the current application as a matter involving the Applicants and the First Respondent only. They adopted a neutral position. It is a disgrace. I will explain later why they were supposed to have filed their answering affidavits and not notices to

abide.

[4] Section 157(2) of the CPA provides that:

“Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of anyone or more of the accused shall be held separately from the trial of the other accused and the court may abstain from giving judgment in respect of any of such accused.”

[5] According to the founding affidavits of the Applicants, the applications of the Applicants are premised on vindicating and asserting their respective fair trial rights as contemplated in:

[5.1] Section 35(3)(a) of the Constitution, in other words, their right to be informed of the charge with sufficient detail to answer to the said charges.

[5.2] Section 35(3)(b) of the Constitution, in other words, their right to adequately propose their respective defenses.

[5.3] Section 35(3)(d) of the Constitution, that is their right to have their trial begin and conclude without unreasonable delay.

[5.4] Section 35(3)(1) of the Constitution, their right to adduce and challenge evidence.

[6] According to the Applicants, failure to move their applications will likely result in them suffering really substantial and irreparable trial-related prejudice in that their respective rights to a fair trial would be considerably severely nullified.

[7] Furthermore, the applications are, according to the Applicants, brought in the interest of justice.

[8] These applications follow up on the respective judgments of this Court handed down on 26 April 2024 and 27 June 2024 in case no. CC1/2021 in which the Court firstly dismissed an application by the Applicants to compel the furnishing of further and better

particulars, and subsequently dismissed their application for leave to appeal.

[9] It is the Applicants' case that the above judgments and orders appealed against, coupled with the First Respondent's refusal and or failure to provide them with the requested further and better particulars in the preparation of their respective defences and trial, impact negatively on their rights to their fair trial.

[10] The issue of separation of trial is discretionary. That discretion must be exercised judicially by the Court having due

regard to the interest of justice and by, inter alia, weighing the interests, the likelihood of prejudice that the Applicants, the State and the Respondents will suffer, against the wide interest of the community.

- [11] The Applicants submit that the conduct of the State is, without doubt, in violation of their fair trial rights under s 35(3)(a), (b),
- (c) and (d) and (i) of the Constitution and the resultant undue substantial and severe prejudice that they have been subjected to and to proceed with the trial, at this stage, would amount to gross irregularity.
- [12] The continuation of the trial, at this stage, would only likely be severely prejudicial to both but would also amount to a grave injustice and failure of justice to both the Applicants and to the administration of justice.
- [13] In the premises, they pray that their trials should be held in abeyance or be provisionally stayed pending the final determination

of their application for leave to appeal and the outcome of their further substantive applications which are inextricably linked to the outcome of their applications for leave to appeal and the final prosecution thereof.

- [14] The First Respondent, through the affidavit of one, Sibongile Mzinyati, the Director of Public Prosecutions for Gauteng Division,

the Fifth and Eighth Respondents opposed the Applicants' application in the said affidavit, and before disclosing the grounds

of opposing the application for a temporary stay of the prosecution and a separation of trials in terms of s 157 of the CPA, Adv Mzinyati sets out the history of the criminal case. In the light of the fact that the history of the criminal matter has been fully set out, from its inception, in the answering affidavit of the said Mzinyati, I will not repeat it. It is documented from paragraphs 9 to 40 of the affidavit. She concludes by confirming that the State is ready to proceed with the trial.

APPLICATION FOR TEMPORARY STAY OF THE PROSECUTION AND SEPARATION OF TRIALS IN TERMS OF SECTION 157 OF THE CRIMINAL PROCEDURE ACT 51 OF 1997

- [15] [15.1] In paragraph 41 of the opposing affidavit, Adv. Mzinyati adumbrated the First Respondent's opposition to the applications. Responding to the applications and the Applicants' reliance on s 35(3) of the Constitution, it is the First Respondent's case that on 12 March 2021, the day of their first appearance, the Applicants and the Respondents were provided with the indictment and that the indictment fully set out the allegations against them.

[15.2] Insofar as the Applicants assert their rights in terms of s 35(3)(b) of the Constitution, the First Respondent contends that the Applicants are both out on bail. It is therefore the First Respondent's view that their right to have adequate time and facilities to prepare for trial has not been limited.

[15.3] As far as it relates to s 35(3)(d) of the Constitution, the State's view is that it is ready to proceed with trial.

[15.4] Finally, regarding section 35(3)(i) of the Constitution, there are no grounds upon which the applicants will be unable to adduce or challenge the evidence during the trial, so contend the First Respondent.

[16] In this judgment, I propose to confine myself substantially to the two issues raised in the notice of motion and to deal with other factors only to the extent to which they impact directly or indirectly on the resolution of the issues. I will avoid

issues

that relates to whether the Applicants have been fully and satisfactorily furnished with further particulars. That bridge we have traversed, and we need not revisit it in this judgment.

[17] The Applicants do not seek a permanent stay of their prosecution. All that they seek is a stay of prosecution of the whole matter while awaiting the results of the appeals they intend launching against the judgments of this Court as delivered on 26 April 2024 and 27 June

2024. All that they seek in the first prayer of their application is to keep their prosecution in the limbo. By the whole matter, it is meant the criminal case that involves them, the State and the rest of the Respondents.

[18] This Court is goaded to consider the following factors in determining whether to grant a stay of the prosecution; (i) whether the Applicants' Constitutional right to a fair trial within a reasonable time has been violated, in other words, the length of the delay before the commencement of the prosecution; (ii) the reasons for the delay; (iii) the assertion by an accused person of his rights, and; (iv) the prejudice to any of the accused person.

[19] According to the Applicants, the outcome of the prosecution of their appeal is intrinsically linked to the substantive application they intend filing and challenging the charges against them as well as the racketeering authorization. This will inevitably occasion an undeterminable delay in the commencement of the trial and will have a serious impact on the s 35(3)(d) Constitutional rights of the Respondents and the associated prejudice to them and their interests.

[20] Section 35(3)(d) of the Constitution provides as follows:

"Every accused person has the right to a fair trial, which includes the right-

(d) to have their trial begin and conclude without unreasonable delay."

[20.1] having regard to the history of the matter and its facts, the nature of the offence, the real likelihood of substantial trial-related prejudice, the fair trial rights of all the Respondents, the interests of the state and society, inherent indeterminable period ensuing delays and the interest of the justice, they remedy of a provisional state is, for the following further reasons, not appropriate. It is, in my view, not the relief the court would be inclined to grant.

[20.2] the court has been informed that the Applicants have petitioned the Supreme Court of Appeal (SCA) for leave to appeal against the judgments of this court of 26 April 2024 and 27 June 2024. This Court is grappling with the following problems, based on what has been intimated to it:

[20.2.1] It is not known when the (SCA) will decide on the petition.

[20.2.2] there is not knowing whether the SCA would decide to hear the appeal or would refer it to the Full Court of this Division

20.1.3] If the SCA decided the petition in favour of the Applicants, there is not knowing whether it will decide to hear the appeal itself or to refer it to the Full Court of this Division.

[20.2.4] In each case there is not knowing when the appeal would be heard.

[20.2.5] If the Applicants lost the appeal, they would still approach the Constitutional Court.

[20.2.6] It is not known how long this whole procedure would it take before the Constitutional Court hears the matter;

[20.2.7] There is no procedure in terms of which these whole procedures, to the SCA and the Constitutional Court, can be expedited.

[20.2.8] The Applicants have themselves stated in the applications that their appeal may take an unknown length of time.

[20.2.9] the circumstances, the Court must therefore have regard to the rights of the Respondents in terms of s 35(3)(d) of the Constitution.

[21] The problem with granting the relief the Applicants seek in prayer

(1) of their Notice of Motion, is that it would, at the same time, amount to a violation of the Constitutional rights of the Respondents. The delay in the given circumstances of the Respondents would have been unreasonable. It would have infringed on the rights for a fair trial of the Respondents in s 35(3) of the Constitution. The Court was accordingly required to bring its own experiences to bear in determining whether the delay would be over lengthy. See in this regard Director of Public Prosecutions and Another vs Phillips [2012] 4 All SA 5.3 (SCA) at paragraph 43 to 48, where the Court had the following to say:

“Fairness is not a one-way street conferring an unlimited right on accused to demand the most favourable possible treatment.” This court had to be fair to the Respondents, to the State and the community. Not a single day passes without the media mentioning the VBS saga; without people complaining how they lost savings with the VBS demise; without complaining that the wheels of justice grind very slowly and without members of the community making VBS as a point of reference. The sooner trial in the matter commences, the better.

- [22] S 35(3) of the Constitution entrenches the right to a fair trial. Among others, this right entails that every accused person must be informed of the charge with sufficient detail to answer it. More importantly, for the purposes of this judgment, it also includes the right that a trial must begin and conclude without any unreasonable delay. The right that a trial must begin and conclude within a reasonable time belongs to all the parties, in other words, to the Applicants, to the accused persons, to the co-accused, and to the State. A step taken by one accused, like the present, may delay the commencement of a trial. Whether the purpose of such a step is to delay the commencement of trial, it is immaterial because it will amount to a violation of the fair trial of the Respondents if its effect is that the trial of the co-accused cannot begin and conclude within a reasonable time.
- [23] The case of *Bothma vs S and Others* 2010 (1) SACR 184 211I-212B is a quintessential ample of the prejudice that the State may suffer because of the violation of its s 35 Constitutional rights.

Regarding irreparable trial, related prejudice, the Court had the following to say:

“[68] These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Does irretrievable loss of some evidence, even if associated delay is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, a potential witness who have died cannot be revived. Documents that have gone permanently lost may not be curable for creation. Irreparability, in this context, must therefore relate to insurmountable damage caused not to a source of testimony as such but to the fairness and integrity of the possible trial. Put another way, to say that the trial has been irreparable prejudice, it accepts that there is no way in which the fairness of the trial could be sustained.”

- [24] The Court must enquire as to the delay in finalizing the case of the Respondents. This is a proper consideration that requires a value judgment. A court could not sanction steps by one or two accused that would result in the flouting of the Constitutional rights of the other accused. In *S v Ramabele and Others* 2020 (2) SACR 604 CC at paragraph [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) systematic delay. Courts have developed further factors such as the nature of the offence as well as the interests of the family and/ or the victims of the alleged crime. A proper consideration of these facts requires a value judgement with reasonableness as the qualifier. Furthermore, it is a fact it is affect specific inquiry.”

- [25] I have pointed out somewhere above that the First, Fifth and Eighth Respondents oppose the granting of the relief set out in prayer (1) of the Notice of Motion on the ground that the application is designed to delay the commencement of the main trial. I agree with them. It is the First Respondent's case this court should compel the Applicants to proceed with the trial and that compelling the Applicants to proceed with trial would not cause substantial prejudice or violate their rights to a fair trial as contemplated in s 35(3)(a), (b), (c), (d) and (i) of the Constitution and neither will it result in a miscarriage of justice or be detrimental to the proper administration of justice.
- [26] The question now is: would it have been proper for this Court to compel the Applicants to proceed with a trial after their counsel had advised the Court that they have petitioned the SCA for leave to appeal? After all, the Applicants have a right to appeal to the SCA against the judgments of this Court. Is there no risk of the Court being faced with yet another application for leave to appeal if the Court compelled the Applicants to proceed with trial in the matter much against their will? If the Applicants refused to participate in the proceedings because they were not ready, how does this Court force them to do so? At any rate, what was the reason for not waiting for the SCA to decide their matter before proceeding with their trial instead of second-guessing it?
- [27] Frankly speaking, the relief that the Applicants sought was an interlocutory relief. This, however, did not mean that it could not be appealed against. It must be recalled that in certain cases leave to appeal is required and that such leave must be obtained from the court a quo to appeal from an interlocutory order made by a Superior Court, if such order does have a final or definitive effect. See *Steytler N.O. vs Fitzgerald* 1911 AD 295, the grant or refusal of an order for further particulars was rightly held to be appealable, see *Maritz vs Swarts* 1935 TPD 202. When leave is sought to appeal against a judgment or order refusing the granting of further particulars, the Court will chiefly be concerned with the balance of convenience. The question whether to grant or refuse the leave to appeal is more likely to lead to a just, speedy and as far as maybe inexpensive settlement of the real issue between the parties.
- [28] In exercising its discretion, this Court needs to consider the likely prejudice to the Applicants resulting from a joint trial against the likelihood to the other accused or the State or their trials in deciding whether the interest of justice ...
- [29] The relief sought by the Applicants in the notice of motion, in other words, the relief for the temporary stay of the prosecution has, in my view, far reaching consequences, as shown in paragraph [20] supra.

The Applicants' counsel indicated to this Court that all the procedures may take four to five years which calls into question the degree of reasonableness. See in this regard *Sanderson vs Attorney General Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC) at para [36] where the Court had the following to say:

“Having isolated some of the relevant considerations, how are they assimilated in determining whether or not the lapse of time is

reasonable. The qualifier “reasonableness” requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with criminal offence to trial and resolving the liability of the accused. Particularly when the Applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomized individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structural legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of such society and accept that a criminal justice system, such as ours inevitably imposes badness on the accused. But we have to acknowledge that these burdens are for profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence and become in itself a form of extra-curial punishment. A person’s time is a profound value, and it should not become the playing-thing of the state or society.”

[30] This Court could not grant the temporary stay of the prosecution without violating the Constitutional rights of the Respondents to have their cases heard without unreasonable delay. The granting of the said relief would result in the cases of the Respondents

having to be postponed for close to four to five years. This, in my view, will be unfair to the State, to the Respondents, and to the community at large. In this regard, I was referred to the judgment of *S v Shaik and Others* [2007] ZACC 19; 2008 (1) SACR 1 CC at 23B-24A, where the Court had the following to say:

“Our courts have recognised that some irregularities result in a failure of justice, in the words of Section 322(1) of the CPA. The failure of justice must be understood within the context of Section 35(3) of the Constitution as an unfair trial. However, not only irregularity has this result. According to the applicants, the failure to charge Mr Zuma, Thint or Thetard without more resulted in a trial being unfair, and they need not to show that they were actually prejudiced by the failure. They also argued that the public interest necessitated a joint trial. The question is therefore, firstly, whether an irregularity did indeed occur, and then if so, whether it was with the kind to render the trial unfair.”

[31] In the judgment of *The National Director of Public Prosecutions v King* 2010 (2) SACR 146 to 152 D (SCA), the judgments to which I was referred by Mr van der Merwe, Harms J had the following to say about the fairness of the criminal trial:

“[5] There is no such thing as perfect justice- a system where an accused person should be shown every scintilla of information that might be useful to his defence - and discovery in criminal cases must always be a compromise. Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State. This does not mean that the accused’s rights should be subordinated to the public interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to

make it impractical to conduct the prosecution. The fair trial right does not mean a predilection of technical niceties and ingenious legal stratagems, or to encourage preliminary litigation, a pervasive feature of white-collar crime cases in this country. To the contrary courts should within the four confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges, and especially minimum sentences, have little inclination to co-operate in the process that may lead to their conviction and 'any new procedure can offer opportunities capable of expectation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge of attacking the prosecution."

- [32] Finally, in *The National Director of Public Prosecutions vs King* (supra) at 151 C-F the Court had the following to say:

"[4] It is well to remind oneself at the outset of a number of basic principles in approaching the matter. Constitutions call for a generous interpretation in order to give full effect to the fundamental rights and freedom that they create. The right to a fair trial is, by virtue of the introductory words to section 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with, what must have passed muster in the past. This does not mean that all the existing principles of law have to be jettisoned, nor does it mean that one can attach to the concept of a fair trial any meaning, whatever one wishes it to mean. The question remains whether the right asserted is a right that is reasonably for a fair trial. A generous approach is called for. This is a question for the trial judge and there is in general not a priori answer to the question whether a trial will be fair or not. Potential prejudice may be rectified during the cause of the trial and the court may make preliminary rulings depending on how the case unfolds and may revoke or amend. Irregularities do not lead necessarily to a failure of justice."

- [33] The right asserted by the Applicants is, quite correctly, a right that is reasonably required for a fair trial. It is of paramount importance to point out that this right of a fair trial belongs not to the Applicants only but also to the community on whose behalf the State acts and to other people or the Respondents who are also involved in the matter under consideration. With the requirements of a fair trial, one should not do so only for the petitioner or the Applicants. One should also have regard to the rights of the other people involved in the matter. One should always ask oneself the following questions: in dealing with this matter, have I considered the rights of fairness to everybody? One should avoid paying too much attention to one party to the exclusion of the others.
- [34] The Court may not, for the foregoing reasons, grant the relief sought by the Applicants in paragraph [1] of the Notice of Motion.

THE APPLICATION FOR SEPARATION OF TRIALS IN TERMS OF SECTION 157 OF THE ACT

- [35] This application for separation of trials is brought by the Applicants, the Fifth and the Eighth Respondents in terms of Section

157 of the CPA. At the pain of repetition, this section provides that:

“157(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the Court may at any time during the trial, upon the application of the prosecutor or of any of the accused direct that the trial of one or more of the accused shall be held separately from the trial of the other accused, and the Court may abstain from giving judgment in respect of any of such accused.”

[36] It is not in dispute that the Applicants and the Respondents Two to Thirteen have been charged jointly with the same offences. The said section provides that:

“... upon the application of any of the accused.”

The Applicants are the accused in the offences with which they are charged with the Respondents. They are accused 9 and 10.

Before they were accused 10 and 11. In such capacities they are, in terms of section 157, entitled to bring an application in terms of section 157 as they have done.

[37] The Criminal Procedure Act does not define what “apply” is, nor does it prescribe how such an application in terms of section 157 may be brought and how many applicant affidavits, if any, should be delivered, and when such affidavits should be delivered. However, in terms of section 173 of the Constitution:

“The Constitutional Court, Supreme Court of Appeal and High Court have inherent powers to protect and regulate their own processes and to develop the common law, taking into account the interest of justice.”

This power is used as far as procedural law is concerned, to regulate the courts’ procedures in the interest of the proper administration of justice. See in this regard *Universal City Studios Incorporated v Network Video (Pty) Ltd* [1986] ZASCA 3; 1986 (2) SA 734 A. This power is used where there is no rule that deals with a particular matter. See *S v Pennington* 1997 (4) SA 1076 (CC).

[38] Based on the Court’s inherent power and the interpretation of section 173 of the Constitution, the Court accepts that the affidavits of the Fifth and Eighth Respondents constitute an application in terms of section 157 of the CPA. In their

affidavits, the said respondents pray for the separation of trials. At the same time, they oppose the granting of prayers

(1) of the Applicants’ Notice of Motion. The Fifth and Eighth Respondents need not bring their application on Notice of Motion supported by a founding affidavit, for no rule or law prescribes that procedure. Accordingly, I am satisfied that before me are proper applications in terms of section 157 of the CPA by the Applicants and by the Fifth and Eighth Respondents.

[39] In opposing the application, I was reminded by counsel for the First Respondent that the Second Applicant previously brought an application for the separation of the trial and that that application was refused. There was subsequently an application for leave to appeal the

order of refusal of the application for separation, but that application too was equally refused. In opposing the application for separation of trial, the First Respondent argued that there are no new facts upon which this application of separation of trial should be reconsidered. He argued furthermore that it is not in the interest of justice. I disagree. Furthermore, the First Respondent argued that once the Court refused the first prayer, the second prayer would become moot. Accordingly, the second prayer is, according to the First Respondent, moot as the Court has refused the first prayer.

[40] According to *S v Libaya en 'n Andere* 1965 (4) SA 249 at 252C-D, an order refusing separation of trial is an interlocutory order and may be reconsidered at any point. This is clear from the remarks made by Hofmeyer J on page 252C-D, that nothing prevents the second application for separation of trials, if it is in the interest of justice to do so, and secondly, if hearing a matter involving more than one accused will prejudice the other accused. He remarked as follows:

“Ek het gedurende die argument die mening uitgespreek dat ‘n beslising om ‘n skeiding van verhore te weier, interlokutories

is. Ek is in die mening gesterk deur die feit dat die Regter a quo in die Bagas saak (sien loc. cit. bl. 441) twee aansoeke om skeiding aangehoor het en dat dit blykbaar as korrekte prosedure deur VAN DEN HEEVER, R.A., beskou was dat die Regter a quo toegelaat het dat ‘n tweede aansoek gedurende dieselfde verhoor om skeiding van die verhore aan hom gerig word. In *R v Mfuduka and Another*, supra te bl. 775, het die voorsittende Regter die applikant uitdruklik die reg toegesê om later ‘n verdere aansoek om skeiding van verhore te maak indien nuwe gronde daarvoor gedurende die verhoor sou ontstaan.

‘n Beslising dat afsonderlike verhore nie toegestaan word nie, is dus nie onherroeplik nie en indien daar bloot gesteun word op die

moontlikheid dat ‘n Hof, saamgestel soos die huidige, onbehoorlik beïnvloed sou kan word deur toelating van getuienis teen

die een beskuldigde wat ontoelaatbaar sou wees teen die ander, meen ek, by verdere oorweging, dat die voorsittende Regter die aansoek as voorbarig kan beskou totdat sekerheid verkry is aangaande die toelaatbaarheid vandie bekkentenis asook die vraag of die beskuldigde

wat die bekentenis gemaak het getuienis gaan lewer al dan nie. In ieder geval behoort die aansoek nie automaties en sonder die sorgvuldigste oorweging van die besondere omstandighede van die saak, toegestaan te word nie.”

A Court may, moreover, of its own accord, raise the issue of separation of trials. See *State v Ndwande* 1970 (4) SA 502 (N.P.D.) 503 A-D:

“The decision to grant a separation of trial is discretionary. It requires the court to weigh up the likelihood of prejudice to the applicant or to the State or the co-accused against the State if a joint trial were to take place.”

Quite clearly, this situation in the current case is not one in which one or more accused plead guilty while the others plead not guilty. This is, as shown earlier, a situation where one or two accused, by a succession of applications, delay the commencement of the trial in which the bulk of the accused have declared their preparedness to commence with their trial. This kind of situation prejudices the bulk of the accused, and, in my view, the Court should take that delay and the prejudice to the bulk of the accused into account and order a separation of trials. In the above judgment, Friedman J, had the following to say:

“It is clear from this that although section 155 of Act 56 of 1955 merely authorises a court, on the application of the prosecutor or the State to order a separation of trials, a court should, whether such an application is made or not, make such an order if a possibility of prejudice exist.”

In my view, such a possibility of prejudice exists in the current matter.

[41] This is clear from the remarks made by Hofmeyer J; on page 252 GD paragraphs that nothing prevents the second application for

separation of trials, if it is in the interest of justice, to do so and seemingly, if necessary, a matter involving more than one accused will prejudice the other accused. He remarked as follows:

[42] In *S v Ntuli and Others* 1978 (2) SA 69 A at page 73 the Appellate Division sets out the discretion as follows:

“In exercising discretion, the trial court has to weigh up the likelihood of prejudice to the applicant-accused resulting from a joint trial against the likelihood of prejudice to the other accused or the State if their trials are separated and decide whether or not in the interest of justice a separation of trial should be granted. “Prejudice” then means prejudice in the sense that no injustice should be caused to the party concerned, including the State. The weight to be given to each of the relevant factors in the adjudication is for the trial court to assess in exercise of its discretion.”

[43] Finally, the separation of trials must be in the interest of justice. In conclusion, the fact that at one stage in the past there was an unsuccessful application for trials does not prevent a subsequent application for the same relief. The argument by Mr van der Merwe that the Second Applicant previously brought an application for the separation of trial which had been refused, does not constitute a reason not to bring a further application for separation based on the changed circumstances.

THE REASONS WHY THIS COURT SHOULD ORDER A SEPARATION OF TRIALS

[44] For ease of reference I would like to refer to the background history of the matter, as set out in paragraphs (9) to (40) of the First Respondent’s answering affidavit to oppose the application for a temporary stay of prosecution and separation of trials in terms of Section 157 of the CPA. I do not intend to repeat it in here.

[45] The following circumstances are, in my view, crucial in the determination of whether the application for a separation of trials

should be granted or not:

[45.1] the reasons for the delay in the commencements of the criminal trial.

[45.2] the State's trial readiness.

[45.3] the accused's' or Respondents' trial readiness.

[45.4] the provisions of Section 35(3)(d) of the Constitution; and

[45.5] hint or absence thereof that trial will commence.

[46] According to paragraph [18], the matter was enrolled on 2 August 2021 in the Pretoria High Court for the first time for purposes of pre-trial conference before Judge de Vos. At that stage the legal representatives of the First Applicant placed on record that he was going to request further particulars from the State. New legal representatives came on record on 2 August 2021. These were Mr Nesane, Mr Magula and Mr Razwinane. The matter was then postponed to 12 October 2021 for a further pre-trial conference.

[47] I will now deal with these circumstances singly:

The delay in the commencements of the criminal trial

[47.1] Initially, there were 14 accused in this matter or in the criminal matter. Most of the accused had by 16 March 2022 legal representatives. This matter was over a period of a subject of pre-trial conferences presided over at a certain stage, by the DJP. Already during a pre-trial conference before the DJP in July 2023, the legal representatives of the Respondents informed the DJP that they were ready to proceed with the trial, even Ms Manaka, who appeared for the Applicants, had given an indication that her clients would be ready to proceed with the trial.

[47.2] On 16 March 2022 the matter was postponed to 3 October 2022 to 3 December 2022 and from 23 January 2023 to 24 March 2023 for trial.

[47.3] On 2 October 2023, a day before trial could commence, the Second Applicant served the First Respondent with a request for further and better particulars. Quite clearly, all because of the Second Applicant's conduct, trial on the matter could not commence. This delay had nothing to do with the Respondents. It was not occasioned by the Respondents who informed the court that they were ready to proceed with the trial.

[47.4] On 3 October 2023, the matter was postponed to 9 October 2023 for plea and trial and for the First Respondent to deal with the request for further and better particulars of the Second Applicant. This postponement was not caused by any one of the Respondents. It was even granted at the time when all the Respondents were ready to proceed with their criminal matter. The rights of the co-respondents to a fair trial, as enshrined in s 35(3)(d) of the Constitution, were violated as their cases did not begin and could not be concluded without unreasonable delay.

[47.5] On October 2023, the matter was postponed to 6 November 2023 for plea and trial. This still was unfair to the respondents because at all material times they were ready to commence with their criminal trial. But that notwithstanding, their cases were postponed without any due regard to their rights. A judicial officer should consider the constitutional rights or interests that might be impacted by the postponement of a matter. The focus of the proceedings on both 3 October 2023 and 9 October 2023 was part of the case that involved the Applicants. There was a dual between the First Respondents, on the one hand, and the two Applicants, on the other hand. This fight had nothing to do with the Respondents, who simply wanted to commence with their trial but who had their cases postponed each time they attended court. An accused person enjoys the right to a fair trial. This right includes the right to have his trial begin and conclude without unreasonable delay. See *S v Le Grange* [2008] ZASCA 102; 2009 (1) SACR 125 (SCA):

“The cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open- mindedly, impartially and fairly, but such conduct must be manifest to all who are concerned in the trial and the outcome, especially of the accused.”

[47.6] On 9 October 2023, the date on which the First Respondent provided additional disclosure after a case docket and audit revealed certain statements disclosed, the matter was postponed for plea and trial to 6 November 2023 and to afford all the legal representatives and opportunity to go through the additional disclosures.

[47.7] On 6 November 2023, the Applicants informed the Court that they had planned to lodge an application to compel the State to furnish further and better particulars and documents. At this stage, the First Respondent should have noticed that the matter was becoming complicated and that trial of the criminal case would not even commence; that the fact that the Applicants had informed the Court of their plans to lodge an application to compel the State to provide them with further and better particulars and disclosure would necessitate a further postponement of the matter; that these further particulars would occur at the instance of the Applicants and not the Respondents; to avoid any further violation of the Respondents’ s 35(3)(d) Constitutional rights, the First Respondent should have withdrawn the case of the respondents provisionally until the Applicants had exhausted all their applications and appeals. Such a provisional withdrawal of the charges against the respondents would have taken place in terms of section 6 of the CPA. Section 6 of the CPA provides as follows:

“An Attorney-General or any person conducting a prosecution at the instance of the State or anybody or person conducting a

prosecution under subsection (8) may –

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquit respect of that charge.”

[47.8] In terms of the law, the prosecution is still dominus litis and has full control over the charge. In other words, even after the State has withdrawn the charges against the Respondents in terms of s 6 of the CPA, the prosecution would still oversee their case. When all the dust created by the battle between the Applicants and the First Respondent has settled, when the Applicants have exhausted all their remedies, provided they have lost their fights with the First Respondent, the State can still prosecute the Respondents with the Applicants, as it is obvious that the State wants to charge the Applicants together with the Respondents, at one sitting.

[47.9] Once the Applicants had informed the Court that they contemplated lodging an application to compel the State to provide them with further particulars and disclosure, it made an order regarding the timelines for the filing of the documents and postponed the matter only in respect of the Applicants to 27 November 2023 for argument. The Court also postponed the matter of the Respondents to 1 December 2023.

[47.10] On 1 December 2023, the case against the Respondents was, by agreement, postponed to 6 May 2024 for trial on the understanding

that it would commence. On 6 May 2024, the Applicants brought an application for leave to appeal. Already then, the whole case that was supposed to start on 6 May 2024, would be postponed. Again, the reason for the postponement of the commencement

of the trial was the conduct of the Applicants. They brought an application for a postponement to file an application for leave to appeal against the judgments in the application to compel the State to provide them with further particulars and disclosure. The application was opposed by the State. The Court ordered that the Trial should commence on 8 May 2024. On 7 July 2024 the Applicants brought an application for leave to appeal in respect of the Court's order of 6 May 2024 that the trial should commence on 8 May 2024. This application for leave to appeal was dismissed.

[47.11] On 8 May 2024, the matter was postponed for trial to 22 July 2024 because Ms Vuma, who appeared for accused 1 and 2, had formed the Court that accused 1, Mr Matodzi, had instructed her to enter a plea of guilty on his behalf and that, in that case, she would not be able to act for Accused 2.

[47.12] On 22 July 2024, the day on which it had been agreed that trial in the criminal case would commence, the Applicants caught everybody on the hop by launching the current application. This current application is a battle between the Applicants and the First Respondents save for the fact that they have been cited as Respondents, the co-accused are not at all involved in the current

application. They have always been ready to commence with their criminal cases. They see no reason why their case was forever

dragged along, or why was it ever linked, with the Applicants' case. If the Court grants prayers (1) of the Applicants'

Notice of Motion, it then means that the cases of the Respondents will not commence until the Applicants have exhausted all their

remedies after four to five years. If the Respondents were to wait for those periods, it would be a further violation

of their rights to a fair trial. In my view, the State, realizing that the matter would not commence as it had anticipated,

should have provisionally withdrawn the charges against the Respondents in terms of section 6 of the CPA.

[47.13] The Respondents have always complained to this Court, on many an occasion, that they were ready to commence with the trial and saw no reason why their matter had to be postponed or could not commence.

The State declares that it was trial-ready to commence

[47.14] Trial in a criminal case can only commence when the parties are ready. The parties can only be ready when the State has furnished the accused with an indictment and further particulars, if the accused has requested to be furnished with such further particulars.

[47.15] The court will never know that the State is ready to proceed with trial, unless it is so informed by both the State and the defence. In this case, the State informed the Court on many occasions that it was ready to proceed with trial. For instance:

[47.15.1] On 12 October 2021, before honourable Justice de Vos, this is recorded in the minutes:

“On behalf of the State Mr van der Merwe confirmed the State’s readiness to proceed with the trial ... It is expected that the trial would commence in the second term of 2022 and run until the third term.”

[47.15.2] Minutes for Case Management Meeting before Acting Judge President Ledwaba on 22 July 2022. Item 2 of this minutes records the following:

“Adv. van der Merwe confirmed that the State is ready to proceed with trial on 3 October 2022.”

[47.15.3] Minutes for Case Management Meeting before Acting Judge President Ledwaba on 27 February 2023 reflect the following recording:

“4. Adv. van der Merwe stressed that the State has been ready to proceed with the trial since the middle of 2021. It is in the interest of justice to start with the trial and any application for further postponements will be opposed by the State.”

[47.15.4] Minutes for Case Management Meeting before Acting Judge President Ledwaba on 15 March 2023. In paragraph [19] these minutes recorded that:

“15. Adv. van der Merwe informed the DJP that this matter appeared in the High Court for the first time on 2 August

2021. On 12 October 2021 it was on the roll for a pre-trial. The State has been ready to proceed with the matter since then. There have been several postponements, since then, to 24 January 2022, 21 February 2022, 16 March 2022 and 3 October 2022. The only way to move forward is to start with the trial. The right to a fair and speedy trial applies to the State and the defence...

17. Adv. van der Merwe confirms that the State has a plan on how evidence will be prevented. Some of the witnesses are not available on specific days and we are planning around it The State has already consulted with all the witnesses set down for testimony in the first term...

22. Adv. Manaka questioned if it is still viable to have 11 April 2023 as a trial date. As the risk that the matter would not proceed, this seems unrealistic. Mr Stroh commended

that as accused 10 and 14 were only involved with municipalities and accused 1 to 9 on the operational side of the bank, there can be a separation of trials.”(My own underlining)

[47.15.5] Minutes for Case Management before Deputy Judge President Ledwaba on 11 April 2023:

“17. Adv. van der Merwe explained as all the parties previously had to reserve the third term, the matter will be able to start in the third term.”

[47.16] As I have not received any indication that the State is no longer ready to commence with the trial, I must assume that the State is as ready as it was in 2021 to commence with trial.

[47.17] We know why the State has not been able to commence trial. This is all because of the unending applications brought by the Applicants with which the Respondents have nothing to do with.

The provisions of Section 35(3)(d) of the Constitution of the Republic of South Africa

[47.18] In *S v Le Grange* supra, the Court dealt with the rights to a fair trial. There it was held that a judicial officer must conduct the trial open- mindedly, impartially and free and that such conduct must be manifest, especially to the accused. Fairness of trial is under threat if the Court fails to apply the law and assess the facts impartially.

[47.19] The above paragraph means that it is required of a judicial officer who conducts a criminal trial to be impartial and to do so freely. The judicial officer should not limit himself to the rights of some of the accused at the expense of the others or, to put it in another way, to concentrate only on the rights of those who claim that they are asserting their rights to a fair trial in terms of section 35(3)(d) of the Constitution and close his eyes to the others. The law must be applied equally to those who are involved in any case. It will be recalled that in *Sanderson v Attorney-General Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC), the Court had the following to say:

“The point should not be overlooked that it is by no means only the accused who has a legitimate interest in a criminal trial commencing

and concluding reasonably expeditiously. Since time in the immemorial it has been an established principle that the public interest is served by bringing litigation to finality.”

[47.20] This case should not be seen only as a case involving the Applicants and the First Respondent to the exclusion of the Respondents.

That will be a violation of the fair trial rights of the Respondents.

[47.21] In terms of section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary. The said section provides as follows:

“8(1) The Bill of Rights applies to all law and binds the legislature, the executive and the judiciary and all organs of State.”

When interpreting any legislation or when developing common law or customary law, every court, tribunal or forum must promote the

spirit, purport and objects of the Bill of Rights.

[47.22] Quite clearly, it is the State’s wish to charge all 13 accused, in other words, the two Applicants together the Respondents together. For the foreseeable future, and for as long as the Applicants are involved in their applications, in the Supreme Court of Appeal and in the Constitutional Court, the First Respondent will not achieve that goal. This Court understands fully the reasons why the First Respondent wants to do so. That goal will also not be achieved as long as the Court respects that the Respondents are entitled to a fair trial in terms of said section 35(3)(d).

[47.23] The interpretation and implementation of the provisions by the State of 35(3)(d) have to comply with the Constitutional mandate. In other words, the Bill of Rights must be respected and given preference. The legislation must be interpreted in such a way that it is consistent with the Bill of Rights. S 35(3)(d) of the Constitution requires the criminal trials to be conducted fairly, which means that criminal trials must begin and conclude without unreasonable delay. Criminal Trials must be conducted in accordance with just notions of basic fairness and justice. There is imposed on all Courts hearing criminal trials or criminal appeals, a duty to give content to these notions included in what is referred to as a fair trial. The right to a fair trial was broader than the specific right set out in the Constitution.

[47.24] While the Court respects the desire of the First Respondent to hear the case of all 13 accused, in other words, the Applicants and the Respondents, in order to avoid multiplicity of trials, that should not be done at the expense of the Respondents who are ready to proceed with their trials in order to protect their rights in terms of s 35(3)(d) of the Constitution; who have repeatedly told the Court that they were ready; and in circumstances where the First Respondent has, on times without number, told the DJP that it was ready to proceed with the trial; and finally, in circumstances where it has become clear that the First Respondent will not achieve its object

of hearing the matter against all the Applicants and the Respondents together without violating the Constitutional Rights of the some of the Respondents. In my view the only solution is to issue an order of separation of trials.

[47.25] The adage “Justice delayed is justice denied”, which is often quoted in the context of criminal trials, is a double edge sword. Democracy was established to bring about an equal and level playfield for all who fall under the umbrella of the protection of the Constitution. Entrenched within the Constitution is the Bill of Rights which affords individuals various rights and Constitutional protection. Section 35(3) of the Constitution guarantees an accused the right to a fair trial which includes various other additional rights.

[47.26] The object of Section 35(3)(d) of the Constitution is to protect an accused person’s liberty, personal security, and trial-related interest. In this regard, see *Sanderson v Attorney-General Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 CC. As already pointed out somewhere supra, the protection of these three rights is described in the judgment of the Supreme Court of Canada, *R v Morin* (1992) 8 CRR (2D)193 at 202, which was quoted with approval by the Court in *Sanderson* as follows:

“The right to security of the person is protected ... by seeking to minimize the anxiety, concern and stigma of the exposure to criminal proceedings. This right to liberty is protected by seeking to minimize exposure to the restrictions on Liberty which results from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.”

[47.27] The principle is clear. Expeditious conclusion of criminal proceedings is central to a fair trial. In *Sanderson*, the Constitutional Court set out principles establishing when delay may warrant permanent stay of prosecution. In *Sanderson* Kriegler J, stressed that:

“The right to a fair trial within a reasonable time is designed to protect the accused who bears the burden of repeated postponements and adjournments from delayed prejudice. That need to relate only to the trial itself. It extends to the fact that, while the charges are undetermined, the presumption of innocence may be a threadbare protection against the fact that the accused’s name and reputation are sullied by the very fact of the charges.”

[47.28] The right to a fair trial within a reasonable time, the Court explained, seeks to mitigate the tension between the

presumption of innocence and the publicity of trial by acknowledging that the accused, although presumed innocent, is nevertheless punished, and when remanded in prison, that punishment is severe. See paragraph [24] of *Sanderson*.

[48] The Constitutional Court in *Ramabele v State*, *Msimango v S*

[2020] ZACC 22 discusses the connection between the right to a fair trial found in s 35(3)(d) and s 342(a) of the CPA, in relation to:

“The overarching aim of section 342(A) is to “provide courts with a statutory mechanism to avoid unreasonable delays in the finalisation of criminal proceedings. Section 342(A) empowers a court to examine the reasons for the delay. In order to ascertain whether the delay is reasonable or not, courts consider an array of factors as stipulated in section 342(A)(2). In the event the court finds that the delay is unreasonable, section 342(3) provides an open list of potential remedies. It has been said that section 342(A) is the vehicle for giving practical application to section 353(3)(d) right to have a trial begin and concluded without unreasonable delay.”

[49] Therefore, when considering s 342(A), one must be mindful of s 35(3)(d) of the Constitution, which entrenches an accused's

constitutional right to an expeditious trial.

[50] The seminal case on unreasonable delays in criminal proceedings, before section 342(a) came into operation, is *Sanderson*. In that matter, this Court recognised that prejudice to an accused resulting from unreasonable delay could make any forms, delays which could jeopardize the fairness of the trial itself and the more general delay-related prejudice not having a bearing on the trial. This court further recognised the three-fold categorization of the kinds of interest protected by speedy trial provisions, namely the right to liberty; to personal security; and to a fair trial.

[51] As shown above the Constitutional 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*, Warden [1972] USSC 144; 407 US 514, 532 (1972), 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.

WHAT IS A REASONABLE TIME

[52] This is a value judgment by the Court. It considers the kind of prejudice suffered, the nature and complexity of the case and the lack of State resources that might have hampered the investigation or prosecution. Mr Zuma's elicited second exposition when he sought a permanent stay of the prosecution on the grounds of unreasonable delay in the start of his trial, Zuma and Another and a related matter 2020 (2) BCLR 153 (K2b) at par. 11F. A full bench of the High Court dismissed the application. It ruled that the seriousness of the charges outweighed the potential prejudice that Mr Zuma claimed he would suffer if the trial proceeded. Constant prejudicial delays can themselves thus become grounds of the defeasibility of a criminal prosecution. Though protection from an unreasonable is key to respecting the accused's rights to procedural fairness when a defence lawyer seeks tactical postponements this may be and a serious threat to justice. In the current matter, the Respondents do not seek a stay of the proceedings. They only seek their “day in court”

- [53] Sanderson warned that an accused who has either sought numerous postponements or delayed the prosecution in less formal ways cannot later invoke those very delays. Equally an accused who has constantly consented to postponement, even if not initiating them, could find it hard to establish delay prejudice. In the current matter, the Respondents neither sought any postponement of the matter nor delayed the commencement of the trial.
- [54] While the Court respects the desire of the First Respondent to hear the case of all the thirteen accused, in other words, the Applicants together with the Respondents, in order to avoid multiplicity of the trial, that should not be done at the expense of the Respondents who have been ready to proceed with their trials in order to protect their rights in terms of s 35(3)(d) of the Constitution; who have repeatedly told this Court that they were ready to commence trial; and in circumstances where the First Respondent, has on times without number, told the Court that it was ready to proceed with the trial; and finally, in circumstances where it has become clear that the First Respondent will never achieve the object of hearing the matter against all the Applicants and the Respondents together without violating the Constitutional rights of some of the Respondents. The only resolution this Court can think of is to order a separation of trials.
- [55] Moreover, Mr Nhlanhla Kelvin Sipho Malaba (Mr Malaba), the Fifth Respondent, argues as follows, in paragraph [6] of his Opposing

Affidavit:

“Ad paragraph 7

6.1 I take note of the citation of section 35(3)(a), (b), (c), (d) and in

(i) of the Constitution.

6.2 If the court grants prayer 2 of this Notice of Motion, the first and second applicants’ respective fair trial rights as set out in Section 35(3)(a), (b), (d) and and (i) of the Constitution will not be harmed and denied.”

Quite clearly the Fifth Respondent favours the granting of prayer (2) of the Applicants’ Notice of Motion.

AD PARAGRAPH 139

[59] In paragraph 28.3 of his opposing affidavit, Mr Malaba states as follows:

“28.3 As far as separation of trial is concerned with regards to separation of trial for First and Second Applicants, I fully support the granting of an order in respect of only prayer two of this Notice of Motion.”

AD PARAGRAPH 162

[60] “47.2 In the premises, I request the Court to dismiss the First and Second Applicants’ first prayer as set out in the Notice of Motion.

47.3 However, if the Court grants prayer two of the Notice of Motion, the First and Second Applicants' respective fair trial rights as set out in section 35(3)(a), (b), (d) and (i) of the Constitution will not be harmed and denied.

AD PARAGRAPH 164

[61] "49.2 In the premises, I request the Court to dismiss the First and Second Applicants' first prayer as set out in the Notice of Motion.

49.3 However, if the Court grants prayer two of this Notice of Motion, the First and Second Applicants' respective fair trial rights as set out in section 35(3)(a), (b), (d) and (i) of the Constitution will not be harmed."

[62] Mr Paul Magula, the Eighth Respondent, has made a similar opposing affidavit. In his affidavit, he opposes the Applicants'

applications especially insofar as it related to prayer (1) of the Notice of Motion. However, he supports the granting of prayer

(2) of the Notice of Motion. Simply put, he supports the separation of trial. This is clear from paragraphs 6, 8, 28, 47 and 49 of his opposing affidavit.

[63] Mr Johan David Stroh, who appeared for the Fifth and Eighth Respondents, has filed heads of argument, sandbagged by some authorities. In his heads of argument, he clearly supports the granting of prayer 2 of the Notice of Motion. I think he echoes the views of the silent counsel in this regard.

[64] There is an obvious support for the separation of trial. This is borne out by the frustration of having his matter repeatedly

postponed when he is ready to proceed.

[65] Firstly, no evidence has been placed before Court that the State has spoken to the witnesses who may have to testify twice and obtained their reaction.

[66] The Applicants, quite correctly, averred in their founding affidavits, that the Respondents face the likelihood of being prejudiced should their trial not be separated from theirs. They pointed out that from the indictment and the evidence that has been discovered so far, it is evident that the separation of trial would curtail the trial of the Respondents by many months and same commences. They make this allegation based on their belief that many of the witnesses required in respect of the charges preferred against them may not be required to testify against the respondents. This matter demands much public interest. The sooner the trial begins, the better.

[67] In my view, it is in the interest of justice to separate the trials of the Applicants from the trial of the Respondents. The State has a duty to prove that the rights of the Respondents to a fair trial have not been violated by repeated postponements.

[68] Accordingly, the following order is made:

1. Prayer [1] of the Notice of Motion is hereby refused.
2. Prayer [2] of the Notice of Motion is hereby granted.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances: Counsel for the First & Second Applicants Adv Shaun Abrahams Assisted by Connie Mokhare Instructed by Maluleke Incorporated t/a Maluks Attorneys Counsel for the First Respondent Adv. JH Van Der Merwe Assisted by S Veenemans Instructed by Director of Public Prosecutions Counsel for the Second Respondent Adv. Werner Smit Instructed by Legal-Aid South Africa Counsel for the Third & Sixth Respondents Adv. Mike Netshiavha Instructed by Nwandzule Attorneys Counsel for the Fourth Respondent: Adv. David Ramagalela Instructed by Shemeya Vengesa Attorneys Counsel for the Fifth & Eighth Respondents Mr. Johan Stroh Instructed by Legal-Aid South Africa Counsel for the Seventh Respondent Mr. Ledile Mphela Instructed by Mphela Mngadi & Associates Counsel for the Ninth Respondent: Adv. Marianna Mampuru Instructed by Legal-Aid South Africa Counsel for the Tenth Respondents Mr. Lwazi Guzana Instructed by Lwazi Guzana Attorneys Counsel for the Eleventh & Twelfth Respondents Adv W Jungbluth Instructed by Hills Incorporated Date heard 22 July 2024 Date of Judgment: 6 September 2024

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