



IN THE HIGH COURT OF SOUTH AFRICA,
NORTHERN CAPE HIGH COURT, KIMBERLEY

Reportable:	No
Of Interest to other Judges:	No
Circulate to Magistrates:	No

Case number: KS 21/2015

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
NORTHERN CAPE**

Applicant

and

ASHLEY MARK BROOKS

First Respondent

PATRICK JOHN MASON

Second Respondent

MANOJKUMAR DAYABHAI DETROJA

Third Respondent

KOMALIN PACKIRISAMY

Fourth Respondent

AHMED ISHABHAI KHORANI

Fifth Respondent

ANTONELLA NATASCIA FLORIO-POONE

Sixth Respondent

KENYADITSWE MCDONALD VISSER

Seventh Respondent

WILLAM JAN WEENINK

Eighth Respondent

JOSEPH SAREL VAN GRAAF

Ninth Respondent

CARL STEVE VAN GRAAF

Tenth Respondent

KEVIN TREVOR URRY

Eleventh Respondent

TREVOR PIKWANE

Twelfth Respondent

FRANK SAMUEL PERRIDGE

Thirteenth Respondent

HEARD ON: 07 DECEMBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 07 DECEMBER 2018

I INTRODUCTION

[1] This is an application by the Director of Public Prosecutions, Northern Cape for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of this Division against my judgment and order of 10 September 2018 in terms whereof a permanent stay of prosecution was ordered. If I am inclined to grant leave, it cannot be to the Full Bench. For reasons unknown to me the application for permanent stay was allocated to me, a judge from the Free State Division, as the matter could not be allocated to anyone of my colleagues of this Division.

[2] The proceedings since my aforesaid order is a comedy of errors. On 1 October 2018 the applicant filed a notice of application for

leave to appeal, relying on several questions of law. Notice in terms of Rule 30 of the Uniform Rules of Court and several objections by the respective respondents followed. This caused applicant to file a notice of application for reservation of questions of law and leave to appeal in terms of section 319 of the Criminal Procedure Act, 51 of 1977 (“the CPA”) and thereby apparently abandoning the first application. This document, filed on 19 October 2018, was accompanied by an application for condonation for the late filing of the notice of appeal. Again objections by the respondents followed. As a consequence of the objections, applicant filed a notice of withdrawal of its application in terms of section 319 of the CPA as well as a notice intending to amend its initial notice of application for leave to appeal dated 1 October 2018. In essence, this notice of amendment reads the same as the first application for leave to appeal although applicant has refrained from specifically relying on questions of law. Again, as could be expected, objections were filed by respondents. The following is evident: the first application for leave to appeal was effectively withdrawn when the second application was filed. When applicant withdrew the second application, there was no application for leave to appeal before the court, and that being the case, it was not possible to seek the amendment of a notice which did not exist.

II THE PARTIES

- [3] The parties before me are as in the permanent stay of prosecution, save insofar as the former applicants/accused are now the

respondents and the DPP who was cited as respondent is now the applicant.

III THE RELIEF SOUGHT

- [4] I have already referred to the relief sought in the introductory paragraph and do not intend to add thereto, save to mention the following. When I pointed out the defectiveness of the processes followed by the DPP, Mr Roothman informed me that private counsel was instructed to assist in arguing the matter as the State advocates were not *au fait* with civil procedure. He mentioned that he might need to apply for a postponement as private counsel was not available today. He was however made aware of the test in *Plascon Evans* and indicated that he was prepared to argue the merits of the application.

IV POINTS IN LIMINE

- [5] I mentioned above that a Rule 30 notice was filed and objections were raised by the various respondents. I directed at the onset of the hearing this morning that all aspects pertaining to the application should be dealt with and argued simultaneously to enable me to give one judgment on all aspects. When I ruled that I would also deal with the merits of the application, stating that it would be unfair and/or not practicable to strike the matter from the roll based on a technicality, Mr Roothman indicated that he would then be able to proceed with argument. I may just say that the respondents' legal representatives appeared quite astonished when they heard that the DPP might ask for a postponement. This was never raised until this morning as stated by Mr Ebrahim.

V THE STATUTORY PROVISIONS PERTAINING TO LEAVE TO APPEAL

- [6] This application could not be brought in terms of any provisions of the CPA as this Act does not provide for such process. This does not mean that the DPP has no right to apply for leave to appeal as Mr MM Hodes submitted. Some of the other legal representatives were initially adamant that the matter falls to be adjudicated in terms of section 319 of the CPA, although Mr Schreuder correctly conceded that this cannot be so. Mr Van Rensburg insisted with reference to the various judgments of the SCA and the latest judgment of the Constitutional Court in *S v Basson* 2007 (1) SACR 566 (CC) at paragraphs 148 – 152 that section 319 applies in deed. I do not agree. That section deals with questions of law arising during a criminal trial. *In casu* no criminal trial is involved. Mr L Hodes tried to show, based on the *Phillips* judgment quoted *infra* that the present proceedings are catered for in the CPA, but he based his argument on the initial unsuccessful appeal of the DPP in terms of section 310 of the CPA in that matter. The SCA held that the now repealed Supreme Court Act, 59 of 1959 applied to the proceedings. I have no doubt that the provisions of sections 16 and 17 of the Superior Court Act, 10 of 2013, read with the definition of “appeal” in section 1, are applicable. In *The Mont Chevaux Trust v Tina Goosen* (LCC Case Number LCC 14R/2014 dated 3 November 2014), cited with approval by the Full Court in *The Acting National Director of Public Prosecutions v Democratic Alliance*, (GP Case Number 19577/09 dated 24 June 2016) at paragraph 25 and *Notshokovu v S* (SCA Case Number 157/15

dated 7 September 2016) it was held that the wording of subsection 17(1)(a)(i) raised the bar insofar as an applicant for leave to appeal faces a higher and more stringent threshold compared to the provisions of the repealed Supreme Court Act, 59 of 1959 insofar as reasonable prospect of success is concerned.

VI MATERIAL BACKGROUND

- [7] This being an application for leave to appeal, I do not intend to deal in any detail with the submissions made by the parties and/or the background leading to the permanent stay of prosecution. I refer to my judgment of 10 September 2018 and confirm that I shall during the course of this judgment merely refer to certain paragraphs in that judgment when considering the grounds of appeal.

VII THE DPP'S APPLICATION

- [8] The application is totally defective to say the least. In essence, there is no application before the court as the notice of amendment was filed in order to amend an application which was for all intents and purposes withdrawn and could not revive. This being the case, the proper procedure would be to strike the matter from the roll to enable applicant to start afresh if it so wishes. This is what Mr MM Hodes called for. This would mean that I might be approached sometime in the future with yet another application for leave to appeal on dates to be arranged with all the parties and at unnecessary expense to them. Such an order cannot be in the interest of justice. The remainder of the respondents' legal representatives agreed with the practical approach adopted by me.

Therefore I shall deal with the merits of the application, notwithstanding its inherent, if not fatal, deficiencies.

VIII THE GROUNDS OF APPEAL

[9] I shall now briefly deal with the grounds of appeal *seriatim* in the next paragraphs.

[10] I reiterate that the State advocates were under an ethical duty to inform their colleagues representing the former accused immediately of the alleged threats and attempts to bribe the trial judge and a crucial State witness. I refer to paragraph 19 of my judgment. If the State advocates played open cards from the very beginning, the respondents' legal representatives could have confronted their clients to establish whether they were involved in any alleged threats and/or bribery. The parties could at that stage – in 2016 - already decide how the further proceedings should be undertaken. Most importantly, the State advocates would have been within their rights to apply for the withdrawal of bail if they were in possession of relevant facts. Whatever the situation, the case would have been taken a totally different course. Instead of disclosing the information in August 2016, the trial was allowed to proceed with a number of witnesses testifying over a period of two years and only then were the respondents' legal representatives informed. It is incomprehensible why the State advocates deemed it necessary to disclose in 2018 that there was complaint by the trial judge, but that a *nolle prosequi* certificate was issued. Mr Roothman also failed to explain meaningfully why it was deemed fit

to disclose the four statements of Mr Jephtha in 2018 and not two years earlier. If it was not relevant in 2016, it could not be relevant in 2018. It is a most basic ethical principle that such alleged conduct be brought in the open by either placing it on record or discussing it in chambers in the presence of all the parties. The DPP's reliance on the National Prosecuting Authority Act, 32 of 1998, section 179(2) of the Constitution and the Prosecution Policy Directives are rejected as irrelevant *in casu*, bearing in mind the facts of this matter.

- [11] It is not correct to submit now that none of the respondents denied the allegations of bribery, but that their alleged unlawful conduct led to the recusal of the trial judge. This is precisely the point. If the issue was dealt with openly by the DPP and its State advocates in 2016, matters would have turned out totally different. If the trial judge recused herself then, there would not be a waste of two years' trial time. The delay of two years from August 2016 to August 2018 and the further delay after the recusal of the trial judge must be attributed to the inaction of the State advocates and nobody else. They caused unreasonable delay to such an extent that the respondents were entitled to the extraordinary relief of a permanently stay of prosecution. The right to a fair trial entrenched in s 35(3) of the Constitution, and in particular the right to have their trial begin and conclude without unreasonable delay (s 35(3)(d)), was duly considered when I considered the delay herein.
- [12] It is submitted that I erred in having regard to the merits of the State's case in the criminal trial, that I made credibility findings

and evaluated the merits and demerits of the State's case without having regard to the merits in its totality. The respondents (as applicants) brought the application for permanent stay and specifically dealt with some aspects appearing from the record which I considered. It needs to be emphasized that the DPP as respondent in that application was obliged to deal with all factual allegations made by the present respondents, but instead, it refrained from doing so on the basis of irrelevance. In my view the failure to properly respond to allegations directly related to evidence of State witnesses and even concessions made by some of them, necessitated a finding that these allegations were undisputed. I wish to refer to the following *dictum* by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*, quoting from para [13]:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments

seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.” (emphasis added.)

I refer *inter alia* to my findings pertaining to Mr Jephta, W/O Potgieter, Adv Botha and Col Botha contained in paragraphs 50 to 55 of my judgment. The DPP cannot now argue that delays were caused by the respondents insofar as they failed to make admissions and/or unnecessary continued with prolonged and irrelevant cross-examination whilst no evidence was placed before me in the application.

- [13] It is also submitted that I erred in relying on inadmissible hearsay regarding the willingness of Mr Jephta to testify. I again refer to paragraph 55 of my judgment wherein I clearly indicated that the newspaper report might be inadmissible hearsay, but that credence can be placed on the essence of the report based on the evidence of Adv Botha and Col Botha together with the police statements of Mr Jephta. These statements under oath are

devastating for the State's case. I refer to paragraph 52 of the judgment.

[14] I specifically considered the application for permanent stay of prosecution by approaching the matter as in opposed motion proceedings. I again refer to *Wightman supra* and the well-known *Plascon Evans* principle. The DPP did not meaningfully respond to crucial allegations and did not deny any of the allegations in respect of hardship suffered and to be suffered by the respondents if a *de novo* trial would be ordered.

[15] The submission that I erred in taking into account certain future scenarios based on speculation and not on fact, is baseless. The history of this matter has shown the delays that have occurred. It took the State two years from the arrest of the accused to get the trial started and another two years of evidence whilst it refrained from calling their star witness and agent Mr Jephta. The probabilities are overwhelmingly in favour of a long and drawn-out case if the State is allowed to proceed. All witnesses will obviously have to be recalled and cross-examination will even take longer on what witnesses previously testified. Witnesses will be cross-examined on what later witnesses testified about as that evidence is now on record. Trial-prejudice will be caused to respondents as the DPP will obviously try to cover loop-holes in its case. The DPP relied on *Bothma v Els* 2010 (1) SACR 184 (CC) in submitting that I followed a wrong approach. The same arguments were put to me during the main application. That case dealt with alleged sexual abuse of a child and the delay in prosecuting the accused was addressed in the context of the facts of that matter. The case was

distinguished in paragraph 52 of the *Phillips* judgment referred to in the next paragraph.

- [16] It is submitted that I erred in finding that the judgment in *DPP and another v Phillips* [2012] 4 All SA 513 (SCA), was on all fours with this case. I specifically stated in paragraph 34 that the *Phillips*-case was on all fours with the present matter, but recognised that I did not deal with an appeal as in *Phillips*; however the consequences would be the same. The dismissal of the application for permanent stay would have the same result which Navsa JA believed should be prevented in *Phillips*, i.e. a *de novo* trial in circumstances where the first trial already took an extraordinary amount of time.
- [17] It is also submitted that I did not have a balanced approach when considering the relevant factors. I do not agree. It is unnecessary to say anything further on this submission, save to refer to my judgment.
- [18] It is submitted that I erred in the interpretation of section 3 of The Finance and Financial Adjustments Acts Consolidation Act, 11 of 1977. The wording of the section is clear and unambiguous. Mr Roothman failed to read the proviso contained in subsection 3(1) when he addressed the court in the previous application. I quoted the section in paragraph 39 of my judgment. I also made the point that this issue will not be considered in isolation in coming to a conclusion. The DPP's reliance on *S v Dos Santos* 2010(2) SACR 382 (SCA) is incorrect. I refer to paragraphs 15 and 16 of the SCA judgment where the court referred to the wording of a draft

confiscation order. Nowhere the SCA found that the Commissioner of SAPS was authorised in terms of section 3(1) to pay a reward of one third of the value of the diamonds as set out in the draft confiscation order. The reference to this draft confiscation order only became relevant as counsel for the first appellant requested a special entry to be made in terms of section 317 of the CPA.

- [19] The tenth ground of appeal is a repetition insofar as it deals with the prejudice to be suffered by the respondents in respect of a *de novo* trial. The respondents will clearly suffer irreparable prejudice as they will have to fork out hundreds of thousands of Rands for legal representation whilst they have already been mulcted with costs, an aspect not denied in the application for permanent stay. They have been subjected to criminal proceedings over a number of years and could expect to be so subjected for a further few years if the application was dismissed.
- [20] Nothing more needs to be said about the fact that I erred to find extraordinary circumstances. I refer to what I stated above and in my judgment.
- [21] It is also submitted that I erred in finding that there were no other less drastic measures available than a permanent stay of prosecution. Based on my observation that Mr Jephta would be taken apart in cross-examination, the DPP argued that if that is so, the *de novo* case would be finalised swiftly. Fact of the matter is that the court cannot prescribe to the DPP, as Mr Roothman reminded me when he argued during the main application, the

order in which to call witnesses. It may again hold the testimony of Mr Jephtha back as it has done thus far. The submission that the court could have directed the DPP to start the *de novo* prosecution within a certain period is neither here nor there. History has shown that this case has been dragging on for years without the trial-within-a-trial not even being finalised yet. The DPP did not suggest any reasonable alternative other than permanent stay in order to ensure that the proceedings get finalised soon. Today Mr Roothman submitted that the court could *mero motu* direct how the State should conduct a *de novo* trial. His submission is not understood.

[22] It is also submitted that I ascribed an improper motive to the DPP in deciding to make use of POCA. Although I made remarks in this regard in paragraphs 10 and 51 of my judgment, I clearly did not consider this issue as of vital importance in the consideration of the application.

[23] I referred to the fact that certain persons had access to unregistered, unmonitored and unrecorded cell phones during the entrapment process. I referred to this as a worrisome issue, but as is the case with my reference to POCA, this did not play a deciding role in my conclusion. I refer to paragraph 51 of the judgment.

IX CONCLUSIONS

[24] In conclusion I was and still am of the view that the actions of the DPP and State advocates deserve to be censored. They knew for

two years that there were attempts to threaten and/or bribe the trial judge and to bribe their star witness and trap, but kept that a secret. Two years later they out of the blue spilled the beans. Mr Roothman could not explain why this was deemed necessary to do in 2018 only and not in 2016. It was a feeble and unacceptable excuse to rely on “the interests of justice and transparency” at that stage of the proceedings. I therefor concur in the remarks of Navsa JA in *Van Heerden v NDPP 2017 (2) SACR 696 (SCA)* referred to in paragraph 35 of my judgment.

- [25] Mr Roothman submitted today for the first time that Mr Jephtha’s visit to Bloemfontein to meet the person that offered him money was indeed by arrangement with the Investigating Officer, W/O Potgieter, as he wanted to arrange a trap. This is an incredible revelation. Not a word was said in this regard in the main application and as mentioned earlier, the State failed to respond to the allegations in the founding affidavits.
- [26] Mr MM Hodes requested punitive costs, but the other legal representatives refrained from doing the same. They are content with a normal costs order. As mentioned, there is even confusion amongst respondents’ legal representatives as to the proper procedure that should have been followed, if at all possible. Clearly the DPP had the right to apply for leave to appeal. The application cannot be labelled frivolous or vexatious and therefore, a punitive costs order should not be made.

[27] The DPP failed to show that the appeal would have a reasonable prospect of success or that there is some compelling reason why the appeal should be heard.

X ORDER

[28] The application for leave to appeal is dismissed with costs.

J P DAFFUE, J

On behalf of the Applicant: Adv JW Roothman, Adv M Makhaga and Adv
T Barnard
Instructed by:
Director of Public Prosecutions
KIMBERLEY

On behalf of respondent 1: Adv E Sithole
Instructed by: Saleem Ebrahim Attorneys

On behalf of respondents 4 and 6: Adv LM Hodes SC
Instructed by: Saleem Ebrahim Attorneys

On behalf of respondents 2 and 5: Mr S Ebrahim

On behalf of respondents 3 and 8: Adv MM Hodes SC
Instructed by: Saleem Ebrahim Attorneys

On behalf of respondents 7,9,11 and 12: Adv CF van Heerden
Instructed by: Towell &
Groenewald Attorneys

On behalf of respondents 10 and 13: Adv JJ Schreuder
Instructed by: Legal Aid SA