



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1417/2016

In the matter between:

JOHAN HEROLD BOTHA

1st Plaintiff

FREDERIKA JOHANNA BOTHA

2nd Plaintiff

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1st Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE

2nd Respondent

THE REGIONAL MAGISTRATE, KROONSTAD

3rd Respondent

HEARD ON: 09 MARCH 2017

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 23 MARCH 2017

[1] The applicants approached the court for an order on the following terms:

1. That the respondents be prohibited from:

1.1 Prosecuting the applicants on the present charges; and/or

1.2 Leading and/or hearing evidence of whatsoever nature and not to proceed with the trial;

2. Costs of the application

3. Further and/or alternative relief.

[2] The application is opposed on the grounds that, firstly, the court lacked jurisdiction to entertain the application. Secondly, neither trial-related prejudice nor extra-ordinary circumstances existed that warranted the court to grant relief that was as drastic as a permanent stay of prosecution.

[3] Both applicants were members of the Parys Hoeveld Motors CC, a closed corporation duly incorporated and registered in accordance with the Close Corporations Act, Act 69 of 1984 and conducted the business of a car dealership at 75 Dolf Street, Parys. Having experienced hard times, the closed corporation filed for liquidation and was placed under a final winding-up order on 23 October 2008.

[4] Both applicants stood arraigned on various charges of theft, money laundering and fraud under case number 102/11/2008 in the Regional Court held at Parys, arising out of transactions and events that took place during 2007 and 2008. Mr J.A Van Aswegen of the firm Theron, Jordaan and Smith Incorporated, Kerksdorp, acted on behalf of the applicants in the liquidation application; the representations made to the prosecution for the reconsideration of the decision to prosecute the applicants and the appearances in the regional court now being held at Kroonstad.

[5] The grounds upon which the applicants' application is based are the following:

5.1 The criminal investigation dragged its feet for approximately seven (7) years since the transactions took place. This constituted an abuse of process and is a trial-related prejudice due to the unavailability of documentary evidence. The above are against the presumption of

innocence. In this regard the deponent stated in para 10 of the founding affidavit:

"10. Derhalwe is dit duidelik dat ek en die 2de Applikant as volg benadeel sal word, sou die vervolging voortgaan:

10.1 Dit is bykans 8 (AGT) jaar na die likwidasie van Parys Hoëveld Motors BK en klagtes gelê is;

10.2 Dit is dan ook bykans 5(VYF) jaar na Kaptein Goosen my in kennis gestel het van die beweerde klagtes;

10.3 Alle brondokumente wat my verweer en antwoorde teen die beweringe en mede beskuldigde kan weerlê, is verlore en/of vernietig, deur die skuldeisers en/of hul gevolgmatigdes (wat die likwidadeur insuit). Ek en die mede Applikant het geensins bygedra tot die vertraging en/of verlies van dokumente nie.

10.4 Derhalwe is dit uiters onblik en inteendeel druis dit teen my Fondamentele en Konstituele regte in om te verwag dat ek nou in 'n verhoor, my en die mede Applikant moet verweer sonder dat my bewyse en dokumente aan my beskikbaar gestel word, en sal ons geensins ons reg op kruisverhoor volledig kan uitvoer nie.

10.5 My moeder het eiendomme verhandel vir 'n bedrag van ongeveer R 1.8 miljoen ten einde die kompromis aanbod te befonds, en sou derhalwe nie voorgemelde godoen het, indien sy geweet het dat ek en die mede beskuldigde strafregtelik aangekla sou word nie."

- [6] The respondents contend that this application should be entertained by the Regional Court at Kroonstad: **Wild and another vs Heffert NO. and others 1998 (3) SA 695 (CC)** paragraphs 32-35. That Court, they argued, would have the authority to consider any matter of a trial-related prejudice when evaluating the evidence and ameliorating it with the appropriate order which could include ruling evidence inadmissible or an acquittal. **Elefeld and Another vs Mabile and Another 2013 ZAGPHC 83 at paragraph 70; S vs Naidoo 2012 (2) SACR 126 paras 32-33; Bothma vs Els and others 2010**

(2) SA (CC) at paras 81,82 and 84. To bar the prosecution before the trial begins, is far-reaching. It indeed prevents the prosecution from presenting society's complaint against an alleged transgressor of the society's rules of conduct. That will seldom be warranted in the absence of a significant prejudice to the accused; **Saunderson vs. Attorney-General, Eastern Cape 1998 (2) SA 38 (CC); Naidoo, supra at para 46** and **Bothma, at para 68.** I agree with this exposition.

(7) Section 342 A of the Criminal Procedure Act, No 51 of 1977 provides as follows:

- "(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appear 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 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 and considerations of costs;
 - (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) That-
 - (i) The State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the state;
 - (ii) The accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
- (f) That the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

[8] If regard is had to the provisions of section 342 A (2) and applying them to the matter at hand, the delay appears to be unnecessarily over-emphasised and exaggerated. The applicants were aware as early as 06 July 2011 of the possible charges that were investigated against them. They appeared in the Regional court on 3 September 2014. The First and Final liquidation and Distribution Account was filed of record on 20 February 2013 and the matter was considered closed as per the Certificate of Discharge from the Master of the Free State High Court dated 20 February 2013. Permission was granted for the destruction of all books and documents in the Liquidator's possession on 02 April 2013 by the Master. Paragraph 3 of the letter from the Master dated 2 April 2013 is to the effect that: "it is suggested that the document which the Liquidator may require for the execution of future duties be retained e.g. to assist the authorities in the case of a prosecution, etc."

- [9] The offences being investigated against the applicants as at July 2011 were fraud, forgery and uttering at Hoëveld Motors, Parys. The applicants gave the impression to the clients that the motor vehicles for the period 1 January 2007 to 1 December 2008 were fully paid for whilst in truth they were not. The applicants had the same legal representative throughout. Approximately two years before the Liquidator destroyed his file, the applicant knew the nature of the charges that they could possibly face.
- [10] In support of their submission of the existence of irreparable trial-related prejudice, the applicants rely on Broome vs Director of Public Prosecution, Western Cape 2008 (1) SACR 178 at para 66-68 and 77-78. In my view this matter is distinguishable from the matter at hand as the State, in the **Broome** case, had seized a substantial part of the audit working papers from the accused's audit firm. Similarly, a reference to **Bothma, supra** at para 75, suffers the same fate. In the latter case, the State was responsible for the loss of documents instrumental to the applicants' defence. The applicants had provided a detailed exposition of the material that was missing and a full explanation of the significance of the working papers; which the applicants in the present case failed to do. Having regard to all of these factors, I am of the view that the lapse of time and the unavailability of the documents as alleged by the applicants, will not lead to the applicants suffering irreparable trial-related prejudice.
- [11] In argument, the applicants did not pursue the compromise relied on in their papers as a ground for the stay of execution. I shall therefore not deal with this aspect thoroughly save to state that, even if they did, it would not have justified or served as a basis for the launching of this application.
- [12] I therefore come to the conclusion that the circumstances of this application do not warrant the court to grant a permanent stay of prosecution. It was argued on behalf of the respondents that this matter was postponed on 17 November 2016 to enable the applicants to supplement their papers, and consequently they should be held liable for the costs. On a question from

the bench, it appeared that the applicants never at any stage made use of or employed some of the steps as set out in section 342 A 3(a) - (c) of Act 51/1977 in the regional court before filing this application to this court. Even though the Superior Courts are at times reluctant to make an adverse costs order against applicants who seek to assert their constitutional rights, I hold the view that in the given set of circumstances, an appropriate costs order is warranted. Consequently I make the following order:

The application is dismissed with costs.



J.J. MHLAMBI, J

On behalf of the Applicant:
Instructed by:

Adv. Knoetze
Symington & De Kok
BLOEMFONTEIN

On behalf of 1st Respondents:
Instructed by:

Adv. BS Mene
State Attorney
BLOEMFONTEIN