

SOUTH AFRICA / JUDGMENT

S v Zonke and Others (CC 30/15) [2023] ZANWHC 31 (10 March 2023)

[2023] ZANWHC 31**COURT**

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

CC 30/15

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

**IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: CC 30/15**

Reportable: YES / NO
Circulate to Judges: YES
/ NO

Circulate to Magistrates: YES / NO
Circulate to Regional
Magistrates: YES / NO

In the matter between: THE
STATE
And
ANELE
ZONKE
ACCUSED 1
XOLANI
NZUZA
ACCUSED 2
SIMPIWE
BoOl
ACCUSED 3
KHANYILE
KANYISE
ACCUSED 4
MZOXOLO

MAGIDIWANA
ACCUSED 5
THOLAKELE
DLUNGA
ACCUSED 6
SAMEKELO
MKHIZE
ACCUSED 7
AMANDA
NOGWAZA
ACCUSED 8
THOBILE
TYOBENI
ACCUSED 9
MAJEKE
NONKONYANA
ACCUSED 10
MZUKISI
SOYINI
ACCUSED 11
BONGILE
MPOTYE
ACCUSED 12
ZAMIKAYA
NDUDE
ACCUSED 13
STHEMBELE
SOHADI
ACCUSED 14
LOYISO
MTSHEKETSHE
ACCUSED 15
ZOLOLE
HOXO
ACCUSED 16
FUNDISILE
LAQHWESHWI
ACCUSED 17
ZWELITSHA
MTSHENA
ACCUSED 18
MZIWANELE
MXINWA
ACCUSED 19
MZOXOLO
ZUKULU
ACCUSED 20
DATE OF
HEARING
7-8 March 2023
DATE OF

JUDGMENT

10 March 2023

**RULING IN THE APPLICATION FOR POSTPONEMENT OF THE
CRIMINAL TRIAL BY THE ACCUSED
REDDY AJ**

Introduction

[1] Justice delayed is justice denied. This adage often quoted in the context of criminal trials is a double edged sword, as will be demonstrated in this matter. The dawn of democracy signalled the cessation of a number of atrocities and human rights abuses. It was a departure from a dark past. It was to usher in an equal and level playing field for all who fell under the umbrella of the protection of the Constitution, identified as the Supreme Law of our land. Embedded within the Supreme Law was our Bill of Rights. The Bill of Rights encapsulated a number of rights which were now afforded constitutional protection. Subsumed therein is section 35(3) (d) of the Constitution which entrenches an accused's right to a speedy trial and provides that:

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

- [2] A careful conspectus of the history of the present criminal trial is a far cry from the laudable prescripts as contained in the Bill of Rights, our common law (where applicable), case law, and the law of general application. This criminal trial has been meandering through the Court since its inception during December 2015 and is a prime example of lip service being paid to constitutional injunctions governing a fair and speedy trial.
- [3] This trial was set down to commence during the course of this week, from 6 to 10 March 2023, at the instance of the Judge President of the Division and confirmation of the dates by the dramatis personae who are at the centre of the conundrum which necessitated this judgment.
- [4] On 6 March 2023, the first day of trial, accused four (4) reportedly had financial constraints which circumvented him using public transport en route to a common meeting place, from which prearranged transport would ferry some of the accused to this Court.

- [5] As the court day progressed it became apparent that accused 4 would not be able to secure money to make the complete journey to court. By consensus with all role-players, the trial stood over to 7 March 2023. In accordance with common practice, a warrant of arrest was authorized for accused 4, but the issue thereof was held over until 7 March 2023. It was further placed on record that there would be a substantive application for the postponement of the trial by the defence.
- [6] On 7 March 2023, all the accused appeared but for certain accused who had in the period since their indictment, passed on. Before proceeding to a dissection of the application for the postponement, it would be prudent to provide a background of the circumstances leading to the indictment of the accused and the litigation history.

Background to the indictment of the accused and the pending review application in the Gauteng Division

- [7] Arising out of the much publicized and tragic occurrences at Marikana between the 12-14 August 2012, the Director of Public Prosecutions, North West indicted the accused before the High Court North West, on a number of counts as appears from the summary of substantial facts in terms of section 144(3) (a) of the Criminal Procedure Act 51 of 1977 ("the CPA"). I was assured by Advocate Muneri that the indictment for trial purposes, had the trial commenced, was the indictment handed to me for the preparation of this judgment. I accept the same.
- [8] An examination of the indictment illustrates the gravity of the allegations, where the so called Minimum Sentencing legislation, that is the Criminal Law Amendment Act 105 of 1997 finds application in respect of some of the charges. To underscore this, the ultimate penalty of life imprisonment finds applicability to some of the charges, in the event the State secures a conviction on those charges.
- [9] In an attempt to put the tapestry of the history of this trial in perspective I have noted that the accused duly represented, sought the intervention of the former National Director of Public Prosecutions, Advocate S.K. Abrahams. Advocate Abrahams was petitioned to reconsider the decision of the Director of Public Prosecutions, Mmabatho ("the DPP"), to prosecute the accused. This is evident from correspondence dated 24 August 2016 and emailed on 25 August 2016. It took Adv Abrahams approximately ten (10) months before correspondence dated 30 June 2017, predicated on the law and Prosecuting Policy, reveals that he would not capitulate on the decision of the DPP. The decision remained to prosecute the accused. It is this decision of Advocate Abrahams, which is the subject of a pending judicial review, wherein the accused (applicants) seek to declare invalid, unlawful and unconstitutional the decision taken by Adv Abrahams ("the review application").

The litigation history in this Court

[10] A chronological examination of the orders available in the court file and the transcribed record reveals the following. The accused appeared in this Court on 2 December 2015 for the purposes of a pre-trial conference. The rhetoric of a pre-trial conference hereafter appears to follow mechanically with each postponement. The matter was postponed on 2 December 2015 to 18 April 2016 for a pre-trial

conference. On 18 April 2016, the pre-trial conference was postponed to 29 August 2016. By this date the decision of Adv Abrahams was known to the legal representatives of the accused. As a matter of course the matter was postponed on 29 August 2016 to 7 November 2016, once again for a pre-trial conference.

[11] The rhetoric of postponement for a pre-trial conference was perpetuated on 7 November 2016, when the matter was postponed to 20 February 2017.

[12] The rhetoric of a pre-trial conference changed when on 20 February 2017, the matter was postponed to 31 July 2017- 4 August 2017. Whilst the reason for this postponement is unclear, I can only surmise that the time period is suggestive of trial dates. There is no court order on file for any of the days from 31 July 2017 to 4 August 2017. What appears next is that on 13 October 2017, it was reported that accused 10 had passed on. This resulted in a postponement of the matter to 12 February 2018.

[13] During 2018, the rhetoric changed to the finalization of the review application. To this end, on 12 February 2018, the matter was postponed to 18 June 2018 for the review application to be finalized. There is no court order for 18 June 2018, the proceedings were recorded digitally and it will be dealt with here under. The matter was postponed to 4 February 2019 pending the review application.

[14] During 2019, the matter was postponed routinely without any reason reflected. I surmise that it was still for finalization of the review application. To this end, on 4 February 2019, the matter was postponed of 6 May 2019, pending the review application. The proceedings of 4 February 2019 will be referred to more fully below. On 6 May 2019, the matter was postponed for a date for the hearing of the review application. On 18 October 2019, the rhetoric of a pretrial conference manifested itself again and the matter was postponed to 10 February 2020.

[15] On 10 February 2020, the matter was postponed to 31 July 2020 by agreement, pending the review application. On 31 July 2020, the matter is once again postponed for a pre-trial conference, to 2 November 2020 for pre-trial conference. On 2 November 2020, in a shift, again the matter was postponed for the outcome of the review application, to 1 March 2021.

[16] On 1 March 2021, the matter was postponed to 26 April 2021, to enable the State to file its answering affidavit and the accused to file their replying affidavit in the review application and the production of proof that an application for the hearing has been filed with the Registrar of the High Court in Gauteng. On 26 April 2021 it was recorded that the State filed its answering papers on 13 April 2021. The filing of the answering papers I note, was done

almost three and half years after the application was launched in the Gauteng Division on 11 October

- [17] It is on record that the accused have not filed a replying affidavit. All this, notwithstanding the prescribed timeframes applicable to review applications. The matter was postponed on 26 April 2021 to 30 July 2021 to enable the accused's legal representatives to finalise the review application.
- [17] On 30 July 2021, the record reflects that accused 6, 10 and 17 were deceased. It is further noted in terms of the court order that the review application was still pending and the accused/applicants are expected to file their replying affidavit and heads of argument on or before the 1st week of October 2021 and then the trial date would be requested. The matter was accordingly postponed to 26 November 2021. On 26 November 2021, the matter was postponed to 18 March 2022 for the outcome of the review application. The State and defence were ordered to communicate on the position in respect of the review application before 18 March 2022.
- [18] On 18 March 2022, the matter was postponed for the outcome of the review application to 27 May 2022. The postponement for the outcome of the review application became the new rhetoric. To this end, on 27 May 2022, the matter was postponed to 9 September 2022 pending the review application. The rhetoric appears to have changed when on 12 September 2022, a firm stance was taken by the present Judge President, resulting in a postponement of the matter to 28 November 2022 to 2 December 2022, which appears to be for trial. On 29 November 2022, the matter was postponed for trial to 6 – 10 March 2023, after confirmation of the dates by all the parties.

The application for the postponement

- [19] The litigation history as aforesaid provides the background to the substantive application for postponement by the defence that I have been called upon to consider. I was informed from the bar that for purposes of practicality, convenience and effectiveness in the face of a potential trial the accused were divided into two groupings. Mr Thlhatlha would represent certain accused and Advocate Nkome others, but as a collective both representatives formed part of a legal team that represented the accused from the infancy of the matter. For pragmatism I delineate the primary grounds for the application for the postponement as follows:

Unavailability of Senior Counsel

- [20] An examination of the record reinforces that Advocate Mpofu SC, has been intimately involved with the legal ramifications of the events that occurred at Marikana since its inception at different legal platforms. This much was confirmed by Advocate Nkome. It is further unquestionable that the trial date for this particular week was not pre-arranged with Advocate Mpofu SC. The reasons advanced for this is clearly untenable. What is apparent is that this neglect must squarely fall at the door of the legal representatives not the accused.

[21] It was argued that the accused prefer Advocate Mpofu SC to represent them for trial purposes. Given the neglect of not having determined the availability of Senior Counsel, the question before this court was whether the legal representatives before court, were adequately au fait with the matter to proceed with trial. Mr. Tlhatlha and Advocate Nkome openly conceded that neither were prepared for trial. Advocate Muneri for the State seemed to initially acquiesce in the postponement of the matter. It was at best cumbersome to determine the precise stance of the State regarding the application for the postponement, with Adv Muneri blowing hot and cold on the issue.

Absence of a pre-trial hearing

[22] This ground for the application independently is meritless, even if read conjunctively with the other submissions. It did not alter the fact that the matter was postponed, a minimum of 6 times for a pretrial conference with same not materialising. In any event, logic dictates that it would have served no meaningful legal purpose to hold a pre-trial conference when Senior Counsel who was to lead the defence was not available to make any concessions and/or admissions that would not be prejudicial to the accused.

The review application

[23] The decision to prosecute the accused is set to be reviewed in the Gauteng Division, Pretoria under Case Number 70192/2017. In the absence of a fully properly ventilated review application, it would be prejudicial for this court to proceed with the criminal trial. The argument ran that the review application may be dispositive of all the criminal counts that the accused have been indicted on.

Submissions by Advocate Muneri

[24] The submissions by Adv Muneri were disjointed as he abrogated and probated between no opposition to the application for the postponement and opposing same. This stance metamorphosed the more this Court engaged on the State's readiness to proceed to trial. What ultimately stood out, was that in face of the accused's present legal team not being adequately prepared for trial, it would not serve the interests of justice to proceed with the trial, although the state witnesses were present.

[25] In respect of the pending review application, Advocate Muneri was unable to take the status of the review application further given his absence of knowledge on the issue and not being intimately involved in the review matter.

[26] Advocate Muneri was adamant that the prosecution was fully prepared for trial and that witnesses were available to proceed at least for this week that the trial had been set down for. In fairness to the State, five (5) witnesses were present on Monday afternoon, until they were excused, when it became apparent that accused 4 would not arrive at court. Advocate Muneri, indicated that the other witnesses were excused by him.

The law on an application for a postponement

[27] In Erasmus, Superior Court Practice, Vol 2, pp DI-552A, the following is said about postponements, albeit in the context mainly in civil matter, the principles which apply equally in criminal matters:

"The legal principles applicable to an application for the grant of a postponement by the court are as follows:

- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.
- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal,
- (c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.
- (d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.
- (e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.
- (f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.
- (g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the applicant in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not. "

[28] An application for postponement must be made bona fide. It must have a specific objective in mind, and it must give due consideration for competing role-players that co-exist within interests of justice. Bona fides is analogous to good faith. I have no basis to doubt the bona fides of the application for the postponement. Mr Tlhatlha indicated in open court, candidly and on record that notwithstanding more than twenty years of legal experience he would be unable to proceed with trial without proper and adequate preparation if the application for the postponement was dismissed. In the event that the trial proceeded the accused were divided into two groupings in order for Mr Tlhatlha and Advocate Nkome to properly deal with each of the accused defences.

[29] There is no underscoring, the neglect in securing the attendance of Senior Counsel by the defence. A microscopic examination of the factors that led to this inept decision does not have any meaningful purpose, in fact it is an exercise in futility. A more meaningful and pivotal two pronged question that should be posed in my view, is what about the accused's right to a fair and speedy trial and what about the witnesses and the families of the deceased who have been involuntarily connected by virtue of the killing of their loved ones? The sentiments expressed in a plethora of cases from the Constitutional Court underscore the competing and valid interests of the accused and the family of the deceased. In *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC), the Constitutional Court said the following:

"28. The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime. '

[30] I have addressed the issue of the postponement founded on the absence of a pre-trial hearing.

The pending review application and its effect on the criminal trial

[31] In my assessment and a reading of the court orders, the pending review application stands out as the singular obstacle to the commencement of this trial. It may or may not be dispositive of the trial. The pending review application has been the nucleus accounting for the delay to the commencement of the trial.

[32] It is well documented that the accused are indicted on a plethora of charges extending over the period 12-14 August 2012. The accused appeared in the High Court on 2 December 2015 for the first time. We are seven years on and counting. The delays occasioned by the initial representations to Adv Abrahams are set out above. It took 10 months (close on a year) for Adv Abrahams to make a decision on the representations. At this point the accused were awaiting trial for approximately 18 months and intertwined parties were awaiting their day in court.

[33] A court, is a court of record. The record I have enunciated above, sadly ventilates a sorry tale of complicity and inaction on the part of the defence and prosecution. The submissions before me were further testimony to this inescapable fact. The inordinate delays in prosecuting the review application, which, without derogating from the seriousness of this matter, does not appear to be a review of the kind which should keep a review court engaged for months or even years. One thing though is clear, the ideals in the Bill of Rights in respect of criminal trials, which is underscored by the notions of a fair and speedy trial have been rendered nugatory. In fact, the collective conduct exhibits scant regard for interests of justice. This certainly cannot in good conscience be perpetuated.

Section 342A of the Criminal Procedure Act 51 of 1977

[34] I digress to deal with a legal principle which finds general application in section 342A of the Criminal Procedure Act, 51 of 1977. The pertinent part of section 342A, which is headed "Unreasonable delays in trials" reads:

"(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—

...

- (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.

[35] The overarching aim of section 342A is to "provide courts with a statutory mechanism to avoid unreasonable delays in the finalisation of criminal proceedings. (See Du Toit Commentary on the Criminal Procedure (Juta & Co Ltd, Cape Town 2020) at 29. Section 342A empowers a court to examine the reasons for the delay. In order to ascertain whether the delay is reasonable or not, courts consider an array of factors as stipulated in section 342A (2). In the event the court finds that the delay is unreasonable, section 342A (3) provides an open list of potential remedies. (See *Ramabele v S*; *Msimango v S* (CCT 232/17; CCT 207/18) [2020] ZACC 22; 2020 (1 1) BCLR 1312 (CC); 2020 (2) SACR 604 (CC) (16 September 2020).

[36] Advocate Muneri was adamant that the State was ready to proceed with the trial, and the physical presence of state witnesses fortified this submission. There was no application before me for a postponement of the trial by the prosecution. It was the existence of the pending review application that disoriented the State. In the conduct of this specific trial, it cannot be said that the defence had unreasonably delayed this trial. The undeniable fact was that this matter was set down for trial for the first instance as per the records on 29 November 2022. (trial date being the 6-10 March 2023). Section 342A of the CPA does not assist this Court when regard is had to the mosaic of circumstances relevant to this criminal trial. I may emphatically say that section 342A was not designed to canvass the peculiar circumstances attendant in this matter. What is the way forward for this matter? No tangible

solution has been forthcoming from the state and defence. The postponement of the matter will undoubtedly result in a perpetuation

of the mosaic I have sketched above.

The inherent jurisdiction of the High Court

[37] Inherent jurisdiction is an English common law doctrine in terms of which a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other tribunal. (See *M v M* 2017 ZAGJJHB 279(28 March the English case of *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, Lord Diplock described the court's inherent jurisdiction as a general power to control its own procedure so as to prevent being used to achieve injustice. This court's inherent jurisdiction applies to an almost limitless set of circumstances. There are four general categories for its use, namely to:

- (i) ensure convenience and fairness in legal proceedings.
- (ii) prevent steps being taken that would render judicial proceedings ineffective;
- (iii) prevent abuses of process; and
- (iv) act in aid of superior courts and in aid or control of inferior courts and tribunals. (See *M v M supra*)

[38] In *Ex Parte Millsite Investments co (Pty) Ltd*, [1981] AC 909 the court per Vieyra J said the following about inherent jurisdiction:

apart from powers specifically conferred by statutory enactments and subject to any deprivation of power by the same source, a Supreme

Court can entertain a claim or give any order which at common law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgements courts have spoken of the inherent power of the Supreme Court. The inherent power is not merely one derived from the need to make the court order effective, and to control its own procedure, but to hold the scales of justice where no law provides directly for such a given situation.

[39] Pollak speaks to the inherent jurisdiction it as follows:

"In short, therefore, the position is that unlike, say, the magistrates' courts or the industrial court, the power of the Supreme Court is not spelled out in a legislative framework and limited by its creating statute: it inherently has all such power as entitles it to entertain to hear 'all causes arising' within the area over which it exercises jurisdiction." Pistorius Pollak on Jurisdiction 2 ed (1993) 28.

[40] The Constitution of the Republic of South Africa, more specifically Section 173 of the Constitution reads as follows:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Discussion

[41] In the exercise of the inherent jurisdiction of this Court, I canvassed the removal of the matter from the roll with the state and defence. The defence aligned itself with the notion of the exercise of my inherent jurisdiction to remove the matter from the court roll pending the finalizing of the review application. Advocate Muneri for the state, however, was vehemently opposed to the removal, contending that such a ruling would set a dangerous legal precedent. This submission is respectfully demonstrative of a lack of knowledge of the procedural effect of a removal of the criminal trial from the court roll, which is entrenched in precedent.

[42] The law is trite in this regard. It was considered in *Zuma v Democratic Alliance and Others* 2018 (1) SA 2000 (SCA) and again in *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v NDPP* [2008] ZACC 14; 2009 (1) SA 141 (CC). In *Zuma* it was stated:

"[41] There are two obstacles in the way of this argument. First once a case is struck from the roll, the case terminates and is no longer pending. There is no guarantee that the criminal proceedings will be reinstated. Removal of a matter from the roll is therefore abortive of the currency of the trial proceedings. Should the trial ever be re-enrolled, it would start anew.

[42] As soon as the criminal matter had been struck from the roll by Msimang J: therefore, the criminal proceedings were terminated and the proceedings were no longer pending. At the time, Mr Zuma had not yet pleaded to the charge. Even if there might have been an intention on the part of the NDPP at that stage to reinstitute proceedings, there was no guarantee that he would actually do so. But it would not matter even if the probabilities were that he would do so.

(my emphasis)

[43] In *Jojwana v Regional Court Magistrate and Another* (5435/17) [2018] ZAECHMHC 54; 2019 (6) SA 524 (ECM) (11 September 2018) the following was said in relation to a matter being struck from the roll, in echoing the sentiments in the *Zuma* and *Thint* judgments:

"[10] In my view the above cases do not lay down a general rule that if a matter is struck from the roll it is thereby terminated and may not be re-enrolled. The striking of the matter from the roll has nothing to do with the merits of the case. In civil matters it often happens that if a party has either failed to comply with practice directives such as pagination, filing of heads of argument etc, or that the applicant or plaintiff failed to appear when the matter was called, the matter is struck from the roll. In practice where the matter has been struck from the roll under those circumstances it may be re-enrolled upon the delivery of an affidavit explaining the reasons for the failure to comply with the practice directive and/or failure to appear when the matter was called. In this context therefore striking of the matter from the roll is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement. Furthermore, the cases relied on by Mr Zono were decided in the context of criminal proceedings. In any event, even in those cases the criminal proceedings were not terminated against Mr Zuma hence his resent trial for the same charges. The word 'terminate' was not used in the context of its general meaning, namely, to 'bring to an end': to 'close' • to 'conclude' • or to 'discontinue'. In my view when the courts said the proceedings were 'terminated' they meant suspension thereof pending any decision to reinstate them." (my emphasis)

The complicity of the state and defence in the review application

[44] I intend to set out the history of the review application in detail to provide an insight into the complicity of the prosecution and defence in the delay in prosecuting the review

application.

[45] On or about 30 June 2017, it became apparent to the defence that the prosecution against the accused would proceed. On 11 October 2017 under the cover of Case Number 70192/2017 (Gauteng Division of the High Court Pretoria) the review application was set in motion. The fulcrum of the review was to declare the decision of the National Director of Public Prosecutions to continue with the prosecution of the accused invalid, unlawful and unconstitutional. The incomplete application tendered into evidence exhibits no service date on the State as respondents.

[46] On 13 October 2017 at one of the appearances of the accused in this Court, the existence of the review application launched in the Gauteng Division, Pretoria was disclosed. By agreement with the prosecution a lengthy postponement was secured pending the review application. Hendricks DJP (as he then was) stated as follows:

"COURT: The matter is remanded until the 12th day of February 2018. The reason for the remand is that representations has been made to the National Director Public Prosecution. ..

No, let me correct it. An application has been launched in the North Gauteng High Court to have the decision of by the National Director of Public Prosecutions to proceed with the prosecutions of this matter being reviewed. Now that matter is still pending and this matter cannot proceed before that review application has been dealt with. It is for that reason that the matter is remanded until the 12th February 2018..

[47] The aforesaid statement by Hendricks DJP (as he then was) is critical as to the inextricable nexus between the review application and the criminal trial. This nexus was highlighted in the ruling, two days after the issuing of the review application on 11 October

2017. There can be no doubt that the prosecution and defence were aware of this ruling. On 12 February 2018, the matter was postponed to 18 June 2018 for the review application to be finalized. The transcribed record of 18 June 2018 reflects that neither Advocate Nkome nor Advocate Muneri addressed the court regarding the pending review. Advocate Muneri was silent regarding the status of the answering affidavit of the State in the review application. Advocate Nkome did not bring to the court's attention the complacency of the respondents in the review application, which includes the absence of the record which the accused sought from the State/ respondents to prosecute the review. The inextricable nexus between this criminal trial and the review application was once again accentuated when the matter was postponed to 4 February 2019. The following appears from the record:

"Court: ... 4th of February. Yes. This matter is postponed to 4th February

2019. This is pending your application. An application has been filed by you wherein you request a stay of prosecution in this matter. And the matter is pending in the Gauteng High Court, and it is enrolled as an application there, and it is still oin there. Until such time that that matter is finalised this matter will not proceed.

(My underlining)

[48] On 4 February 2019, the matter was postponed to 6 May 2019. On 4 February 2019, the complacency of Advocate Muneri and Advocate Nkome had escalated into factual inaccuracies. It is best demonstrated with reference to the transcribed record of 4 February 2019:

"MR MUNERI: Thank you, M'Lord. This matter has been remanded to today pending the outcome of the review application brought by the accused in the high court, challenging the decision of the NDPP to charge them. Until to date, M'Lord the Court may be informed that we do not have a decision yet. Together with the defence we agreed that PENDING THE DECISION OF THE HIGH COURT IN PRETORIA NORTH THE-RATHER GAUTENG NORTH, the matter may be remanded to the 6th day of May in the year 2019.

COURT: Yes?

MR NKOME: May it please the honourable Court. I confirm the arrangement of the remand of this matter to the 6th of May in the year 2019, M' Lord. May I further, M' Lord submit...

[49] The matter was then postponed on the following basis:

"COURT... ..the reason for the remand is they have filed an application with the Director of —with the North Gauteng High Court to review the decision of the National Director of Public Prosecutions in order to prosecute them. Now that review is still in the process, because the state has filed an answering affidavit. They need to reply thereto. The matter will be then be enrolled, and it will be heard on a specific day. And that outcome it will...Or the outcome thereof will determine whether this matter will proceed or not..

[50] The record will later explicate that on 4 February 2019, the State's answering affidavits had not been filed, and this should have been within the express knowledge of both counsel. If there had been a bona fide error, either of counsel were at liberty to correct the court's ruling that the answering affidavit had not been filed. This was not done. In fact, as shown above, this is exacerbated by Adv Muneri's intimation to the court acquiesced in Adv Nkome that they (the State and defence) do not have a decision yet and pending a decision from the Gauteng Division, they agreed on a postponement of the criminal trial. Implicit in the submission that the State and defence were awaiting a decision is that all affidavits had been filed and the review application has been argued. But as shown and will be elaborated upon below, the State had at this stage not even filed an answering affidavit.

[51] On 6 May 2019 the accused appeared before the former Judge President Leeuw. Advocate Muneri addressed the court as follows as it appears from the transcribed record:

"MR MUNERI: Thank you, M' Lady. This...matter has been remanded until today awaiting the decision by the North Gauteng High Court with regard to the application to review the DPP's decision to-to prosecute the accused before this Court.

To date the matter is still seized with the North Gauteng High Court. We do not have the date yet. However, if I may help the Court, we have agreed with the defence that the matter may be remanded to the 18th day of October, the year 2019.

COURT: Yes, Mr Nkome?

MR NKOME: As it pleases the Court, M'Lady. I do confirm that indeed the submissions by my learned colleague, to the effect that the matter is dealt with as a matter of priority before the North Gauteng High Court, and we expect that come the 18th of May it would have been heard. I also need to submit, M'Lady, that before the Court we have got all the accused, say for accused number 7, Sarnkelo Mkhize, who apparently is in custody in a different matter. He has just been arrested, M'Lady.

COURT: So you say the position with the application at Gauteng-North High Court is that you are still awaiting a date of trial.

MR NKOME: Indeed so. WE are still awaiting a date. And it has been confirmed to us as that it is dealt with as a matter of priority.'

[52] The submissions by both counsel to Leeuw JP were simply disingenuous and sadly they did not as officers of the court portray the true state of affairs with the review application to Leeuw JP. With great tedium, I repeat, this could never have been the status of the review application. I re-iterate that as the position was in February 2019 when the misleading statement was made by counsel in February 2019 that the State's answering affidavit had not been filed, on 6 May 2019, the answering affidavit had still not been filed. The answering affidavit was in fact only filed on 13 April 2021, two years after the Court was misled in February and May 2019 that the answering affidavit had already been filed. Advocate Nkome peculiarly and with great gusto sought to emphasize this before me, forgetting that he was complicit in this misleading information fed to the Court in 2019.

[53] Notably the record of the Marikana Commission that was received only a few weeks ago and never brought to the attention of this Court at any of the appearances to date, in fact the absence of the record has hampered the filing of a replying affidavit. The suggestion by Advocate Nkome in February 2019 that come 18 May 2019, the review application would have been heard was nothing more than misleading.

[54] This brings me to February 2020, after the matter was postponed in May 2019 for a pre-trial conference. On 10 February 2020, Adv Jika appeared for the prosecution and Advocate Nkome for the accused. In respect of the pending review application Advocate Nkome stated:

"MR NKOME: That it be held over up until the 31 st of July. I confirm, M'Lady that the date of the 31 st of July is by agreement, pending the review application of the decision of the former NDPP, Mr Abrahams, to prosecute in this matter.

We, M'Lacly, would like to place it on record that if the review application is heard by March. we will then approach the Court once more and request that this date be brought forward as that this matter can be finalised M'Lady, because it has been long outstanding.

[55] From the aforesaid submission of Adv Nkome to Nobanda AJ, the Court was once again misled as to the true state of affairs with the review application. Adv Jika acquiesced in this misleading statement by Adv Nkome. This led to a further postponement of the matter to 31 July 2020 for a pre-trial conference. I underscore that the record confirms the submissions made and the impropriety thereof. On 31 July 2020, the matter was postponed to 2 November 2020 for a pre-trial conference. The ineluctable deduction is that as hindsight with a complete transcript of the record reflects, the wool was once again pulled over the eyes of this Court.

[56] The proceedings of 2 November 2020 are set out below:

"MR MUNERI: Thank you, M'Lady... M'Lady, I am Muneri TR. I am representing the state. The matter before this Court is before this Court pending, awaiting the application that has been brought before the North Gauteng High Court by the accused who are opposing the decision of the National Director of Public Prosecution to try...findistinctl. Even today the matter has not been heard in the North Gauteng High Court. We are still waiting for the date and the finalisation of the

matter. And as a result we agreed that the matter be remanded to the 1 st day of March in the year 2021.

MR NKOME... I confirm. M'Lady that it is by agreement that this matter be remanded to the 1 st March in the year 2021. The reason being, M'Lady that it is pending the finalisations of a review application against the decision of the then National Director of Public Prosecutions Mr S. Abrahams We are awaiting. We filed the review. We are waiting the state to file its answer. And then onl M'Lad can we obtain a date and have the matter finalised. That being the case, M'Lady...

[57] In a turn of events and in all probability having forgotten the misleading statements made previously, Advocate Nkome in stark contrast to submissions made previously, informs the Court that they are still awaiting an answering affidavit from the State. This exposes Advocate Muneri to prosecutorial misconduct given the totally inaccurate and unsubstantiated submissions that were made by him as an officer of the court, with similar misconduct on the part of Adv Nkome who acquiesced in Adv Muneri's misleading submissions and had also perpetuated misleading statements to the Court.

[58] Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the State and s 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement. That legislation is the NPA Act which provides in relevant part:

'32 Impartiality of, and oath or affirmation by members of prosecuting authority -

(1)(a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law." A prosecutor's

function is not merely to have the matter placed on the roll to then simply be postpone it. A prosecutor must pay attention to the contents of his docket. A prosecutor must act with objectivity and must protect the public interest. In the present case that was not done. (See *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 SCA)

[59] With the true state of affairs now on record, that the State had not filed its answering affidavit in the review application, the matter was postponed on 1 March 2021 to 26 April 2021, to afford the State an opportunity to file its answering affidavit in the review application, so as to ensure that the accused could file their replying affidavit. This Court sought proof by 26 April 2021 that an application for the hearing had been filed with the Registrar of the Gauteng Division. On 26 April 2021, the matter was postponed to 30 July 2021, for the finalisation of the review application. On 30 July 2021, the matter was postponed to 26 November 2021, the draft order, records that the applicants are expected to file their replying affidavit and heads of argument on or before the 1 st week of October

2021. Needless to say that has not been done to date. On 26 November 2021, the replying affidavit and heads had not been filed. By agreement, the matter was postponed to 18 March 2022.

[60] On 18 March 2022 the record reads:

"MR NKOME: As it pleases the Court, M' Lady. I do confirm indeed that the accused's non-appearance today was by agreement, and it was as a result of discussions that were held to the effect that the review application in the North Gauteng High Court was still pending.

Now it looks as though by April the matter possibly could have been wrapped up in North Gauteng.

COURT: Okay.

MR NKOME: And for that reason we are committed that this matter may be remanded to the 27 May for a decision in respect of the outcomes of the North Gauteng High Court. I do confirm indeed that we will make all means possible to make sure that all the accused are present before Court, We have got... [intervenes]

COURT: on the 27th

MR NKOME: all of their contacts. As it pleases the Court, M'Lady

COURT: So you are hoping that on-in April end of April the review application will be finalized.

MR NKOME: Indeed so, M'Lady

[61] With what was purportedly firm guarantee from Adv Nkome that the review application would be finalised by the end of April 2022, the matter was postponed to 27 May 2022. No difficulty regarding the accessing of court proceedings or the Marikana Commission's record, was ventilated.

[62] On 27 May 2022 the record reflects that Adv, Muneri was uncertain whether the heads of argument had been filed by the applicants in the review application. In the absence of counsel for the accused the matter was postponed to 9 September 2022 for a pre-trial conference, pending the finding or review application in the Gauteng Division.

[63] On 9 September 2022, the rhetoric relating to the pending review application continued as the record reflects:

"MR MUNERI: Thank ou M'Lord. M'Lord because of what I have stated M'Lord the decision b the NDPP to char e the accused has been taken for review. THIS MATTER CANNOT PROCEED TODAY. HENCE AN AGREEMENT that the matter may be remanded to the 29th day of November in the year 2022 pendingq the findinqs from the application.

MR NKOME: May it please th Court, M'Lord. I confirm indeed that the submissions b m learned collea ues are b a reement to the effect that the matter be remanded to the 29th of November for us to be allocated a date for the review of the National Director of Public Prosecutors' decision the then Shaun Abrahams..

[64] The submission by Adv Nkome was once again clearly misleading. There is simply no way a date would be allocated for the hearing of the review application, if on, what is now known from Adv Nkome, they had not filed their replying affidavit at that stage and have still not filed their replying affidavit. On 29 November 2022, the matter was postponed for trial to this week, being 6-10 March 2023. The review application, unsurprisingly has not been finalized.

[65] I have intentionally and for specific reason quoted extensively from the court record. The litigating conduct of Advocate Muneri and Advocate Nkome speaks for itself as evidenced by the record. It is replete with misleading submissions in which Advocate Muneri and Adv Nkome had acquiesced. In engaging with Adv Muneri and Adv Nkome fully in the application for postponement, the true state of affairs of the trial readiness of this criminal trial has been laid bare and revealed. This is evinced from the court record. Neither Adv Muneri nor Adv Nkome can hide from the truths or untruths which have been uncovered.

[66] Adv Nkome has conceded that the replying affidavit had not been filed as at 7 March 2023. Even at this stage, where the State purports to be trial ready, no time frame is envisaged within which the replying affidavit would be filed. The reason proffered by Adv Nkome — the Marikana Commission record, which has only recently been received is a lengthy record. It was therefore imprudent for Adv Nkome to apportion blame solely to the State, whereas the accused (applicants in the review) are dominus litus. If the record was required and not presented for the purposes of the review, then the mechanics of the law should have been invoked to ensure that the required record was received. This has not been done in all the

years since the review application was launched. In the same vein, if the accused (applicants in the review) had not taken the next procedural step, the State (the respondents in the review) could have followed the next procedural step in the review to expedite it.

- [67] Advocate Muneri labours under a misapprehension which must be placed in context and stifled. It became increasingly apparent in oral argument by Adv Muneri, when it was requested that the State Attorneys be called to testify regarding the review. This submission was in all probability generated by Advocate Muneri, feeling the proverbial pinch of the shoe. I underscore that Advocate Muneri appeared for the State on innumerable occasions, during which submissions were made, which ex facie the record were factually incorrect.
- [68] Adv Muneri's contention and insistence that the State has always been ready to proceed to trial is not echoed in the many misleading statements he made to this Court over the years. What is particularly telling is that, premised his submissions and that of Adv Nkome, which led to the Court recording on 13 October 2017, more than five years ago, that because there was now a review application pending in the Gauteng Division, the matter, that is this criminal trial, cannot proceed until the review application is dealt with, Adv Muneri did not correct the Court to state emphatically that the State even at that stage was ready to proceed to trial. I interject at this stage, to make the point that once a matter is transferred to the High Court, which is never a Court of first instance in criminal matters, it is accepted that a matter is trial ready and that there should ordinarily be nothing to hamper the commencement and finalisation of the trial. The trial readiness Adv Muneri now professes to which he says has always been the case with the State, would be trial readiness inimical to that when a criminal trial is transferred to the High Court. As this Court now knows, Adv Muneri acquiesced in the Court's recording wherein he submitted : "Until such time that that matter is finalised, this matter will not proceed... " and "Or the outcome thereof will determine whether this matter will proceed or not." I cannot fathom how Adv Muneri could now argue otherwise.
- [69] If truth be told, having regard to what this Court has painstakingly set out above, no blame can be apportioned to the accused for the delay in finalising the review and from the State's side a disservice has been done to those affected by the audacity and horror of what is set out in the summary of substantial facts. Adv Muneri's continued insistence only now, that the State is ready to proceed cannot be accepted as being correct and is demonstrative of an attempt to shy away from his complacency and acquiescence in perpetuating the narrative that, pending the outcome of the review, this criminal trial cannot proceed.
- [70] The status of this criminal trial is that the State is not ready to proceed to trial pending the outcome of the review application and possibly any further legal proceedings which may be necessitated from the decision given by the review court. It was opportunistic for Advocate Muneri to attempt to divorce the prosecution from the review application. The nexus between the criminal trial and the pending review application was pronounced on 13 October 2017 as the record reveals. This was within his implicit knowledge. To now bury one's head in the sand and argue the narrative that due to the review being in another

jurisdiction being dealt with by the State Attorney, and is of no consequence or concern to this criminal trial is simply disingenuous. As the lead prosecuting counsel, it would have been expected that a more proactive stance to the prosecution of this trial should have been adopted, in view of the age of the matter. One cannot help but wonder, as to the source of the information that was placed on this record by Advocate Muneri with reference to the pending review. In my view, it could probably only emanate from the State Attorney. This is

suggestive of an interplay between the State Attorney and the prosecution, not the independent and island approach that was sought

to be promoted. The independence of the State attorney and the prosecution is further discounted by the absence of an iota of evidence from the prosecution that pressure was brought to bear on the State Attorney to dispose of the review application. It is

remarkable that at higher echelons, this trial in conjunction with the review application was not case managed and properly tracked to ensure compliance with constitutional imperatives and applicable norms and standards governing a speedy and fair trial.

[71] In arriving at a decision which is both fair to the accused and society and those affected by this matter, I have taken due cognizance that all of the accused have been released on their own recognizance, but for accused

1. I am fully alive to the fact that all of the accused have complied with the conditions of their release and as Advocate Nkome has submitted, are now considered family given the inordinate timeframe within which all the accused have appeared in this Court. The whereabouts of each of the accused as well as contact numbers are within counsel's knowledge. In short, the accused are traceable and contactable.

[72] I have indicated at the outset, an application for a postponement must have an objective. The review application had its genesis in October 2017. In April 2021, the answering affidavit was filed. As at March 2023, no replying affidavit has even been deposed to. The complicity of the state and defence is self-explanatory. Allowing the trial to amble through the court whilst the review remains pending is too take a plunge into the unknown. This Court, the accused and those affected by the crimes set out in the indictment, have been strung along for more than five years, with no end in sight of the review application.

[73] The removal of a criminal matter is not a verdict. This much is clear from section 6 of the CPA. The removal of a criminal matter therefore does not signal the end of the matter, but in the context of the present matter, constitutes a proverbial pause in the proceedings whilst the review application plays itself out. It is not in the interests of justice to string along all the role players, providing false hope through misleading submissions to Court. This, whilst the legal representatives on both sides, demonstrate no vigour in prosecuting the review application to finality.

[74] The sad reality is that this criminal trial is not trial ready and with hindsight and a transcribed record to echo this, could never have been certified trial ready. This Court's ruling today should not be construed as a victory for the accused or defeat for those seeking closure more than decade after the fateful events set out in the indictment. I would classify the ruling as a conscientious endeavour by this Court to prompt the legal teams who have been inactive in the prosecution of the review application into action.

[75] I propose to do so by bringing this judgment to the attention of the Judges President of this Division and the Gauteng Division, the National Director of Public Prosecutions, the Director of Public Prosecutions and the Office of the State Attorney Pretoria.

Order

[76] In the premises, I issue the following order:

(i) The matter is removed from the roll.

(ii) A copy of this judgment must be forwarded to the Judge President of North West Division Mafikeng, The Judge President of the North Gauteng Pretoria, the National Director of Public Prosecutions South Africa, the Director of Public Prosecutions, North West and the Office of the State Attorney, Pretoria.

A REDDY

ACTING JUDGE OF THE HIGH COURT

Appearances:

Date of Hearing: 7-8 March 2023

Date of

Judgment:

10 March 2023

Counsel for the State: Mr Muneri

Attorney for Plaintiff: Legal Aid SA

Mafikeng Justice Centre

NO.742 Dr. James

Moroka Drive

MMABATHO

Tell: 018 381 4582

Counsel for Defendant: Mr Tlhatlha for 1-5, 7-9 and 11 th

Mr Nkome for 12-16 and 18-20th

Attorney for Defendant: NDPP

Megacity Building,

East Gallery

3139 Sekame Street

Tell: 018 381 9015

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2023/31.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-zonke-and-others-unknown-topic-anwhc-2023>

Prepared on 8 October 2026 · Esheria