

SOUTH AFRICA / JUDGMENT

S v Mdluli and Others (CC3/2021)

[2024] ZAGPPHC 353 (10 April 2024)

[2024] ZAGPPHC 353**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

CC3/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case number: CC3/2021****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE****DATE****In**

the matter between:

THE
STATE
v
RICHARD
MDLULI
ACCUSED 1
HEINE JOHANNES
BARNARD
ACCUSED 2
SOLOMON
LAZARUS
ACCUSED 3

JUDGMENT

MOSOPA, J

1. This is an application brought by the state in terms of the provisions of section 342A of Act 51 of 1977, for this court to investigate any delay in the completion of the proceedings, which appears to the court to be unreasonable, which could lead to substantial prejudice to the prosecution, accused, the state or witnesses. This application is opposed by accused number 1, Mr Mdluli, no answering papers were filed by the accused.
2. Accused 2 and 3 filed an affidavit supporting the state's application and averred that the accused are prepared to proceed to trial and that they are prejudiced by consistent postponements of this matter and their constitutional right to a fair and speedy trial is violated. In the alternative, they averred that changes be withdrawn against accused 2 and 3, pending the outcome of accused 1's review application. Accused 1's legal representative, in opposition to the state's application submitted oral submissions from the bar.

BACKGROUND

3. The accused are arraigned on various counts of corruption, contravention of the Prevention of Organized Crime Act, fraud and defeating the administration of Justice, stemming from the time they were employed in the South African Police. At the time of the alleged commission of the offences Accused 1, Mr Mdluli, was the Divisional Commissioner of Crime Intelligence ("CI"), Accused 2, Mr Barnard, was the Supply Chain Manager for the Secret Service Account ("SSA"), CI Head Office, Pretoria and Accused 3, Mr Lazarus, was a command of the Covert Intelligence Support Unit, Chief Financial Officer of the SSA.
4. Accused 1 and 2 were arrested on the 21 September 2011 and 4 October 2011 respectively, under Silverton CAS 155/07/2011. On the 17 November 2011, accused 1 made representations to Advocate Mrwebi, in his capacity as Special Director of Public Prosecutions ("DPP") and Head of Specialized Commercial Court Unit ("SCCU") seeking of withdrawal of charges against him. Such charges were withdrawn against the accused on the 14 December 2011.
5. The decision to withdraw such charges against accused 1, was taken on review and on the 17 April 2014, the SCA confirmed the setting aside of the decision to withdraw charges against accused 1. This resulted in the matter being reinstated and served before Specialized Commercial Crime Court, Pretoria on the 1 April 2015. The matter was struck off the roll on the 6 July 2015 and the court ordered that the matter can only be enrolled if the document that needs to be disclosed to the defence are declassified.
6. National commissioner Sithole then declassified such documents on the 8 July 2019 and the matter was enrolled again for hearing on the 27 August 2020.

7. The first application brought by the state in terms of section 342A of Act 51 of 1977 was supposed to be heard on the 6 April 2021, and such application was withdrawn after it was agreed between the state and the defence, that accused 1 file his application to the South Africa Police in respect of his legal funding within a period of a month.
8. On the 1 January 2022, the accused was informed of the South African Police's refusal to fund his legal fees. Mr Motloun on behalf of the accused, then on the 22 February 2022 informed court that he intends to take a decision not to fund accused's legal fees by the South African Police on review. On 6 April 2022, accused 2 and 3 made applications that have their cases, struck from the roll due to postponements, which application was refused.
9. The state filed a second section 342A application after it was informed that the accused has not filed a review application on the 12 April 2022. The matter was then enrolled for hearing on the 11 May 2022, but it could not proceed on that day as the court's roll was crowded and the matter was adjourned to the 11 May 2022 for hearing. The review application by the accused was finally issued on 18 May 2022.
10. The second section 342A application was then heard on 20 June 2022 and the following order was made;
 - 10.1. That the matter is postponed to 20 September 2022.
 - 10.2. That the pre-trial shall proceed on that day, and
 - 10.3. That the application to withdraw charges against accused 2 and 3 is refused.
11. Request for further particulars was made by the accused on 6 February 2023 and on the 18 May 2023, the state replied to such request. The pre-trial was held on the 24 October 2023 and the pre-trial minutes filed on the 31 October 2023. Mr Motloun on that day confirmed that pleadings in the review application was closed, but the accused intends to file a replying affidavit to be accompanied by application for the late filing of such. The state attorney then made an undertaking that the accused should fund his legal defense pending the finalization of the review application, that in the event of the review application being successful, the South African Police will refund the accused in full for all reasonable expenses in terms of the state attorney's fee structure, such undertaking was rejected by Mr Motloun on behalf of the accused. The accused has not yet pleaded to the charges that he is arraigned with in this court.

LEGAL PRINCIPLE

12. An unreasonable delay or unreasonable duration of the case can affect the fairness of the trial (see *S v Maredi* 2000
 - (1) SACR 611 at par 7).
13. Section 342A of Act 51 of 1977, governs unreasonable delays in trials, and provides that;

“(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...”
14. The Constitutional Court in *S v Ramabele and Others* 2020 (2) SACR 604 at par 59, when dealing with considerations to be taken into account and the nature of the test, stated;

“[59] This Court has proffered guidance to determine whether a particular lapse of time is reasonable. With reference to foreign law including American jurisprudence, such as Barker v Wingo, this Court in Sanderson stated that the inquiry requires a flexible balancing test. However, the Court accepted that the specific South African context requires its own home-baked approach. Therefore, the approach is as follows: courts ought to consider whether a lapse of time is reasonable by considering an array of factors including: (a) the nature of the prejudice suffered by the accused; (b) the nature of the case; and (c) systemic delay. 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 factors requires a value judgment with reasonableness as the qualifier. Furthermore, it is a fact specific inquiry.”

15. In *S v Ndibe* (14/544/2010) [2012] ZAWCHC 245 (14 December 2012) at par 6 the court when dealing with the nature of the enquiry envisaged by section 342A, stated;

“[6] A holistic reading of the provisions of s 342A leaves me with the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course necessitates an enquiry. The investigation includes taking into

account the factors listed in s 2. Those factors are not limited to the prejudice suffered by an accused person and also include the impact an unreasonable delay may have in the administration of justice, the victim, and the States case. Even though S 342

- (3) does not specifically state that a ‘formal’ enquiry be held, it does call at the very least for an enquiry, on the basis of which a finding must be made. Such an enquiry must have regard to the full conspectus of the factors in s 2. In the absence of an enquiry, a court may find it difficult to assess whether a delay is unreasonable or how much systemic delay to tolerate. (See *Sanderson v Attorney-General* [1997] ZACC 18; 1998 (1) SACR 227 (CC) at page 243 para 35). That can only be determined when there has been an enquiry albeit informal, in which the conspectuses of the factors listed have been considered. This I say mindful of the fact that the bulk of the criminal cases are heard before the magistrate’s court, and to insist on a formal enquiry is likely to be burdensome to the already overstretched court rolls. The finding should be followed by a remedy the court considers appropriate, depending on whether the accused person had already pleaded or evidence led. It seems to me that, once the provisions of s 342 are invoked, the following three stages must be followed:
- (1) investigation of the cause of the delay in the finalization of the case, taking into account the listed factors;
 - (2) making of a finding whether the delay is reasonable or unreasonable;
 - (3) depending on the stage of the proceedings, the application of the remedies provided.”
16. A further layer of what is expected of the enquiry when invoking the provisions of section 342A, was added in *S v Ramabele* (supra) at par 57 when the following was stated;

“[57] It has been said that section 342A is “the vehicle for giving practical application to the section 35(3)(d) right to have a trial begin and conclude without unreasonable delay”. Therefore, when considering section 342A, one must be mindful of section 35(3)(d) of the Constitution which entrenches an accused’s constitutional right to an expeditious trial. This section provides:

“Every accused person has a right to a fair trial, which includes the right—

- (d) to have their trial begin and concluded without unreasonable delay”.

ANALYSIS

17. A considerable period of time lapsed, from the time when accused 1 and 2 were arrested in 2011 up to this stage. It is not clear from the papers as to when accused number 3 was arrested and when he was joined together with Accused 1 and 2 appeared at court for the first time. Mr Motloun in contention submitted that facts in this matter are not in dispute but are common cause. Precisely a period of almost 14 years has lapsed since accused 1 and 2 were arrested for this matter.
18. There was a stage when charges were withdrawn against accused 1 and such decision was set aside in 2014, which resulted in the matter being re-enrolled on the 1 April 2015. The effect of such a decision to withdraw charges against accused 1 is that nothing happened between that period, i.e. from 14 December 2011 to 17 April 2015, which is a period of approximately 4 years. No party can be blamed for such a delay, and such cannot be classified as an unreasonable delay of the matter as there was ongoing litigation between the parties in another forum.
19. From that period until the documents in this matter were declassified by the National Commissioner of the Police, the matter could not be enrolled but was only enrolled on the 27 August 2020. The state proffered no explanation as to why a period of one year and a month, i.e. from 8 July 2019 when there was declassification documents and disclosure of documents and 27 August 2020 when the matter was enrolled at Specialized Commercial Crime Court, lapsed. To this end, Mr Motloun on behalf of accused 1, contended that the state charged the accused when they were not ready to commence with the trial of the accused.
20. I agree with Mr Motloun. The state when charging the accused knew exactly the type of documents that they intended to use to prosecute the accused and its respective status. Various Police Commissioners were appointed and there is no reason proffered as to why they failed to declassify such documents, until it was done by the National Commissioner Sithole in 2019. However, the matter was consequently resolved but the matter could not proceed to trial.
21. What is now holding back the start of the trial matter is the refusal by the Police to fund the legal fees of accused 1. Such decision was communicated to the accused on the 18 January 2022. The application to review such decision was only lodged with the court on the 18 May

2022. There is no explanation why accused 1 waited for a period of approximately four months after such decision was made, to file the review application.

22. On the pre-trial hearing held on the 24 October 2023 before De Vos AJ, the following order was made;

1. That the state's application in terms of section 342A will be heard on 27 March 2024.
2. Bail of accused 1 is extended until such date and that accused 2 and 3 will remain on warning until such date.

No mention was made of the outcome of the pre-trial hearing. The pre-trial minute was then filed on the 31 October 2023.

23. It is at that pre-trial hearing that, Mr Motlounq informed the court that the pleadings are "closed" in the review application. But the accused is contemplating to file a replying affidavit. According to Mr Motlounq, the answering affidavit in that review application was filed on the 23 September 2023. It is not clear now as to whether such replying affidavit was filed or not by accused 1.

24. The state attorney in an effort to assist accused 1 with the issue relating to Police funding his legal fees pending the finalization of the review application made a certain undertaking in which the following was stated;

"To assist in the expedition of the criminal trial and to ensure that justice is served, our client (SAPS) is prepared to provide Lt General Richard Naggie Mdluli with an undertaking, that he fund his legal defence, pending the finalization of the review application. If his review application is successful, the SAPS will reimburse him in full for all reasonable legal expenses in line with State Attorney tariffs incurred in his criminal defence."

25. I must at this stage, pause to mention that no date is yet set for the adjudication of the review application. The Director of Public Prosecutions is not a party to such review application.

26. As already stated elsewhere in this judgment, the undertaking by the state attorney's office was rejected by accused 1. The main reason for such a rejection was mainly that the undertaking does not make sense to the accused and further that the accused want to be assisted by a Senior Counsel in his trial matter.

27. Accused 1, like any citizen in the Republic has a right of access to courts a right which is enshrined in section 34 of the Constitution, which provides that;

"[34] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

28. Accused 1 cannot be faulted for taking a decision to refuse to fund his legal fees on review. There is also not a reason to fault him in the event that he is aggrieved by the outcome of such a review application, and take the matter further to the Superior Courts.

29. Section 35(3)(f) of the Constitution, provides;

“[3] Every accused person has a right to a fair trial, which includes the right-

(f) to choose and be represented by, a legal practitioner, and to be informed of this right promptly.”

30. Section 36 of the Constitution limits the rights in the Bill of Rights, and provides;

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.”

31. It is trite that, even though enshrined in the Bill of Rights, the right to choice of legal representation is not an absolute right but subject to limitation of rights. The aspect was dealt with in the matter of *S v Halgryn* 2002 (2) SACR 211 (SCA) par 11, where the following was stated;

“[11] Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (R v Speid

(1983) 7 CRR 39 at 41). It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and, furthermore, that the lawyer is readily available to perform the mandate, having due regard to the court’s organization and the prompt despatch of the business of the court. An accused cannot, through the choice of any particular counsel, ignore all other considerations ... and the convenience of counsel is not overriding ...”

ENQUIRY INTO THE DELAY

32. According to the indictment which bears the date stamp of 08 February 2021, accused 1’s age is stated as 62 years old (which makes him 65 years currently), accused 2 was 57 years old (which makes him 60 years old currently) and accused 3 was 57 years old (which makes him also 60 years old currently). The accused are elderly people when considering their respective ages and are expected to properly formulate accurately their defences to events

that allegedly occurred 17 years ago. I find this to be totally unfair on the accused and not forgetting the fallibility of the human mind. All the accused are currently on bail in this matter.

33. Accused 2 and 3 had been saying consistently that they are ready to proceed to trial, but that could not materialize because of the number of postponements in this matter and not at their instance. This is totally unfair to the accused. I was informed in argument that accused also suffer financial prejudice as they have instructed a Senior Counsel, a junior Counsel and an attorney to legally assist them in this matter as they received no funding from the South African Police.
34. I have mentioned on numerous occasions and advised Mr Motloun to approach the office of the Deputy Judge President in an endeavor to secure a preferential date of hearing of the review application. That was never done by accused 1, Mr Motloun in argument conceded that this court can make an order that the parties in the review application can approach the office of the Deputy Judge President for a preferential date of hearing.
35. Mr Rossouw in contention, argued that the state is prejudiced by postponements in the matter at the instance of accused 1 and this court must refuse a further postponement and set a trial date, for the following;
 - 35.1. That, the accused 2 and 3 rights to speedy trial are infringed and their legal costs are increasing,
 - 35.2. Witness are getting older and will be required to testify about occurrences that are alleged to have occurred 17 years ago,
 - 35.3. That will have the effect of inevitably leading to a weakening of the quality of the evidence,
 - 35.4. That one of the state witnesses and his family, have been in witness protection scheme since 2011, and
 - 35.5. That some of the state witnesses are at an advanced age and may soon not be able or available to testify anymore.
36. The Uniform Rules of Court regulate the procedure relating to applications and review applications. Rule 58 of the Uniform Rules in particular governs the review application. The notice of motion, for the review application under case number 24980/22, to this court, set out the timelines which must be followed in serving and filing of court papers. The respondent was given 15 days of receipt of notice of motion, to dispatch to the Registrar of this court, the record of the decision ought to be reviewed and set aside. It further gave the applicant 10 days after receiving such record to amend or to vary the terms of the notice of motion and supplement the supporting affidavit. Thereafter, the respondent is given 15 days to file a notice of its intention to oppose the review application. The respondent is again given 30 days to file its answering affidavit. According to the accused 1, at the

time or the pre-trial hearing on the 23 October 2023 such process was finalized and what puzzles this court is why a date of hearing was not applied for or a preferential date not sought from the office of the Deputy Judge President. In terms of Rule 6, the accused had 5 days to apply to court for date of hearing, after the filing of the last document in the application.

37. It is clear that accused 1 does not want to proceed with his trial matter until the review application is finalized. The state submits that if a normal process of securing a date of hearing of the review application is followed, the possibility is that the matter can be heard in the 4th term of 2024. If the accused is not satisfied with the outcome of such and decides to appeal the outcome of such that means that the trial can stall until 2028 and this aspect is not disputed by accused 1.
38. Waiting for such a long period of time for a trial to commence is not in the interest of any party and that will also have the effect of also prejudicing accused 1. The quality of evidence can be compromised by such a long wait and the state witnesses taking into account their ages, can end up dying. I am saying this without a fear of contradiction. As I had an opportunity of going through the list of witnesses contained in the indictment and most of them are senior ranking officers in the police and this is an indication that they are at an advanced stage of their lives, taking into account the number of years taken to be promoted in the South African Police, to a higher rank.
39. The review application brought by accused 1 is a legality review including a PAJA review and it is trite that such kind of a review applications must be brought within a reasonable time and we are today in the year 2024 and with a review application instituted in May 2022 but there is no date of hearing set. This is coupled with a fact that the state attorney's office made an undertaking to fund the accused's legal fees in the event that he is successful with his review application. The state attorney does not express any intention to appeal the outcome of the review application in the event that the accused succeeds.
40. The pending review application does not impact on the merits of the case against the accused but is purely based on state finding. The accused in the event that he receives legal funding from the state, he will still be required to refund the state in the event that he is convicted.
41. There are standing orders regulating police funding of their members, if tried in the Criminal Court. I was referred to Standing Order 109 (1) (a) published under the South African Police Service Act, 1995 by the state in which the following was provided;

"If a member of the force is to be tried in a criminal court, his defence should he so elect, will be conducted by the state attorney, provided he has indicated in the application presented ... or the evidence reflects that he did not forfeit the privilege of state defence in that he, where applicable ... acted in execution of his duties or bona fide believed that he did."

42. Accused 2 and 3 waived their right to state funding, but accused 1 opted for such funding. The refusal of police funding was based on the fact that the police are of the view that the charges proffered against the accused were not committed in the execution of his duties. It is not for this court to make a determination as to whether such allegations were committed or not in execution of accused's duties.
43. Accused 2 and 3 to prove that they suffer prejudice, they have with no success attempted to apply for their withdrawal of charges against them pending the finalization of the review application. There is no mention in argument that the accused are facing complicated charges and this court is also not privy to the merits of this matter. The delay in my considered view has a serious effect on the administration of justice and offends section 165 of the Constitution.
44. Having had regard the above, the court makes the following finding after determining that the failure to timeously finalize the review application by accused 1 unreasonably delays the matter. Declassification of documents took a long time to finalize and also that unreasonably delayed the start and conclusion of the matter. However, at that stage no party was prejudiced as charges were then withdrawn against the accused. The current delay of the matter pending the finalization of the review application, have the effect of prejudicing the state, accused 1 and 2 as already indicated. There is a family of one of the state witnesses who is affected by the alleged commission of the offences that the whole family is now under the witness protection scheme since
2011. There has been systematic delays that I have noted relating to declassification of documents that I have already dealt with.
45. The continued delay of starting a trial matter is unreasonable and has the effect of causing substantial prejudice to the state, accused 2 and 3 and the state witnesses and such needs to be eliminated. This court is not willing to grant a further postponement pending the finalization of the review application.

ORDER

46. Having regard to the above, the following order is made;
1. That the parties involved in the review application, more especially accused 1 as he is the applicant in the matter, approach the office of the Deputy Judge President to determine the date of the hearing of the review application.
 2. That all the accused are ordered to finalize all interlocutory applications they intend to bring in this matter relating to their trial matter before the date set for the trial to commence.
 3. Application by accused 2 and 3 to have charges withdrawn against them, pending finalization of the review application by accused 1, is hereby refused.

4. That the parties shall set the trial date today, for the trial matter to commence irrespective of the fact that the review application has not been finalized or not on that date.
5. Upon set of the trial date, the bail of accused 1 is extended to such date and accused 2 and 3 will remain on warning until such trial date.

MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

Appearances

For the State: Advocate A J Rossouw together with Advocate Dias Instructed by: The DPP For Accused 1: Mr I Motlounng Instructed by: Maluleke Seriti Makume Matlala Inc. For Accused 2 and 3: Advocate T Murtle (standing in for Advocate Killian SC) Instructed by: James Bush Attorneys
Date of hearing: 27 March 2024 Date of judgment: 10 April 2024

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