

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 5980/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
Signature <i>[Handwritten Signature]</i>	
Date <i>14/01/2019</i>	

In the matter between:

JOHANNA CATHARINA SNYMAN**APPLICANT**

And

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS N.O**

FIRST RESPONDENT

**THE DIRECTOR OF PUBLIC PROSECUTIONS
LIMPOPO PROVINCE N.O**

SECOND RESPONDENT

**THE CONTROL PROSECUTOR, MOREBENG
MAGISTRATES' COURT N.O**

THIRD RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] In this application the Applicant seeks an order for a permanent stay of prosecution against her as a result of an alleged incident that occurred on 2 March 2012. The Applicant contends that her right to fair trial as provided for in terms of section 35(3)(d) of the Constitution has been disregarded from the outset.
- [2] The Applicant is facing a charge, in the Magistrate Court, of contravention of section 63(1) of the Road Traffic Act 93 of 1996 – Reckless and / or Negligent Driving, alternatively contravention of section 64 of Act 93 of 1996 – Inconsiderate Driving. The Respondents, as per answering affidavit of the Second Respondent, allege that the Applicant whilst driving a motor vehicle she overtook another motor vehicle driving in front of her at the time when it was unsafe to do so in that there was oncoming traffic already too close. As a result of the Applicant's ill-timed overtaking, a collision occurred between other vehicles, resulting in one of the motorists sustaining serious injuries. The Respondents contend that the Applicant's conduct is a serious

transgression of the traffic laws. Therefore, the State has a *prima facie* case against the Applicant and as such, has a legal duty to prosecute her.

[3] This matter was argued before me on 13 December 2018 and on the same date I granted the following order:

1. The prosecution of the Applicant by the Respondents or any person(s) acting as their duly authorized delegate(s) in Morebeng Magistrate's Court Criminal Case number MG 49/2018, MOGWADI POLICE DOCKET CAS 60/03/12 be and is hereby permanently stayed.
2. The Applicant is absolved from attending Court at the next hearing in the Magistrate Court in respect of this case.
3. The Respondents are ordered to pay the costs of this application on a party and party scale.

[4] I indicated that my full reasons of judgment would follow in due course. What follows are my reasons for judgment and order granted on the 13 December 2018.

[5] The Applicant's case is premised on section 35(3)(d) of the Constitution which provides:

"Every accused person has a right to a fair trial, which includes the right –

.....

(d) to have the trial begin and conclude without unreasonable delay”

The Applicant contends that this right, entrenched in the Constitution, has been disregarded and that she is justified in seeking the relief sought in the notice of motion. The application is opposed by the Respondents.

Factual Background

[6] The factual matrix of this case are mainly common cause. The alleged incident of reckless and / or negligent driving took place on the 2 March 2012. The Applicant received the summons dated 6 May 2012, calling upon her to appear in Mogwadi Periodical Court on 6 July 2012. After the hearing on 6 July 2012 the matter was postponed to 5 September 2012 for plea and trial. It is common cause that between 6 July 2012 and 5 September 2012 the Applicant's attorney addressed three unanswered requests for further particulars.

[7] By 5 September 2012, the Applicant's attorney did not receive a reply to the request for further particulars and consequently the matter was postponed to 12 November 2012 for plea and trial. By 12 November 2012, the state had failed to present the Applicant with a police plan and the key thereto in respect of the scene of the alleged accident. The matter was also pushed out due to a congested roll. The matter was then postponed to 24 January 2013. On 24

January 2013, the matter was again pushed out due to a congested roll. The matter was postponed to 11 March 2013.

[8] On 11 March 2013, the Applicant failed to attend the criminal proceedings. A warrant for the Applicant's arrest was issued but was held over until the next appearance, which appearance was due to be held on 5 April 2013. On 5 April 2013, the matter was again pushed out due to a congested roll. The matter was then postponed to 27 May 2013. On 27 May 2013, the prosecution indicated that it intended to request a postponement of the matter due to non-availability of an interpreter. The Applicant's attorney of record objected to the proposed postponement and consequently the matter was struck from the roll in terms of section 342 of the Criminal Procedure Act 51 of 1977.

[9] Approximately 2^{1/2} years later, the Applicant was again charged for the same offences. The Applicant was required to appear in Court on 19 February 2016. The second summon contained a comedy of errors. The matter was not on the roll and the Applicant and her attorney of record was excused from the proceedings. Nothing came of the second summons. Five months later the Applicant first attended the Polokwane Court. The matter was not on the roll and thereafter attended to the Mogwadi Periodical Court. The matter was eventually traced to the Mogwadi Court. Again the matter was struck from the roll.

- [10] During March 2017 the Applicant received a fourth summons to appear in Court on 27 April 2017. The Applicant was not able to attend the proceedings on this day and consequently the matter was postponed to 12 July 2017. The Applicant's attorney of record indicated that he intended to direct representations to the DPP for the permanent stay of the prosecution. The Applicant's representations for the permanent stay of the prosecution was declined by the DPP.
- [11] On 12 July 2017 the prosecutor of the day informed the Applicant's attorney that he intended applying for the matter to be postponed and to be transferred to another Court due to the fact that the recording equipment in the Mogwadi Court had been defective for the previous three to four months. The matter was then postponed to 19 September 2017. At this time the matter was transferred to the Morebeng Magistrate Court. At the hearing of 19 September 2017, the Applicant's attorney of record argued that the Morebeng Magistrate Court did not have the requisite jurisdiction to adjudicate the matter. This argument was upheld and the matter was again struck from the roll.
- [12] The Applicant was again called upon to appear in Court on 8 June 2018. Curiously enough, the fifth summons received by the Applicant allowed for an

admission of guilt fine in the amount of R 2000.00. This was the first time in approximately six years that such a concession was made.

The Impact upon the Applicant

[13] The Applicant in her founding affidavit (para 42-46) has demonstrated to the Court the impact the pending criminal proceedings have had on her. She demonstrated that these proceedings have affected her psychologically and financially in that:

13.1. She has been prosecuted for an offence that she has not committed.

13.2. After 6^{1/2} years the trial proceedings are yet to commence.

13.2. Had the proceedings proceeded within a reasonable time, and worst case scenario the Applicant had been found guilty, the Applicant would have received a fine or prison sentence which sentence would have already been served.

13.4. The proceedings have affected her working environment.

13.5. The Applicant has spent a substantial amount of money attending the proceedings over a period of six years and continues to spend significant amounts of money on legal fees and travelling costs.

[14] The Respondents admit the impact the proceedings have had upon the Applicant but fail to demonstrate how the interests of justice require these proceedings to continue to its finality. The following concessions emanate from the Respondents answering affidavit:

14.1. AD PARAGRAPH 32

“I accept that this case has possibly cost her substantial amount of money. I also accept that the State used substantial public purse to pursue the matter. But that cannot be the reason for the State to abandon the matter when it is trial ready.”

14.2. AD PARAGRAPH 35

“Applicant’s averments concerning psychological trauma, emotional distress and fiscal loss cannot be disputed. However, one would have expected the Applicant to utilize every opportunity available to her, to get the trial going. Instead, the Applicant defaulted without advancing any excuse at some point in time”

14.3. AD PARAGRAPH 39

“This Honourable Court only has to answer the question whether the State caused inordinate delay in commencing with the trial or not. If so, whether it is in the best interests of justice to order permanent stay of prosecution or not”

14.4. AD PARAGRAPH 59

“Even if the Applicant successfully demonstrates to the Honourable Court that the State caused inordinate delay, it is submitted that the relief sought is still inappropriate in that the prejudice she might have

suffered is not “trial-related” and most importantly, not irreparable. The prejudice is reparable in that the Applicant may institute civil proceedings for damages arising out of the anticipated trial.”

[15] The Respondents contend that the stay of the proceedings will adversely affect the DPP’s primary mandate of prosecuting anyone without fear, favour and prejudice. In the light of the Respondents’ shortcomings demonstrated in this case, it can hardly be permitted to argue that this Court must strike a balance between the impact of the proceedings upon the Applicant and the interest of justice. The Respondents’ submission that the Applicant has an alternative remedy in resorting to a civil action against the State is in my view far-fetched and is accordingly rejected.

[16] It is noted that the Applicant did absent herself from Court on two occasions. It is not clear from the evidence on papers that on those two occasions the State was ready to proceed with the trial. It is wrong for the Respondents to apportion blame on the Applicant merely by her failure to attend Court on those two occasions, as there is no indication that she was in willful default of attending Court, otherwise she would have been found guilty of contempt of Court.

- [17] Section 38 of the Constitution states that anyone, especially those acting in their own interest, is entitled to “approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights.”

The right relied upon in *casu* is the Applicant’s right to a fair trial entrenched in section 35(3) of the Constitution and in particular the right to have his trial begin and concluded without unreasonable delay (section 35(3)(d)). It is clear that the relief embodied in section 38 is not restricted to constitutional rights being infringed during a criminal trial but it is also applicable in a pending or upcoming criminal trial.

- [18] The Constitutional Court held in **Wild and Another v Hoffert NO and Others 1998 (2) SACR 1 (CC) at paragraph [11]** that an application for a permanent stay of prosecution is an extraordinary remedy. It prevents the State from proceeding with a worthy cause, i.e the prosecution of an accused in the public interest, especially where the alleged crimes are serious and comprehensive. I may mention that in *casu* the Applicant is faced with a charge of contravening road traffic statutory provisions where there has not been any loss of life or property.

- [19] In **Wild v Hoffert NO** supra, the Constitutional Court was not prepared to grant a permanent stay of prosecution after having found that the Appellants

themselves were responsible for a considerable period of delay. In *casu* there is no evidence that the Applicant is to blame for the delay in prosecution. The present case is therefore distinguishable from the **Wild v Hoffert NO** case.

[20] In **Zanner v DPP, Johannesburg 2006 (2) SACR 45 (SCA)** the Court accepted that compelling reasons for granting permanent stay of prosecution would normally relate to trial-related prejudice such as the unavailability of witnesses or fading memory in consequences whereof the accused may be prejudiced in the conduct of his or her trial. In **Zanner** there was a delay of ten years between the first and second decision to indict the Appellant. It is so that the SCA found that the accused had to show definitive and not speculative prejudice; it is not good enough to rely on vague allegations of prejudice resulting from the passage of time and the absence of witnesses.

[21] In **DPP and Another v Phillips [2012] 4 All SA 513 (SCA)** the DPP's appeal to the High Court was struck from the roll due to an inordinate delay in prosecuting it. Mr Phillips brought an application in the High Court in terms whereof the appeal should be permanently struck from the roll, but later added relief to the effect that a permanent stay of prosecution of the appeal be ordered. The High Court ordered a permanent stay of prosecution and this order was confirmed by the SCA.

Navsa JA, writing for a unanimous Court, stated the following at paragraphs [54] and [55]:

“[54] One would have expected the DPP, allegedly concerned with the issues thrown up by the evidence already adduced, would act with greater purpose and commitment. Should a Court, without an end in sight in respect of the proposed appeal and therefore no indication of when the trial might resume, in the event of a successful outcome for the DPP, expect an accused to continue to be in limbo? In the totality of the circumstances of this case, I think not.

[55]..... She (Satchwell J) was correct in laying the fault for the delay at the door of the DPP. She was correct to conclude that the inordinate delay was inexcusable.”

- [22] The most recent authority on this topic is **Van Heerden v NDPP 2017 (2) SACR 696 (SCA)**. In this case Navsa JA, writing for a unanimous Court was extremely critical of the prosecution’s approach to litigation. The learned Judge remarked that *“whether a breach of right to an expeditious trial has occurred and relief is justified, are to be determined by a Court after having been apprised of all the facts on a case-by-case basis.”*

[23] Kriegler J's judgment in **Sanderson v Attorney General, Eastern Cape 1998 (1) SACR 227 (CC)** – a unanimous judgment of the Constitutional Court was referred to extensively in **Van Heerden** supra.

It is apparent from the **Sanderson** judgment that a balancing act must be performed by a Court considering an extraordinary remedy such as a permanent stay of prosecution. Kriegler J mentioned three factors to be considered, to wit

- (1) the right to a trial within a reasonable time is fundamental to the fairness of the trial and the consequent prejudice suffered by an accused if this does not materialise – see section 35(3)(d) of the Constitution;
- (2) the nature of the case; and
- (3) so-called systematic delay such as effectiveness of police investigation or prosecution of the case and delays caused by congested Court rolls.

[24] The following remarks by Kriegler J in paragraph [30] of the judgment are apposite:

“I do not believe it would be helpful for our Courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a Court to exercise. The Courts will apply their experience of how the lapse of time generally affect the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as

in the case of other forms of prejudice, trial Courts will have to draw sensible inferences from the evidence.”

- [25] The judgment in **Sanderson** points out that in determining reasonableness, it is not only the interest of the accused that must be borne in mind. In making a value judgment, Courts must be consistently mindful of the profound social interest in bringing a person charged with a criminal offence to trial and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest will loom very large.
- [26] In **Bothma v Els 2010 (1) SACR 184 (CC)** an application for the permanent stay of prosecution was dismissed by the Constitutional Court. It was decided that all the relevant factors would have to be weighed on a case-by-case basis. Of central significance would always be the nature of the offence. The less grave the breach of the law, the less fair would it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter went to trial.

Section 342A of the Criminal Procedure Act, 51 of 1977

[27] In the present case the provisions of section 342A of the Criminal Procedure Act, 1977 were invoked on two occasions when the State had failed to proceed with the trial. Despite these, the Director of Public Prosecutions decided to reinstitute the criminal proceedings against the Applicant. In my view the decision of the DPP in this regard was not fair and in the public interest especially where the Applicant had to endure the effects of a pending trial for such a long period. An analogy can be drawn between applications in terms of section 342A and those for permanent stay of prosecution.

[28] Section 342A of the Criminal Procedure Act must be considered. The relevant portion reads as follows:

“342A Unreasonable delays in trials

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

- (a) The duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;

- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
 - (e) the seriousness, extent or complexity of the charge or charges;
 - (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
 - (g) the effect of the delay on the administration of justice;
 - (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
 - (i) any other factor which in the opinion of the court ought to be taken into account.
- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
- (a) refusing further postponement of the proceedings;
 - (b) granting a postponement subject to any such conditions as the court may determine;
 - (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;

(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;

(e)

(f)

(4) (a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, and an order contemplated in subsection (3) (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.

(b)

[29] The public interest must be considered in concluding as to what is fair. I refer to *National Director of Public Prosecutions v King* 2010 (7) BCLR 656 (SCA) at paragraph [5] which was quoted with approval in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3 paragraph [71]. According to the SCA in *King*,

“(f)airness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State....the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair

trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country.... Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and ‘any new procedure can offer opportunities capable of exploitation to obstruct and delay’. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.”

Similar comments were made in **S v Shaik 2008 (1) SACR 1 (CC)** at paragraph [43] where the court reiterated that

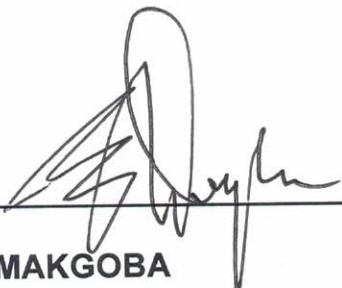
“(i)t (a fair trial) has to instill confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror of crime.”

Conclusion

- [30] The Applicant has demonstrated that an inordinate delay has occurred in the prosecution of the matter against her. The delay is to be placed squarely at the door of the DPP and not the Applicant as submitted by the Respondents. The proceedings have had a tremendous impact upon the Applicant both psychologically and financially.

[31] The Respondents have shown a total disregard for the Applicant's rights guaranteed in section 35 of the Constitution. Furthermore the Respondents have failed to show how the interest of justice should prevail over the Applicant's rights entrenched in section 35 of the Constitution.

[32] In the premises the order for permanent stay of prosecution is granted with costs as sought in the Notice of Motion.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	: 13 December 2018
Order Pronounced on	: 13 December 2018
For the Applicant	: Adv DH Hinrichsen
Instructed by	: Van Onselen & Partners c/o Steytler Nel & Partners
For the Respondents	: Adv M Sebelebele
Instructed by	: Director of Public Prosecutions Limpopo Division, Polokwane