

SOUTH AFRICA / JUDGMENT

S v Thabethe and Others (15/2023)

[2024] ZAFSHC 317 (7 August 2024)

[2024] ZAFSHC 317**COURT**

Free State High Court, Bloemfontein

BEFORE

Reinders

CASE / FILE NUMBER

15/2023

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Source record**FLYNOTES:**

CRIMINAL – Fair trial – Delay –
Court
investigation into unreasonable delay – Alleging State is
reason for the delay – Prosecution failed to comply
with its
duty – Whether accused supplied with whole content of
information available to it – Facts central to
case being
electronic data – Information on hard drive supplied by
State to defence could not be properly accessed
by defence –
Accused entitled to such information before trial commences –
Incurable prejudice to accused –
Matter struck from roll –
Criminal Procedure Act 51 of 1977, s 342A.
IN
THE HIGH COURT OF SOUTH AFRICA
FREE
STATE DIVISION, BLOEMFONTEIN
Reportable
/ Not reportable
Case
no: 15/2023
In
the matter between
The
State
and
Mbana
Peter Thabethe

First
Accused
Seipati
Silvia Dlamini
Second
Accused
Takisi
Jankie Masiteng
Third
Accused
Kamal
Vasram
Fourth
Accused
Mosebenzi
Zwane
Fifth
Accused
Ronica
Ragavan
Sixth
Accused
Ugeshni
Naidoo (nee Govender)
Seventh
Accused
Sahara
Computers (Pty) Ltd
Eighth
Accused
Aerohaven
Trading (Pty) Ltd
Ninth
Accused
Oakbay
Investments (Pty) Ltd
Tenth
Accused
Linkway
Trading (Pty) Ltd
Eleventh
Accused
Islandsite
Investments 180 (Pty) Ltd
Twelfth
Accused
Westdawn
Investments (Pty) Ltd
Thirteenth
Accused
Mabengela

	Investments (Pty) Ltd Fourteenth Accused Confident Concept (Pty) Ltd Fifteenth Accused Neutral
citation:	The State v Mbana Peter Thabete and 14 Others
Coram:	Reinders J
Heard:	5 and 6 August 2024
Delivered:	7 August 2024
Summary:	Criminal procedure - investigation in terms of s 342 of the Criminal Procedure Act 51 of 1977 - discovery - right to expeditious trial. ORDER 1. The matter is struck from the roll in respect of all the accused before court. 2. The matter may not be resumed or instituted de novo without the written instruction and authorization of either the National Director of Public Prosecutions, alternatively, the Head Investigating Directorate of the National Prosecuting Authority, and in the further alternative, the Director of Public Prosecutions: Free State.

JUDGMENT

Reinders J

[1] The fifteen accused before me, according to the indictment in my possession, are to stand trial on various charges. Although all the accused are not charged in respect of all the counts, it suffices to mention the charges include counts of fraud, money laundering and corruption running into millions of rands.

- [2] The summary of the substantial facts, as required by s 144(3) of the Criminal Procedure Act 51 of 1977, as amended (hereafter referred to only as 'the Act') explaining the various counts, consists of 190 pages. The list indicating the proposed witnesses to be called on behalf of the prosecution reveals the names of at least 177 witnesses.
- [3] Without being presumptuous, I would think it fair to state that the accused stands trial in what has become generally known as a 'State capture' case, and in casu, in particular with reference to the Estina Dairy Project.
- [4] The matter is enrolled before me and was set down for trial on the continuous roll to run from 5 August 2024 at least until 13 September 2024. It was as such enrolled when the matter was certified trial ready by the Judge President of this Division almost a year ago, on 29 August 2023.
- [5] On 30 July 2024 accused seven to sixteen, by way of affidavits, drew my attention thereto that the prosecution has failed to comply with its duty to supply the various accused with the whole of the contents of information available to it. They aver that they cannot therefore properly consult and prepare for purposes of trial, and requested me to hold an investigation, as is provided for

in section 342A (1) of the Act, and to find that the State is therefore the reason for the delay in the prosecution.

- [6] I am being urged to make an order that the matter should be struck from the roll, and that the prosecution not be resumed without the written instruction and authorisation of the National Director of Public Prosecutions. Similar complaints were hereafter received by the rest of the accused, save for accused six, who indicated by way of a letter that it abides by the Court's decision.
- [7] On the morning of 5 August 2024, shortly before the matter was called, opposing papers were filed by the prosecution. I afforded the accused until 6 August 2024 with an opportunity to reply thereto. In some instances, the Defence prepared short heads of argument for my consideration, for which I am indebted.
- [8] The Apex court in *Ramabele v Sand* related matters[1] (*Ramabele*) stated at para 56 the following:

'The overarching aim of section 342 A is to provide courts with a statutory mechanism to avoid unreasonable delays in the finalisation of criminal proceedings. Section 342 A empowers a court to examine the reasons for the delay. In order to ascertain whether the delay is reasonable or not, courts consider an array of factors, as is stipulated in section 342A (2).'

- [9] The *Ramabele* decision in para 57 also clearly states that:

'Section 342A is the vehicle for giving practical application to the constitutional right entrenched by section 35(3){d), which guarantees to an accused an expeditious trial which should begin and be concluded without unreasonable delay. Where an accused is of the view on proper grounds that his rights are being infringed, he or she is entitled to bring an application in terms of section 342 A.'

I must therefore consider whether the delay viewed in the totality of the evidence presented before me can meet the required threshold of unreasonableness.

[10] In Ramabele, in para 58, referred to earlier, the Constitutional Court referred to an earlier decision in *Sanderson v Attorney-General Eastern Cape*,^[2] and made the following observations in para 59 regarding what would constitute an 'unreasonable delay'.

'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 Defence, as well as the interest 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 enquiry.'

[11] I have read all the affidavits and carefully considered the arguments on behalf of all parties. I do not intend to repeat each and every detail thereof herein. The case law to which I was referred was thoroughly considered by me.

[12] As a starting point, the prosecution in its opposing affidavit explains that the Defence was supplied with certain documents as far back as 2023. In its opposing affidavit the prosecution explains, in from the answering affidavit:

'18. This disclosure in January 2023 also included affidavits relating to the search and seizure of documents. Those affidavits are marked as A 94, A 95, A 189 and A 312 in the docket (1. Evidence File: Digital Forensic). All the data referred to above forms part of the contents of a five- terabyte hard drive which was provided to the Defence on 19 June 2024.

19. The ' Gupta Leaks' emails consist of data recovered and retrieved from the hard drive, which I will refer to in this affidavit as the 'original harddrive disk' ("Original HOD").

The State engaged with the Commission in terms of section 71 to obtain the HOD drive. Only hard copies were obtained, necessitating that a further process be undertaken.'

The opposing affidavit further states: 'On 29 August 2023 ... '

'.. the matter was remanded for trial from 5 August to 13 September 2024. On the said date, the State provided the Defence with additional disclosure consisting of 32 affidavits. The State also indicated to the Court that there was additional electronic disclosure (data) still outstanding, the original HOD.' For purposes of obtaining the HOD drive, the State embarked on a mutual legal assistance process with the Netherlands counterparts, following which the HOD drive was obtained on 1 March 2024.

[13] It is then explained via the State that the expert who was initially engaged, one Mr CP Lourens, took possession of the original HOD, and the forensic copy thereof on the 2 May 2024. The State requested him to do a comparison of hash values and provide a copy of the forensic copy created in the Netherlands from the original HOD. Unfortunately, Mr. CP Lourens fell ill on 23 May 2024. It then states that:

'The services of another service provider were obtained. That person ostensibly took possession of the forensic copy of the original HOD for purposes of authentication and preparing a copy which had to be provided to the Defence. Then once the expert had concluded the above process, on 19 June 2024 email communication was sent to all the legal representatives of the accused to provide five-terabyte hard drives to the State to enable us to download the data relating to the search and seizure (1. Evidence File) and forensic copy of the original HOD (2. Evidence File). The State received the five-terabyte hard drives from the legal representatives between 24 June 2024 and 5 July 2024. The hard drives containing the disclosures were handed back to the legal representative of the accused between 5 July and 16 July 2024.'

[14] I deem the following to be important also from the State's answering affidavit:

'On 9 July 2023 we received a letter from Krause Attorneys, attached hereto marked B, indicating that ... (and of course there is an error, it should be "2024") ...indicating that, amongst others, they had encountered difficulty in accessing the contents of the 5-terabyte hard drive, some portions are accessible, and some are not. The State is called upon to explain the reason for the late disclosure for supplying disclosure which cannot be accessed, and how the accused are supposed to prepare for trial on inaccessible and unreadable disclosure.'

[15] Hereafter it was indicated by the prosecution that it did attempt to make provision for some of its IT specialists to assist. It is then clear from certain email communication, that the following occurred: there was an email by Adv Serunye subsequent to Krause's letter, dated 15 July 2024, in which he indicated the following:

'In our endeavour to ensure that there are no unnecessary delays in the trial commencing as scheduled, and to help your clients to avoid incurring costs to procure the required software, we have engaged our service provider to download the necessary software in a CD to enable you to access the contents of 2. Evidence Item. The messenger must bring back the five-terabyte harddrive to enable our service providers to load a readable format of the forensic copy (1. Evidence Item).'

[16] Of great importance is the prosecution's own acknowledgement that:

'The case against the accused is very complex, it is the type of case requiring the testimony of experts, forensic accountants, computer experts and handwriting experts. It is a type of case requiring detailed analysis of

documents and computer data, thus the investigation of this type of case will naturally take longer to complete than other less

complicated cases, and further its acknowledgement that 'the accused ought to be afforded enough time to prepare for the electronic data forming part of this latest disclosure.'

[17] Furthermore it was also stated by the prosecution in their answering affidavit and stressed: 'The facts central to this case is electronic data.'

[18] The undisputed factual position is that the information on the said five-terabyte hard drive supplied by the State to the Defence could not be properly accessed by the Defence. This position has remained unchanged even at the time of me now handing down the

judgment.

[19] It begs no explanation that if it was not able to be opened, it is akin to no discovery at all. It has been conclusively held by the Apex court almost three decades ago in *Shabalala & Others v Attorney-General of the Transvaal & Another*[3] (*Shabalala*) that an accused is entitled, before the trial starts, to be supplied with all the information and documentation in possession of the State, as is guaranteed by the Constitution.

[20] It also became common cause that each of the accused would be entitled to the information or discovery as contained in the five- terabyte hard drive before the trial commences. The prosecution deemed this information so essential and necessary in proving their case that it did intend supplying it to the Defence.

[21] The prosecution, however, argued that the information is not relevant at this stage, and that it has taken so-called 'precautionary safety measures' to curb any potential prejudice in that the prosecution, during the present six weeks set down for trial, does not intend to adduce any evidence concerning the documents that cannot be opened.

[22] Moreover, so the argument went, not all of the documentation contained in the five- terabyte hard drive is relevant for purposes of trial, or put differently, there is documentation that is irrelevant for purpose of trial.

[23] In response to a pertinent question put by me to counsel appearing for the prosecution on whether he has himself been able to access all the information on the five- terabyte hard drive, the answer was regrettably somewhat evasive, to the extent that I was informed, 'It had been seen on the so-called "Gupta leaks" information', but eventually it became evident to me that the prosecution itself has not seen all the documents contained in the hard drive.

- [24] I have various concerns with the aforementioned approach by the prosecution. Firstly, it does not lie in the mouth of the prosecution to tell the Defence which documents they should look at for purposes of consulting and considering its defences. On the contrary, a legal practitioner who thoroughly assists her or his client needs to study all the documentation available to consider her or his client's position, and the merits and/or demerits thereof. As indicated, the Constitutional Court in *Shabalala* confirmed the constitutional right of an accused to be provided with all documentation before the start of the trial.
- [25] I find it difficult to comprehend an argument, therefore, that the prosecution can prescribe selectively which information or documentation it deems to provide and to consider the sufficiency thereof. At the commencement of the trial there was no application for a postponement before me. It does, however, not mean that I could not consider the same. The prosecution, however, insisted that it was ready for trial. Notwithstanding the history of this matter and the fact that some of the accused were arrested for the first time as far back as 2018, the prosecution was not able to tell me when the required information and discovery would be properly made.
- [26] The prosecution's intention was to start with the trial. I can only speculate on the legal consequences and possible prejudice to the accused when the trial gets to the stage when documents and information contained in the mentioned files might become relevant whilst remaining inaccessible. But more important, I am now fully aware of the predicament of the accused by not having had access to the documentation that the prosecution, on its own version, undertook to furnish to the Defence with via electronic data, but failed to do so. To allow the trial to start might result in incurable prejudice to the accused, and a continuous wrong in contravention of the Constitution and the accused's right to a fair trial.
- [27] In conducting an investigation as envisaged in section 342A of the Act, I may make any such order as I deem fit with the purpose of eliminating any delay or prejudice arising from it.
- [28] In a belated attempt to oppose the application for the matter to be struck from the roll, the prosecution suggested some kind of a postponement. During submissions made by the Defence, I made it clear that one of the remedies afforded to me in terms of section 342A is that I may have the matter postponed, to which the Defence, with reference to all papers filed, argued why such an option would not curb the prejudice that their clients would suffer.
- [29] I have considered duly an order to postpone the matter, such an order to be subject to conditions as I deem fit. I have, however, already indicated that the matter cannot be postponed indefinitely, where even the prosecution cannot reasonably furnish me with information as to when it would be in a position to properly access and supply the documents.

- [30] It goes without saying that, even should such a proper discovery of the information on the five-terabyte hard drive be made now, it is undeterminable how long it would take the Defence to properly investigate the voluminous content of the hard drive. It goes without saying that the legal representatives for the accused must then still consult with their clients, and might even decide to request further particulars from the State.
- [31] In assessing whether the delay, which is inevitable in view of what I have alluded to herein above, is unreasonable, I have taken into account the factors as prescribed in section 342A (2) under subsections (a) to (i). The golden thread running through the founding and replying affidavits filed by the accused paints a picture of the adverse effect on the personal circumstances of the accused. This includes some having lost their employ, and subsequent financial constraints. Although they are also desirous of having the matter brought to finality, they do not desire to do so at the cost of the infringement of their constitutional right to a fair trial. It can be accepted that prejudice would also lie in the continuous financial implications of having the legal representatives on brief to defend them.
- [32] The prosecution argued that the factors mentioned by me herein are irrelevant for the purposes of adjudicating the said application before me. This cannot be correct. It is trite that these are some of the considerations or factors which I should consider and take into account.
- [33] The undetermined and consequent lengthy duration of the delay is evident from what has been concluded by me herein above. Although I do not intend to lay the blame for the delay on any specific person, it can, in my view, not be gainsaid that the late furnishing and eventual inability to access the documentation on the five-terabyte hard drive did, in fact, cause this delay. The prosecution failed to proffer any proper explanation in its answering affidavit, or even in court, of the details on accessing of the five-terabyte hard drive from the Netherlands only in May 2024, after undertaking at the pre-trial conference to do so some nine months earlier.
- [34] The seriousness, extent and complexity of the charges cannot be gainsaid, nor can the interest of the public (more specifically the alleged victims to wit farmers of this province) in having this matter finalized, and bringing those that are implicated of having committed crimes emanating from the Estina Dairy Project before court, be denied.
- [35] However, this matter should be conducted in full compliance and adherence to the Constitution. Having taken all the above factors into consideration, I conclude that the delay caused by the prosecution is indeed under the circumstances unreasonable for the reasons as I have fully explained. The prosecution argued that should the Court make an order in terms of s 343A(3)(c), as requested

it, 'effectively prevents the prosecution from presenting society's complaint against alleged transgressors of society's rules of conduct.'

[36] The relief sought by the Defence is not that of a stay of prosecution. I am satisfied that the trial cannot proceed in these circumstances; it can most certainly not be postponed indefinitely. The only appropriate order to make, in my view, is an order as prayed for in terms of section 342A(3)(c), which provides the remedy where the accused has not pleaded yet, as in this matter. The Director of Public Prosecutions: Free State and the Head of the Investigating Directorate of National Director of Public Prosecutions can still overview the prosecution and declare that the existing constraints are, by then, historic once the investigation is completed, and the Defence is in possession of all the information necessary to properly prepare for trial. The relief that I intend granting is not one barring the prosecution. I, therefore, make the following order:

1. The matter is struck from the roll in respect of all the accused before court.
2. The matter may not be resumed or instituted de novo without the written instruction and authorization of either the National Director of Public Prosecutions, alternatively, the Head Investigating Directorate of the National Prosecuting Authority, and in the further alternative, the Director of Public Prosecutions: Free State.

C REINDER, J

On behalf of the State: Adv T Motau SC Adv Serunye Adv Nhlatywayo Instructed by: STATE BLOEMFONTEIN On behalf of the Accused 1: Mr L Mantsha Instructed by: Lungisani Mantsha Attorneys. c/o Bokwa Attorneys Inc. BLOEMFONTEIN On behalf of the Accused 2: Adv Edeling SC Instructed by: Bokwa Attorneys Inc. BLOEMFONTEIN On behalf of the Accused 3: Adv Motselebane Instructed by: ZB Moletsane Attorneys. BLOEMFONTEIN On behalf of the Accused 4: Adv Ramlal Instructed by: Abdool and Associates. c/o Bezuidenhouts Inc. BLOEMFONTEIN On behalf of the Accused 6: Adv L Hodes SC Instructed by: Denga Incorporated. BLOEMFONTEIN On behalf of the Accused 7-16: Adv M Helens SC Adv D Joubert SC Instructed by: Krause Attorneys Inc. c/o Honey Attorneys. BLOEMFONTEIN

- [1] Ramabele v S; Msimango v S [2020] ZACC 22; 2020 (11) BCLR 1312 (CC)
- [2] Sanderson v Attorney-General, Eastern Cape [1997] ZACC 18; 1997 (12) BCLR 1675.
- [3] Shabalala & Others v Attorney-General of the Transvaal & Another [1995] ZACC 12; 1996 (1) SA725.

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