

SOUTH AFRICA / JUDGMENT

Naidoo v S (A 293/2011) [2011] ZAWCHC 448; 2012 (2) SACR 126 (WCC) (6 December 2011) [2011] ZAWCHC 448

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, Cloete

CASE / FILE NUMBER

A 293/2011

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

Case

No: A 293/2011

Before:

Mr Justice Binns-Ward

Ms

Acting Justice Cloete

In

the matter between:

MADRI

MOOTHU NAIDOO

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

DELIVERED ON: 6 DECEMBER 2011 BINNS-WARD J et CLOETE AJ: [1] This matter came before us on appeal against the decision of a regional court magistrate refusing an application by the appellant

for a permanent stay of prosecution. The application pertained to 39 charges preferred against the appellant for fraud and contraventions of the Customs and Excise Act 91 of 1964. The matters which gave rise to the charges were investigated by the South African Revenue Service (SARS) in 2003 and 2004 and resulted in the payment by the close corporation concerned (of which the appellant and two other persons were the members) of unpaid value added tax and certain penalties. It is common cause that the appellant was informed at the time the close corporation paid the amounts demanded by SARS that the matters identified in the SARS investigation were going to be referred by it to the prosecuting authority. Several years thereafter, in 2010, criminal proceedings were indeed instituted against the appellant. The proceedings were commenced by way of summons. The application for a stay of prosecution was brought at the first hearing before the regional court in the criminal proceedings, and before the appellant was required to plead to the charges. The basis for the application was the allegation that a trial on the charges at that stage in time would infringe the appellant's right in terms of s 35(3)(d) of the Constitution¹ to have his trial begun within a reasonable time. Counsel who appeared for the state in the court below had contended that the magistrate did not have the jurisdiction to entertain the application. He argued in limine that the appellant was required to bring the application in the High Court.²

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BINNS-WARD J et CLOETE AJ:

[1] This matter came before us on appeal against the decision of a regional court magistrate refusing an application by the appellant

for a permanent stay of prosecution. The application pertained to 39 charges preferred against the appellant for fraud and contraventions of the Customs and Excise Act 91 of 1964. The matters which gave rise to the charges were investigated by the South African Revenue Service (SARS) in 2003 and 2004 and resulted in the payment by the close corporation concerned (of which the appellant and two other persons were the members) of unpaid value added tax and certain penalties. It is common cause that the appellant was informed at the time the close corporation paid the amounts demanded by SARS that the matters identified in the SARS investigation were going to be referred by it to the prosecuting authority. Several years thereafter, in 2010, criminal proceedings were indeed instituted against the appellant. The proceedings were commenced by way of summons. The application for a stay of prosecution was brought at the first hearing before the regional court in the criminal proceedings, and before the appellant was required to plead to the charges. The basis for the application was the allegation that a trial on the charges at that stage in time would infringe the appellant's right in terms of s 35(3)(d) of the Constitution¹ to have his trial begun within a reasonable time. Counsel who appeared for the state in the court below had contended that the magistrate did not have the jurisdiction to entertain the application. He argued in limine that the appellant was required to bring the application in the High Court.²

- [2] The magistrate dismissed the point in limine raised by the state, holding, on the authority of the judgment of the Natal Provincial Division in *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate, Durban and Another* 2001 (2) SACR463 (N) (per Hugo J, Combrink J concurring), that the regional magistrates' court did have jurisdiction. The conclusion reached by the KwaZulu-Natal Court on the point of jurisdiction was opposed to that which had been reached previously by a Full Bench of this court (per Farlam J, van Zyl and Brand JJ concurring) in *S v Scholtz and Others* 1996
- (2) SA 623 (C). However, as pointed out by Hugo J, *Scholtz* was decided in the context of the Interim Constitution (Act No. 200 of 1993); and more particularly of express provisions therein which made it very clear that a magistrates' court did not have jurisdiction. [3] It was confirmed in the subsequent judgment of this court in *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999
- (2) SACR 13 (C) (per Hlophe ADJP and Griesel J) that the insertion of s 342A3 into the Criminal Procedure Act 51 of 1977 (the CPA), read with s 170 of the Constitution, had so altered the applicable legislative

framework from that which had obtained when *Scholtz* was decided as to make it clear that magistrates' courts now do have the power to entertain and determine applications for a permanent stay of prosecution. However, the judgment in *The Regional Magistrate, Wynberg* did not go so far as to suggest that s 170 of the Constitution operated to vest the magistrate with jurisdiction beyond the extent provided in terms of s 342A of the CPA. Hugo J indeed acknowledged as much in *Regional Magistrate, Durban*, at 467b. Mr King, who appeared for the appellant, conceded that the judgment in *The Regional Magistrate, Wynberg* falls to be distinguished on the facts of the current case, which took the application for a stay outside the

ambit of s 342A. [4] We must also mention the decision in *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Others* 2008

- (1) SACR 178 (C). That case also concerned an appeal to this court from a decision of a regional magistrate to refuse an application for a permanent stay of prosecution. As in the current case, the delay that was relevant in that matter occurred before the commencement of criminal proceedings and accordingly the matter fell outside the ambit of s 342A of the CPA. The court in *Broome* evidently proceeded to address the merits of the case on the assumption that they had been within lower court's jurisdiction to determine. Thus the question of whether the magistrate had enjoyed the jurisdiction to deal with the application at first instance was not pertinently considered in *Broome*. [5] In determining in *Regional Magistrate, Durban* that a magistrates' court has jurisdiction to decide such an application outside the ambit of s 342A, Hugo J found the basis therefor in s 170 of the Constitution which provides as follows: Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. (In the context of chap 8 of the Constitution, in which s 170 resorts, it is apparent that the expression 'all other courts' refers to all courts other than the Constitutional Court, the Supreme Court of Appeal and the High Courts. All of these 'other courts' are courts established or recognised in terms of an Act of Parliament, as contemplated in terms of s 166(e) of the Constitution. The

individual Acts of Parliament in terms of which each of those other courts are established expressly determine what matters may be decided by such courts.⁴ The jurisdiction of those courts is in many cases supplemented in particularised respects by provisions in other statutes.⁵ [6] Hugo J reasoned his finding as follows (at p. 465h - 466d): I believe that this section [s 35(3)(d) of the Constitution] must be read together with s 170 of the Constitution. This section reads:⁶ Section 35(3)(d) reads as follows: 'Every accused person has a right to a fair trial, which includes the right- (d) to have their trial begin and conclude without unreasonable delay.' When taxed by the Court as to what the magistrate is supposed to have done in the light of this application and in the light of these provisions in the Constitution, Mr Nel, who appeared for the applicant, was unable to give an answer, save to suggest that

perhaps the magistrate should have adjourned the matter so that the application could be brought before the High Court. That suggestion of course involves further delays which might exacerbate the problem already faced by the accused. The applicant seems to have thought that s 170 of the Constitution is not applicable to the present case because of the provision therein that the magistrate's court may not enquire into or rule on the constitutionality of legislation. That is the very thing that the court was not doing. It was applying legislation and assuming it to be constitutional as indeed it had to because it was contained in the very Constitution itself. The Constitution of course, is in itself an Act of Parliament and s 170 in terms permits the magistrate's court to decide such a matter. It is surely within the province of any magistrate's court even aside

from the provisions of the Constitution to ensure that trials heard before it are fair. [7] While we agree with the learned judge's observation that the magistrate in Regional Magistrate, Durban had not been enquiring into the constitutionality of legislation, we find ourselves in respectful, but complete disagreement with the KwaZulu-Natal Court's understanding of the import of s 170 of the Constitution. The provision is not the most elegantly framed, but any room for doubts about its intended meaning is, we think, removed when the provision is read in its context. In this respect we have in mind the textual, as well the historical, context. [8] The textual context of s 170 is afforded by the setting of the provision within chap 8 of the Constitution, which is entitled

'Courts and Administration of Justice'. The chapter commences with s 165, which provides that the judicial authority of the Republic vests in the courts, and enjoins all persons and organs of state to respect and promote the authority of the courts. Section 166 of the Constitution provides that 'the courts are - (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High

Courts; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.' With the single exception of the high courts of appeal, none of which has yet been established, the courts referred to in paragraphs

(a) to

(d) of s 166 were already in existence at the time of the adoption of the Constitution. The magistrates' courts were established in terms of the Magistrates' Courts Act 32 of 1944. That Act continues to be the statute under which the magistrates' courts are established and regulated. Section 167 of the Constitution

determines the composition and jurisdiction of the Constitutional Court; s 168 deals similarly with the Supreme Court of Appeal; and s 169 with the high courts. In regard to the high courts, s 169 provides that such courts may decide any constitutional matter

except a matter that-(i) only the Constitutional Court may decide; or (ii) is assigned by an Act of Parliament to another court of a status similar to a high court; and any other matter not assigned to another court by an Act of Parliament. [9] When s 169 is read together with s 170 (the latter provision, it will be recalled, treats not only of the magistrates' courts, but also the 'other courts') it is plain, in our view, that the words 'any matter determined by an Act of Parliament' are intended to identify the basis for all of those courts' jurisdictions. In other words the intention of the drafters of the Constitution was that the jurisdictional authority of the magistrates' courts and the other courts fell to be determined by applicable Acts of Parliament: Those courts may decide only any matter which an Act of Parliament determines that they may decide. In regard to courts of similar status to the high courts, the relevant Acts of Parliament will, by reason of s 169 of the Constitution, also define matters which the high courts may not decide. [10] The content of the statute books bears out this interpretation; see for example the statutes referred to in footnote 4, above. Section 170 further prohibits the investing of any magistrates' court or other court of a

status lower than a high court with the power to enquire into or rule on the constitutionality of legislation or the conduct of the President; thus any Act of Parliament purporting to invest the magistrates' courts or any other lower court with such jurisdiction would be unconstitutional.⁷

[11] Were it the intention to invest the magistrates' courts with the jurisdiction to deal with any matter provided for in an Act of Parliament, which is the construction given to s 170 of the Constitution in the judgment of Hugo J, that would have given rise to the most extraordinary increase in the breadth of the magistrates' courts' jurisdiction. So, to give an example, the

enactment of the Promotion of Administrative Justice Act 3 of 2000, which gives effect to everyone's right in terms of s 33 of the Constitution to fair and reasonable administrative action and which regulates the judicial review of administrative action, would ipso facto have resulted in the magistrates' courts becoming invested with the authority to judicially review administrative action. Any provision in the Act limiting or excluding the magistrates' courts' jurisdiction to do so would necessarily be incompatible with the Constitution on Hugo J's construction of s 170 because the very object of the provision, on the reading thereof by the KwaZulu-Natal

Court, was to vest the magistrates' courts with the power to decide any matter determined by statute. Mr King was constrained to concede, correctly, that despite the provisions of s 170 of the Constitution and the enactment of PAJA magistrates

courts' do not, in general, have jurisdiction to decide judicial review applications.⁸ [12] Turning to the historical context, Mr King also conceded that magistrates' courts have always been 'creatures of statute' - in that their powers and jurisdiction are limited to those which have been expressly provided by statute - and that that continues to be the position in the constitutional era.⁹ The correctness of this concession is borne out, for example, by the decision of this court in *Minister of Safety and Security and Another v Bosman* 2010

- (2) SA 148 (C). In that matter Le Grange J (Cleaver J concurring) observed (at para 10): 'Our law is replete with case law and legal authority that the jurisdiction of magistrates' courts is established in the statute

under which the courts are constituted. This applies not only to the empowering sections of the Magistrates' Courts Act, but also to the Rules. A magistrate cannot exercise powers which are not expressly stated in the Act or the Rules. There may be instances where authority may be implied, since it has been held that the purpose of an Act is not to be defeated because the ancillary powers which are necessary to enforce a judgment have not been especially mentioned. See *Sibiva v Minister of Police* 1979

- (1) SA 333 (T) at 337C - D; *Abarder v Astral Operations Ltd t/a County Fair* 2007
- (2) SA 184 (C) at 187D - E; Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 9 ed vol 2 at 55-2; TJM Paterson Eckard's *Principles of Civil Procedure in the Magistrates' Courts* 5 ed at 42 - 45; LTC Harms *Civil Procedure in the Magistrates' Courts - Commentary* 6-3 and further (Issue 19)' .¹⁰ [13] Section 170 of the Constitution thus did not

alter the position which had long prevailed in respect of the jurisdiction of the magistrates' courts. On the contrary, it confirmed and entrenched it. [14] Mr King argued, however, that the rights of an accused person to a fair trial, as provided in terms of s 35 of the Constitution, was such a fundamental consideration that it should be implied that any magistrate presiding in criminal proceedings must be empowered to exercise an authority to give effect to the right. We have no quibble with the essential validity of this argument stated in those general terms. In respect of delay there is in fact express provision therefor in s 342A of the CPA. Section 342A of the CPA invests all courts engaged with 'criminal proceedings' within the meaning of the Act with the power to enquire into and effectively address issues of delay.¹¹ The provision is, however, limited in effect to unreasonable delay which occurs after the commencement of criminal proceedings, that is intra-curially; it does not apply in respect of delay that has occurred before the commencement of proceedings, that is extra-curially. The limitation to the reach of s 342A of the CPA does not mean, however, that a magistrate is thereby precluded from giving an effective remedy if it appears, in the context of a criminal trial conducted in the magistrates' court, that an accused person has suffered irremediable trial prejudice as a consequence of an unreasonable delay before the commencement of proceedings. If a fair trial were obviated by the prejudice attendant upon such a delay the magistrate would obviously be enjoined, by reason of the courts' duty to give effect to the implicated fundamental right, to acquit the accused; in most cases this would manifest in the form of giving the accused the benefit of the doubt, or of holding that the prosecution had failed to discharge its heavy burden of proof.¹² In whatever form, however, the courts' duty in that regard would be incidental to the exercise by the magistrates' courts of a jurisdiction with which it is expressly endowed by statute, namely the jurisdiction to try and adjudicate criminal cases. In that sense it amounts to an incidence of the 'implied authority' mentioned in the passage from *Bosman*, quoted above. [15] Non constat, however, that a magistrates' duty to uphold an accused person's constitutional rights in the context of criminal proceedings conducted before a magistrates' court vests a magistrate (outside the provisions of s 342A of the CPA) with the jurisdiction to

entertain and determine an application for a permanent stay of prosecution on the basis of a delay in the institution of criminal

proceedings. The very character of the exercise of such power militates against an acceptance of the argument that it falls incidentally within the jurisdictional authority of a magistrates' court. Had the magistrate granted the appellant's application for a permanent stay of execution, the effect of the decision would be to determine not only that the prosecuting authority could not proceed against the appellant in the magistrates' court in question, but indeed before any court. A trial of the charges before any court whatsoever would thereby be prohibited. The remedy granted would have been premised on facts put before the magistrate in respect of issues outside his or her central statutory mandate to try the charges preferred, and it would have been given before the commencement of the trial. Its character and effect would be in essence that of a judicial review accompanied by a declaratory order. It would amount to a review and setting

aside of the prosecuting authority's decision to prosecute accompanied by a declaration that it would be unconstitutional for the prosecuting authority to press the relevant charges against the applicant. The order granting a permanent stay of prosecution would constitute a prohibitory interdict intended to give effect to the aforementioned

review and declaratory relief. [16] Magistrates' courts do not ordinarily enjoy jurisdiction to judicially review administrative or constitutional action, or to make declaratory orders. That well-established limitation on their jurisdiction probably explains why the wording of s 342A of the CPA, which does afford a basis for a magistrate to make an appropriate delay related order, is limited to delay after the commencement of proceedings, that is delay which occurs while the matter is under the supervision of the court.¹³ The appellant was in essence applying for a declaration that he could not be prosecuted; he was seeking a remedy which would avert his trial, rather than one which asserted his right to a fair trial. The difference between the two concepts in the context of the issue currently under consideration is illustrated by the fact that it does not lie within a magistrate's power to give declaratory relief, while it does fall within a magistrate's duty to ensure that criminal proceedings conducted before that court are so conducted as to assure an accused of a fair trial. In our view the inclusion of the right to have a trial begin without unreasonable delay as one of the elements of a fair trial within the ambit of s 35(3) of the Constitution does not detract from the relevance of the aforementioned dichotomy for jurisdictional purposes. For the moment we are concerned not with the content of the implicated right, but with identifying the forum in which the particular remedy sought in this case could competently be granted. [17] Do the Magistrates' Court Act, the CPA or the Constitution expressly invest the magistrates' courts with the jurisdiction to make such orders? They do not. Is the authority to make such orders necessarily implied in the functions which the magistrates' courts are mandated by statute to discharge? Again, in our view, the answer is in the negative. Any notion that constitutional principle requires that the magistrates' courts should, by necessity, have an implied broader jurisdiction to determine matters implicating fundamental rights is rebutted in the following dictum of the Constitutional Court at para 138 of the Certification judgment¹⁴: 'The mere fact that some, but not all, courts have jurisdiction to decide constitutional issues does not mean that CP15 V7/[16] has not been complied with. Differences between the jurisdictions of "lower" and "higher" courts are not an unusual feature of court systems elsewhere in the world. The CA[17] was entitled to confine jurisdiction over particular matters, including constitutional jurisdiction, to the "higher"

courts, as has been done in the IC.[18] The fact that such a decision was taken does not mean that the judiciary lacks the jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It means no more than that litigants who wish to turn to the courts for enforcement of such rights must look to the "higher" and not the "lower" courts.' The Constitutional Court was dealing with the narrow contention that the proviso to s 170 of the Constitution was inconsistent with the requirements of Constitutional Principle VII, but in our view the observations made by the Court have a wider bearing. They demonstrate that it is not inconsistent with constitutional principle to hold that the mere implication of a fundamental right does not necessarily entail that the court before which the implication is raised has an unfettered power in respect of remedy.

Which court must be turned to in the peculiar circumstances depends on the competence of the court to grant the particular remedy that is sought. [18] In the result an accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(d) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal

proceedings (in other words in circumstances not provided for in s 342A of the CPA) must bring the application before the High

Court having jurisdiction.¹⁹ By contrast, what we have termed 'intra-curial' delay - delay occurring after the commencement of criminal proceedings - is a

matter falling to be dealt with exclusively by the court seized with the criminal proceedings. [19] In view of the conclusion reached on the matter of jurisdiction it would ordinarily be unnecessary to say anything about the merits of the appellant's application for a stay of prosecution. We consider that it is nevertheless in the interest of justice for us to do so; hopefully thereby conducing to the avoidance of any further delay, even if it be at the instance of the appellant himself, in bringing the proceedings against him to finality. For that purpose it is appropriate to describe the nature of the charges faced by the appellant and the factual background insofar as it may be deduced from the papers in greater detail than we did for the purposes of the jurisdictional question of which we have just disposed. [20] The close corporation of which the appellant had been a member at the material time operated as a ship chandler to vessels passing the Cape coast. It supplied victuals and spares to ocean going vessels and drilling rigs working off the coast of West Africa. Incidentally to these activities the corporation operated a bond store with premises situated in Montague Gardens, Cape Town. [21] On 17 February 2003 SARS carried out a search and seizure operation at the premises of the corporation. A number of documents and items were seized during that raid. Over the year which followed that raid the corporation co-operated in the ensuing SARS investigation. The extent of that co-operation is, however, in dispute. [22] On 10 February 2004 the corporation received a letter from SARS setting out the irregularities which had allegedly occurred and the damages which SARS claimed it had suffered as a result thereof in the amount of R62 844,19. The corporation was also advised that a decision was pending whether or not to involve the National Prosecuting Authority ('the NPA'). [23] On 15 March 2004 SARS demanded payment from the corporation, alternatively its members,²⁰ of the amount of R111 965,25. Included in that amount was the sum of R74 388 which was claimed as a forfeiture penalty in terms of s 88(2)(a) of the Customs and Excise Act. [24] The corporation paid the full amount demanded by SARS notwithstanding its denial of liability. A consequence of the SARS

raid and investigation was that the business of the corporation dried up and it ceased trading in 2006. The bond store was

deregistered with the approval of SARS in 2007. [25] At a meeting with SARS on 24 March 2004 the members of the corporation were informed that the matter would be handed over to the NPA for consideration. The SARS official involved stated that he could not give any undertaking in respect

of the outcome of the NPA's consideration of the case. This was the last communication which the appellant received about a possible prosecution until 6 years later. [26] In April 2010 the appellant received the summons commencing the criminal proceedings. [27] The state's case is that the corporation had falsely claimed in 37 instances over a 26 month period spanning December 2000 to February 2003 that it had sold soft drinks, cigarettes and liquor to foreign vessels, rendering these sales VAT and duty free whereas in fact no such export sales occurred. The amount of the unpaid VAT and duty involved was R36 771. The members of the corporation insisted at the time that the goods had indeed been sold to foreign vessels and that accordingly no VAT or duty were payable by the corporation. Two further charges preferred against the appellant concern his allegedly having been in possession of 20 rubber stamps purporting to be those of foreign vessels, and having been in possession of 12 cartons of cigarettes and 7 bottles of whisky, apparently valued at R806, that were required to have been kept in a bond store. [28] The appellant contended that he was entitled to a permanent stay of prosecution because during the intervening years between the SARS investigation and the institution of criminal proceedings certain documents and records had been destroyed. The supposed germaneness of the documents and records to the case was not described in his supporting affidavit save in the most general terms. He also claimed that certain witnesses he might wish to call, in particular the captains of certain ships to which he alleges goods were supplied by the close corporation, are no longer readily available and cannot be traced. He gave no particularity of what steps, if any, have been taken to try to locate these witnesses. He also emphasised that the investigations and punitive measures by SARS had been against the close corporation and not against him personally. We have understood the suggested relevance of this as being to negate any imputation of a duty on the appellant personally to have preserved the allegedly lost documentary evidence; particularly in the context of the close corporation having ceased to carry out business some years ago. (Without so holding, we would consider that the appellant's personal duties and potential liability in this regard would be defined by the provisions of ss 101 and 103 of the Customs and Excise Act, which appear to us to be of general application irrespective of the

peculiar factual context relied upon by the appellant. Suffice it to say that these are pre-eminently matters that are better considered and determined in the context of a trial of the charges brought against the appellant, and neither centrally relevant, nor appropriate for conclusive determination in the context of a stay of prosecution application.) [29] In seeking the relief the appellant was being ambitious. In *Sanderson v Attorney-General*, Eastern Cape 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 at para 38, Kriegler J, writing for the Constitutional Court, stated of a permanent stay of prosecution as a remedy for the infringement of an accused person's rights in terms of the equivalent under the Interim Constitution of s 35(3)(d) of the Constitution: '...the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case

- is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. [30] As far as we are aware, and counsel confirmed as much, an order granting a permanent stay of prosecution by reason of an

unreasonable delay in the commencement of criminal proceedings has previously been granted in only a single reported case; certainly

during the era of modern constitutional jurisprudence. The case in which the remedy was granted was *Broome*, *supra*. The factual basis for trial related prejudice in *Broome* was quite exceptional. Not only was there an unreasonable delay in the institution of criminal proceedings, it was undisputed in that matter that a considerable amount of the documentary evidence confiscated from the applicants, which was admittedly centrally

germane to their ability to conduct his defence, had been lost or destroyed by agents of the state. The loss and destruction of the documentation had occurred after the applicants had been refused the opportunity, which they had requested when the documents were taken from them, to make copies for their own protection and use. In contrast with the current matter, the affidavits made in support of the application for a permanent stay in *Broome* provided a detailed exposition of the material that was missing and a full explanation of their significance in the contemplated criminal proceedings. [31] In *Bothma supra*,²¹ at para 74, Sachs J distinguished the exceptional circumstances of *Broome* in terms which hold true for the current case: 'It is notable that in the only case where a stay was granted, it was the state that had been responsible for the loss of crucial

documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the state to prosecute someone and then deliberately or through an unacceptable degree of negligence deprive that person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays. Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal. (Emphasis supplied.) [32] It is firmly established that the mere passage of time in the abstract does not suffice to justify a permanent stay of

prosecution.²² The significance of delay to the establishment of an entitlement to the remedy of a permanent stay in a case like the current one is that it must be demonstrated that the effect thereof is to cause material and irremediable trial prejudice. It is well established in the relevant jurisprudence that it will be difficult to satisfy the requirement in advance of a trial and that in the usual case the trial court is the forum best placed to determine the existence of such

prejudice in the conduct of the trial, and not before the commencement of proceedings. It seems to us that is especially appropriate on the facts of the current case, in which the relevance of the material which the appellant claims has been lost has not been clearly established and in which the fact of its ever having existed is called into question by the prosecuting authority. [33] The appellant's counsel submitted that the nature of the charges, involving, as they do, an alleged prejudice to the fisc of less than R40 000, is such that the court should regard this as a matter in which the balance of interests in favour of the appellant outweighs that of the state in prosecuting the matter at this remove from the date of the alleged commission of the offences. It is correct that the determination of applications such as this entails a balancing of interests; it is also correct that the nature of the offence(s) in issue is a relevant consideration in the balancing exercise.²³ The argument advanced by the appellant's counsel would carry some persuasive weight if the alleged offences were indeed trifling. We are however unable to agree with the suggestion that they are. Indeed, they go to matters in which SARS is heavily reliant on the honesty and co-operation of taxpayers, and in respect of which contraventions of the applicable legislation will often be difficult to detect. Policy considerations weigh heavily in favour of a public interest in such matters going to trial notwithstanding that the systemic weaknesses in the state apparatus do not provide a satisfactory reason for the long delay. Those considerations fall to be weighed against the fact that the appellant did not in our view establish that he will suffer irreparable prejudice if the trial proceeds.

[2] The magistrate dismissed the point in limine raised by the state, holding, on the authority of the judgment of the Natal Provincial Division in *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate, Durban and Another* 2001 (2)

SACR463 (N) (per Hugo J, Combrink J concurring), that the regional magistrates' court did have jurisdiction. The conclusion reached by the KwaZulu-Natal Court on the point of jurisdiction was opposed to that which had been reached previously by a Full Bench of this court (per Farlam J, van Zyl and Brand JJ concurring) in *S v Scholtz and Others* 1996

(2) SA 623 (C). However, as pointed out by Hugo J, Scholtz was decided in the context of the Interim Constitution (Act No. 200 of 1993); and more particularly of express provisions therein which made it very clear that a magistrates' court did not have jurisdiction.

[3] It was confirmed in the subsequent judgment of this court in *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999

(2) SACR 13 (C) (per Hlophe ADJP and Griesel J) that the insertion of s 342A3 into the Criminal Procedure Act 51 of 1977 (the CPA), read with s 170 of the Constitution, had so altered the applicable legislative

framework from that which had obtained when Scholtz was decided as to make it clear that magistrates' courts now do have the power to entertain and determine applications for a permanent stay of prosecution. However, the judgment in *The Regional Magistrate, Wynberg* did not go so far as to suggest that s 170 of the Constitution operated to vest the magistrate with jurisdiction beyond the extent provided in terms of s 342A of the CPA. Hugo J indeed

acknowledged as much in Regional Magistrate, Durban, at 467b. Mr King, who appeared for the appellant, conceded that the judgment in The Regional Magistrate, Wynberg falls to be distinguished on the facts of the current case, which took the application for a stay outside the ambit of s 342A.

[4] We must also mention the decision in *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Others* 2008

(1) SACR 178 (C). That case also concerned an appeal to this court from a decision of a regional magistrate to refuse an application for a permanent stay of prosecution. As in the current case, the delay that was relevant in that matter occurred before the commencement of criminal proceedings and accordingly the matter fell outside the ambit of s 342A of the CPA. The court in *Broome* evidently proceeded to address the merits of the case on the assumption that they had been within lower court's jurisdiction to determine. Thus the question of whether the magistrate had enjoyed the jurisdiction to deal with the application at first instance was not pertinently considered in *Broome*.

[5] In determining in *Regional Magistrate, Durban* that a magistrates' court has jurisdiction to decide such an application outside the ambit of s 342A, Hugo J found the basis therefor in s 170 of the Constitution which provides as follows:

Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

(In the context of chap 8 of the Constitution, in which s 170 resorts, it is apparent that the expression 'all other courts' refers to all courts other than the Constitutional Court, the Supreme Court of Appeal and the High Courts. All of these 'other courts' are courts established or recognised in terms of an Act of Parliament, as contemplated in terms of s 166(e) of the Constitution. The

individual Acts of Parliament in terms of which each of those other courts are established expressly determine what matters may be decided by such courts.⁴ The jurisdiction of those courts is in many cases supplemented in particularised respects by provisions in other statutes.⁵)

[6] Hugo J reasoned his finding as follows (at p. 465h - 466d):

I believe that this section [s 35(3)(d) of the Constitution] must be read together with s 170 of the Constitution. This section reads:

.....⁶

Section 35(3)(d) reads as follows:

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

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

When taxed by the Court as to what the magistrate is supposed to have done in the light of this application and in the light of these provisions in the Constitution, Mr Nel, who appeared for the applicant, was unable to give an answer, save to suggest that

perhaps the magistrate should have adjourned the matter so that the application could be brought before the High Court. That suggestion of course involves further delays which might exacerbate the problem already faced by the accused.

The applicant seems to have thought that s 170 of the Constitution is not applicable to the present case because of the provision therein that the magistrate's court may not enquire into or rule on the constitutionality of legislation. That is the very thing that the court was not doing. It was applying legislation and assuming it to be constitutional as indeed it had to because it was contained in the very Constitution itself.

The Constitution of course, is in itself an Act of Parliament and s 170 in terms permits the magistrate's court to decide such a matter.

It is surely within the province of any magistrate's court even aside from the provisions of the Constitution to ensure that trials heard before it are fair.

[7] While we agree with the learned judge's observation that the magistrate in Regional Magistrate, Durban had not been enquiring into the constitutionality of legislation, we find ourselves in respectful, but complete disagreement with the KwaZulu-Natal Court's understanding of the import of s 170 of the Constitution. The provision is not the most elegantly framed, but any room for doubts about its intended meaning is, we think, removed when the provision is read in its context. In this respect we have in mind the textual, as well the historical, context.

[8] The textual context of s 170 is afforded by the setting of the provision within chap 8 of the Constitution, which is entitled

'Courts and Administration of Justice'. The chapter commences with s 165, which provides that the judicial authority of the Republic vests in the courts, and enjoins all persons and organs of state to respect and promote the authority of the courts. Section 166 of the Constitution provides that 'the courts are -

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High

Courts;

- (d) the Magistrates' Courts; and

- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.'

With the single exception of the high courts of appeal, none of which has yet been established, the courts referred to in paragraphs

- (a) to

- (d) of s 166 were already in existence at the time of the adoption of the Constitution. The magistrates' courts were established in terms of the Magistrates' Courts Act 32 of 1944. That Act continues to be the statute under which the magistrates' courts are established and regulated. Section 167 of the Constitution

determines the composition and jurisdiction of the Constitutional Court; s 168 deals similarly with the Supreme Court of Appeal; and s 169 with the high courts. In regard to the high courts, s 169 provides that such courts may decide any constitutional matter

except a matter that-(i) only the Constitutional Court may decide; or (ii) is assigned by an Act of Parliament to another court of a status similar to a high court; and any other matter not assigned to another court by an Act of Parliament.

- [9] When s 169 is read together with s 170 (the latter provision, it will be recalled, treats not only of the magistrates' courts, but also the 'other courts') it is plain, in our view, that the words 'any matter determined by an Act of Parliament are intended to identify the basis for all of those courts' jurisdictions. In other words the intention of the drafters of the Constitution was that the jurisdictional authority of the magistrates' courts and the other courts fell to be determined by applicable Acts of Parliament: Those courts may decide only any matter which an Act of Parliament determines that they may decide. In regard to courts of similar status to the high courts, the relevant Acts of Parliament will, by reason of s 169 of the Constitution, also define matters which the high courts may not decide.

- [10] The content of the statute books bears out this interpretation; see for example the statutes referred to in footnote 4, above. Section 170 further prohibits the investing of any magistrates' court or other court of a status lower than a high court with the power to enquire into or rule on the constitutionality of legislation or the conduct of the President; thus any Act of Parliament purporting to invest the magistrates' courts or any other lower court with such jurisdiction would be unconstitutional.⁷

- [11] Were it the intention to invest the magistrates' courts with the jurisdiction to deal with any matter provided for in an Act of Parliament, which is the construction given to s 170 of the Constitution in the judgment of Hugo J, that would have given rise to the most extraordinary increase in the breadth of the magistrates' courts' jurisdiction. So, to give an example, the

enactment of the Promotion of Administrative Justice Act 3 of 2000, which gives effect to everyone's right in terms of s 33 of the Constitution to fair and reasonable administrative action and which regulates the judicial review of administrative action, would ipso facto have resulted

in the magistrates' courts becoming invested with the authority to judicially review administrative action. Any provision in the Act limiting or excluding the magistrates' courts' jurisdiction to do so would necessarily be incompatible with the Constitution on Hugo J's construction of s 170 because the very object of the provision, on the reading thereof by the KwaZulu-Natal

Court, was to vest the magistrates' courts with the power to decide any matter determined by statute. Mr King was constrained to concede, correctly, that despite the provisions of s 170 of the Constitution and the enactment of PAJA magistrates

courts' do not, in general, have jurisdiction to decide judicial review applications.⁸

[12] Turning to the historical context, Mr King also conceded that magistrates' courts have always been 'creatures of statute' - in that their powers and jurisdiction are limited to those which have been expressly provided by statute - and that that continues to be the position in the constitutional era.⁹ The correctness of this concession is borne out, for example, by the decision of this court in *Minister of Safety and Security and Another v Bosman* 2010

(2) SA 148 (C). In that matter Le Grange J (Cleaver J concurring) observed (at para 10): 'Our law is replete with case law and legal authority that the jurisdiction of magistrates' courts is established in the statute

under which the courts are constituted. This applies not only to the empowering sections of the Magistrates' Courts Act, but also to the Rules. A magistrate cannot exercise powers which are not expressly stated in the Act or the Rules. There may be instances where authority may be implied, since it has been held that the purpose of an Act is not to be defeated because the ancillary powers which are necessary to enforce a judgment have not been especially mentioned. See *Sibiva v Minister of Police* 1979

(1) SA 333 (T) at 337C - D; *Abarder v Astral Operations Ltd t/a County Fair* 2007

(2) SA 184 (C) at 187D - E; Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 9 ed vol 2 at 55-2; TJM Paterson Eckard's *Principles of Civil Procedure in the Magistrates' Courts* 5 ed at 42 - 45; LTC Harms *Civil Procedure in the Magistrates' Courts - Commentary* 6-3 and further (Issue 19)' .¹⁰

[13] Section 170 of the Constitution thus did not alter the position which had long prevailed in respect of the jurisdiction of the magistrates' courts. On the contrary, it confirmed and entrenched it.

[14] Mr King argued, however, that the rights of an accused person to a fair trial, as provided in terms of s 35 of the Constitution, was such a fundamental consideration that it should be implied that any magistrate presiding in criminal proceedings must be empowered to exercise an authority to give effect to the right. We have no quibble with the essential validity of this argument stated in those general terms. In respect of delay there is in fact express provision therefor in s 342A of the CPA. Section 342A of the CPA invests all courts

engaged with 'criminal proceedings' within the meaning of the Act with the power to enquire into and effectively address issues of delay.¹¹ The provision is, however, limited in effect to unreasonable delay which occurs after the commencement of criminal proceedings, that is intra-curially; it does not apply in respect of delay that has occurred before the commencement of proceedings, that is extra-curially. The limitation to the reach of s 342A of the CPA does not mean, however, that a magistrate is thereby precluded from giving an effective remedy if it appears, in the context of a criminal trial conducted in the magistrates' court, that an accused person has suffered irremediable trial prejudice as a consequence of an unreasonable delay before the commencement of proceedings. If a fair trial were obviated by the prejudice attendant upon such a delay the magistrate would obviously be enjoined, by reason of the courts' duty to give effect to the implicated fundamental right, to acquit the accused; in most cases this would manifest in the form of giving the accused the benefit of the doubt, or of holding that the prosecution had failed to discharge its heavy burden of proof.¹² In whatever form, however, the courts' duty in that regard would be incidental to the exercise by the magistrates' courts of a jurisdiction with which it is expressly endowed by statute, namely the jurisdiction to try and adjudicate criminal cases. In that sense it amounts to an incidence of the 'implied authority' mentioned in the passage from *Bosman*, quoted above.

[15] Non constat, however, that a magistrates' duty to uphold an accused person's constitutional rights in the context of criminal proceedings conducted before a magistrates' court vests a magistrate (outside the provisions of s 342A of the CPA) with the jurisdiction to

entertain and determine an application for a permanent stay of prosecution on the basis of a delay in the institution of criminal

proceedings. The very character of the exercise of such power militates against an acceptance of the argument that it falls incidentally within the jurisdictional authority of a magistrates' court. Had the magistrate granted the appellant's application for a permanent stay of execution, the effect of the decision would be to determine not only that the prosecuting authority could not proceed against the appellant in the magistrates' court in question, but indeed before any court. A trial of the charges before any court whatsoever would thereby be prohibited. The remedy granted would have been premised on facts put before the magistrate in respect of issues outside his or her central statutory mandate to try the charges preferred, and it would have been given before the commencement of the trial. Its character and effect would be in essence that of a judicial review accompanied by a declaratory order. It would amount to a review and setting aside of the prosecuting authority's decision to prosecute accompanied by a declaration that it would be unconstitutional for the prosecuting authority to press the relevant charges against the applicant. The order granting a permanent stay of prosecution would constitute a prohibitory interdict intended to give effect to the aforementioned

review and declaratory relief.

[16] Magistrates' courts do not ordinarily enjoy jurisdiction to judicially review administrative or constitutional action, or to make declaratory orders. That well-established limitation on their jurisdiction probably explains why the wording of s 342A of the CPA, which does afford a basis for a magistrate to make an appropriate delay related order, is limited to delay after the commencement of proceedings, that is delay which occurs while the matter is under the supervision of the court.¹³ The appellant was in essence applying for a declaration that he could not be prosecuted; he was seeking a remedy which would avert his trial, rather than one which asserted his right to a fair trial. The difference between the two concepts in the context of the issue currently under consideration is illustrated by the fact that it does not lie within a magistrate's power to give declaratory relief, while it does fall within a magistrate's duty to ensure that criminal proceedings conducted before that court are so conducted as to assure an accused of a fair trial. In our view the inclusion of the right to have a trial begin without unreasonable delay as one of the elements of a fair trial within the ambit of s 35(3) of the Constitution does not detract from the relevance of the aforementioned dichotomy for jurisdictional purposes. For the moment we are concerned not with the content of the implicated right, but with identifying the forum in which the particular remedy sought in this case could competently be granted.

[17] Do the Magistrates' Court Act, the CPA or the Constitution expressly invest the magistrates' courts with the jurisdiction to make such orders? They do not. Is the authority to make such orders necessarily implied in the functions which the magistrates' courts are mandated by statute to discharge? Again, in our view, the answer is in the negative. Any notion that constitutional principle requires that the magistrates' courts should, by necessity, have an implied broader jurisdiction to determine matters implicating fundamental rights is rebutted in the following dictum of the Constitutional Court at para 138 of the Certification judgment¹⁴: 'The mere fact that some, but not all, courts have jurisdiction to decide constitutional issues does not mean that CP15 V7/[16] has not been complied with. Differences between the jurisdictions of "lower" and "higher" courts are not an unusual feature of court systems elsewhere in the world. The CA[17] was entitled to confine jurisdiction over particular matters, including constitutional jurisdiction, to the "higher"

courts, as has been done in the IC.[18] The fact that such a decision was taken does not mean that the judiciary lacks the jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It means no more than that litigants who wish to turn to the courts for enforcement of such rights must look to the "higher" and not the "lower" courts.' The Constitutional Court was dealing with the narrow contention that the proviso to s 170 of the Constitution was inconsistent with the requirements of Constitutional Principle VII, but in our view the observations made by the Court have a wider bearing. They demonstrate that it is not inconsistent with constitutional principle to hold that the mere implication of a fundamental right does not necessarily entail that the court before which the implication is raised has an unfettered power in respect of remedy. Which court must be turned to in the peculiar circumstances depends on the competence of the court to grant the particular remedy that is sought.

[18] In the result an accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(d) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal

proceedings (in other words in circumstances not provided for in s 342A of the CPA) must bring the application before the High

Court having jurisdiction.¹⁹ By contrast, what we have termed 'intra-curial' delay - delay occurring after the commencement of criminal proceedings - is a

matter falling to be dealt with exclusively by the court seized with the criminal proceedings.

[19] In view of the conclusion reached on the matter of jurisdiction it would ordinarily be unnecessary to say anything about the merits of the appellant's application for a stay of prosecution. We consider that it is nevertheless in the interest of justice for us to do so; hopefully thereby conducing to the avoidance of any further delay, even if it be at the instance of the appellant himself, in bringing the proceedings against him to finality. For that purpose it is appropriate to describe the nature of the charges faced by the appellant and the factual background insofar as it may be deduced from the papers in greater detail than we did for the purposes of the jurisdictional question of which we have just disposed.

[20] The close corporation of which the appellant had been a member at the material time operated as a ship chandler to vessels passing the Cape coast. It supplied victuals and spares to ocean going vessels and drilling rigs working off the coast of West Africa. Incidentally to these activities the corporation operated a bond store with premises situated in Montague Gardens, Cape Town.

[21] On 17 February 2003 SARS carried out a search and seizure operation at the premises of the corporation. A number of documents and items were seized during that raid. Over the year which followed that raid the corporation co-operated in the ensuing SARS investigation. The extent of that co-operation is, however, in dispute.

[22] On 10 February 2004 the corporation received a letter from SARS setting out the irregularities which had allegedly occurred and the damages which SARS claimed it had suffered as a result thereof in the amount of R62 844,19. The corporation was also advised that a decision was pending whether or not to involve the National Prosecuting Authority ('the NPA').

[23] On 15 March 2004 SARS demanded payment from the corporation, alternatively its members,²⁰ of the amount of R111 965,25. Included in that amount was the sum of R74 388 which was claimed as a forfeiture penalty in terms of s 88(2)(a) of the Customs and Excise Act.

[24] The corporation paid the full amount demanded by SARS notwithstanding its denial of liability. A consequence of the SARS

raid and investigation was that the business of the corporation dried up and it ceased trading in 2006. The bond store was

deregistered with the approval of SARS in 2007.

- [25] At a meeting with SARS on 24 March 2004 the members of the corporation were informed that the matter would be handed over to the NPA for consideration. The SARS official involved stated that he could not give any undertaking in respect of the outcome of the NPA's consideration of the case. This was the last communication which the appellant received about a possible prosecution until 6 years later.
- [26] In April 2010 the appellant received the summons commencing the criminal proceedings.
- [27] The state's case is that the corporation had falsely claimed in 37 instances over a 26 month period spanning December 2000 to February 2003 that it had sold soft drinks, cigarettes and liquor to foreign vessels, rendering these sales VAT and duty free whereas in fact no such export sales occurred. The amount of the unpaid VAT and duty involved was R36 771. The members of the corporation insisted at the time that the goods had indeed been sold to foreign vessels and that accordingly no VAT or duty were payable by the corporation. Two further charges preferred against the appellant concern his allegedly having been in possession of 20 rubber stamps purporting to be those of foreign vessels, and having been in possession of 12 cartons of cigarettes and 7 bottles of whisky, apparently valued at R806, that were required to have been kept in a bond store.
- [28] The appellant contended that he was entitled to a permanent stay of prosecution because during the intervening years between the SARS investigation and the institution of criminal proceedings certain documents and records had been destroyed. The supposed germaneness of the documents and records to the case was not described in his supporting affidavit save in the most general terms. He also claimed that certain witnesses he might wish to call, in particular the captains of certain ships to which he alleges goods were supplied by the close corporation, are no longer readily available and cannot be traced. He gave no particularity of what steps, if any, have been taken to try to locate these witnesses. He also emphasised that the investigations and punitive measures by SARS had been against the close corporation and not against him personally. We have understood the suggested relevance of this as being to negate any imputation of a duty on the appellant personally to have preserved the allegedly lost documentary evidence; particularly in the context of the close corporation having ceased to carry out business some years ago. (Without so holding, we would consider that the appellant's personal duties and potential liability in this regard would be defined by the provisions of ss 101 and 103 of the Customs and Excise Act, which appear to us to be of general application irrespective of the

peculiar factual context relied upon by the appellant. Suffice it to say that these are pre-eminently matters that are better considered and determined in the context of a trial of the charges brought against the appellant, and neither centrally relevant, nor appropriate for conclusive determination in the context of a stay of prosecution application.)

[29] In seeking the relief the appellant was being ambitious. In *Sanderson v Attorney-General*, Eastern Cape 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 at para 38, Kriegler J, writing for the Constitutional Court, stated of a permanent stay of prosecution as a remedy for the infringement of an accused person's rights in terms of the equivalent under the Interim Constitution of s 35(3)(d) of the Constitution:

'...the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case

- is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.

[30] As far as we are aware, and counsel confirmed as much, an order granting a permanent stay of prosecution by reason of an

unreasonable delay in the commencement of criminal proceedings has previously been granted in only a single reported case; certainly

during the era of modern constitutional jurisprudence. The case in which the remedy was granted was *Broome*, supra. The factual basis for trial related prejudice in *Broome* was quite exceptional. Not only was there an unreasonable delay in the institution of criminal proceedings, it was undisputed in that matter that a considerable amount of the documentary evidence confiscated from the applicants, which was admittedly centrally

germane to their ability to conduct his defence, had been lost or destroyed by agents of the state. The loss and destruction of the documentation had occurred after the applicants had been refused the opportunity, which they had requested when the documents were taken from them, to make copies for their own protection and use. In contrast with the current matter, the affidavits made in support of the application for a permanent stay in *Broome* provided a detailed exposition of the material that was missing and a full explanation of their significance in the contemplated criminal proceedings.

[31] In *Bothma* supra, 21 at para 74, Sachs J distinguished the exceptional circumstances of *Broome* in terms which hold true for the current case: 'It is notable that in the only case where a stay was granted, it was the state that had been responsible for the loss of crucial

documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the state to prosecute someone and then deliberately or through an

unacceptable degree of negligence deprive that person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays. Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal. (Emphasis supplied.)

[32] It is firmly established that the mere passage of time in the abstract does not suffice to justify a permanent stay of

prosecution.²² The significance of delay to the establishment of an entitlement to the remedy of a permanent stay in a case like the current one is that it must be demonstrated that the effect thereof is to cause material and irremediable trial prejudice. It is well established in the relevant jurisprudence that it will be difficult to satisfy the requirement in advance of a trial and that in the usual case the trial court is the forum best placed to determine the existence of such prejudice in the conduct of the trial, and not before the commencement of proceedings. It seems to us that is especially appropriate on the facts of the current case, in which the relevance of the material which the appellant claims has been lost has not been clearly established and in which the fact of its ever having existed is called into question by the prosecuting authority.

[33] The appellant's counsel submitted that the nature of the charges, involving, as they do, an alleged prejudice to the fisc of less than R40 000, is such that the court should regard this as a matter in which the balance of interests in favour of the appellant outweighs that of the state in prosecuting the matter at this remove from the date of the alleged commission of the offences. It is correct that the determination of applications such as this entails a balancing of interests; it is also correct that the nature of the offence(s) in issue is a relevant consideration in the balancing exercise.²³ The argument advanced by the appellant's counsel would carry some persuasive weight if the alleged offences were indeed trifling. We are however unable to agree with the suggestion that they are. Indeed, they go to matters in which SARS is heavily reliant on the honesty and co-operation of taxpayers, and in respect of which contraventions of the applicable legislation will often be difficult to detect. Policy considerations weigh heavily in favour of a public interest in such matters going to trial notwithstanding that the systemic weaknesses in the state apparatus do not provide a satisfactory reason for the long delay. Those considerations fall to be weighed against the fact that the appellant did not in our view establish that he will suffer irremediable prejudice if the trial proceeds.

[34] For these reasons, had we been called upon to decide the appeal on the merits of the application for a permanent stay of prosecution, we would not have been persuaded that this was an appropriate case for the radical and far-reaching remedy sought and would have declined to grant it on appeal. [35] The appeal is dismissed. AG. BINNS-WARD Judge of the High Court J.I. CLOETE Acting Judge of the High Court

[34] For these reasons, had we been called upon to decide the appeal on the merits of the application for a permanent stay of prosecution, we would not have been persuaded that this was an appropriate case for the radical and far-reaching remedy sought and would have declined to grant it on appeal.

[35] The appeal is dismissed.

AG. BINNS-WARD

Judge of the High Court

J.I. CLOETE

Acting Judge of the High Court

Date of hearing: 25 November 2011 Date of judgment 6 December 2011 Counsel for appellant W.A. King Counsel for respondent C. Van der Vijver W.P. Els Appellant's attorneys: Bowman Gilfillan, Cape Town

Date of hearing: 25 November 2011

Date of judgment 6 December 2011

Counsel for appellant W.A. King Counsel for respondent C. Van der Vijver W.P. Els

Appellant's attorneys: Bowman Gilfillan, Cape Town

¹The Constitution of the Republic of South Africa, 1996.

²In contradiction of that stance, lead counsel for the state before us (who had not appeared in the court below) was inclined to concede that the magistrate did enjoy jurisdiction. Of course, we are not bound by counsel's view on a question of law; being under a duty to apply the law as it is, and not as counsel might consider it to be. See *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009

(2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68 and the authority cited in fn. 40 to the judgment of Ngcobo J (as he then was).

³Section 342A of Act 51 of 1977 provides insofar as relevant: (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) that- (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State; (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or [Date of commencement of para, (e): to be proclaimed.] (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action

against any person responsible for the delay. (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.

3Section 342A of Act 51 of 1977 provides insofar as relevant:

(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) that-
 - (i) the State shall pay the accused concerned the wasted costs Incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
 - (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
- [Date of commencement of para, (e): to be proclaimed.]
- (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action

against any person responsible for the delay.

(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.

4See e.g. chap VI in respect of civil jurisdiction and chap XII in respect of criminal jurisdiction (which is exercised procedurally in accordance with the provisions of the CPA) of the Magistrates' Court Act 32 of 1944, in respect of the magistrates' courts; Part C of chap 4 of the Competition Act 89 of 1998 in respect of the Competition Appeal Court; and Parts D and E of chap VII of the Labour Relations Act 66 of 1995 in respect of the Labour Court and Labour Appeal Court, respectively.

5See e.g. s 43A(5)(f) of the National Prosecuting Authority Act 32 of 1998; s 82 of the Mine Health and Safety Act 29 of 1996; and s 9A of the Promotion of Administrative Justice Act 3 of 2000.

6See para [5] above, in which the text of s 170 of the Constitution is set out.

7Cf. South African Law Reform Commission Discussion Paper 75, Constitutional Jurisdiction of the Magistrate's Courts (March

1998) at para 17.

8A basis for a limited jurisdiction for magistrates' court in terms of Act 3 of 2000 was introduced by virtue of the insertion into the Act of s 9A and the amendment of the definition of 'court' in s 1 thereof, in terms of ss 1 and 2 of the Promotion of Administrative Justice Amendment Act 53 of 2002. To the best of my knowledge, no designation as contemplated by para (b)(ii) of the definition of 'court' in Act 3 of 2000 has yet been made, but in any event the provisions of s 9A are just an example of a supplementary ad hoc jurisdictional provision of the nature exemplified above (in para [5], with reference to fn 5).

9Cf. L.C. Steyn *Die Uitleg van Wette 5de uitgawe* at 206: '...n persoon of liggaam wat sy bevoegdhede aan 'n wet ontleen niks geldigs kan verrig waartoe hy nie by daardie wet, uitdruklik of by verswee bepaling, gemagtig is nie...'

10Cf. also the recent judgment of the Free State High Court in *Tshisa v Premier of the Free State and Another* 2010

(2) SA 153 (FB) treating of condonation of late service of notice of intended proceedings against an organ of state under the Institution

of Legal Proceedings against certain Organs of State Act 40 of 2002, which exemplifies a situation in which it was held that a magistrates' court may decide a matter determined by a generally applicable statute incidentally to the exercise of the jurisdiction

vested in the court by the Magistrates' Courts Act. In that matter the issue of condonation was necessarily incidental on the facts to the plaintiff's ability to pursue a civil case admittedly within the jurisdiction of the magistrates' court. The relevant provision provided that a claimant requiring such condonation had to apply to 'the court having jurisdiction'. The High Court held that the phrase was intended to refer to the court having jurisdiction in respect of the claim which it was sought to prosecute.

11In *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999

(2) SACR 13 (C) this court (per Hlophe ADJP and Griesel J) referred to s 170 of the Constitution read with s 342A of the CPA as the basis for confirming the jurisdiction of a magistrates' court seized with criminal proceedings to grant an order permanently staying a prosecution; see the judgment at p. 20e-g.

12Cf. *Bothma v Els and Others* 2010

(2) SA 622 (CC) (2010 (1) SACR 184; 2010 (1) BCLR 1) at para 81-82.

13Seen in that way, s 342A of the CPA may be recognised as a legislative measure within the meaning of s 165(4) of the Constitution directed at ensuring the independence, dignity and effectiveness of the criminal courts.

14Certification of the Constitution of the Republic of South Africa[1996] ZACC 26; , 1996; 1996

(4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

15Constitutional Principle.

16CP VII provided 'The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'

17Constitutional Assembly.

18Interim Constitution.

19As indeed was done, for example, in *Bothma*, supra.

20The members' alleged personal liability presumably was founded on s 103 of the Customs and Excise Act.

21Footnote 12.

22See *Bothma* supra, at para 39.

23See *Sanderson* supra, at para 27-39; and *Bothma* supra, at para 35-38.

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