



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO:	CA&R 155/2015
DATE HEARD:	16 MAY 2016
DATE DELIVERED:	3 June 2016

In the matter between:

NANDIPHA DAPHNE MADIBA

Appellant

and

**DIRECTOR: PUBLIC PROSECUTIONS
NORTHERN CAPE**

Respondent

Coram: Olivier J et Phatshoane J et Mamosebo J

JUDGMENT

Olivier J:

1. The appellant, Mrs N D Madiba, along with five co-accused, are facing several charges of, *inter alia*, fraud and corruption. She first appeared in the Magistrate's Court on 17 November 2011, when the matter was transferred to this court for trial. Several further postponements then followed.
2. On 30 January 2015, when the criminal matter was postponed to 12 February 2016, it appeared that the appellant intended to apply for the stay of the prosecution against her. A date for the hearing of that application was determined in the presence of all the other accused¹ and the appellant agreed to make copies of her founding affidavit available to all of them. The appellant cited only the Director of Public Prosecutions, Northern Cape, as a respondent, and not any of her co-accused.
3. At the hearing of the application, on 13 May 2015, counsel for the appellant at that stage, Mr Mnyatheli, argued that, in the event of a permanent stay of the proceedings not being ordered, the court should strike the criminal case against the appellant from the roll. Counsel for the respondent, Mr J J Cloete of the Office of the Director of Public Prosecutions, Northern Cape, adopted the attitude that the court hearing the application would be entitled "*to refuse a further postponement against the Applicant until the 16th of February next year*", which was the date to which the criminal matter had been postponed. He argued that the prosecution was not to blame for the delays and that the court should, in the event of a finding that the delays were nevertheless unreasonable, not order a permanent stay of the prosecution against the appellant, but rather refuse a further postponement of the criminal proceedings against the appellant², as a less drastic remedy which would then leave the prosecution with the option of withdrawing the charges against the appellant temporarily.

¹ All of whom had, unlike the appellant, been legally represented at those proceedings.

² In other words to the date in February 2016 to which the case had in any event already been postponed.

4. In a judgment delivered on 21 August 2015, and therefore still well before the date to which the criminal trial had been postponed, Lever AJ found that a permanent stay of the prosecution would not be appropriate under the circumstances. The application was dismissed and no costs order was made.
5. No finding was made as regards the possibility of refusing a further postponement of the criminal proceedings or of striking the criminal proceedings off the roll as far as the appellant (as an accused) was concerned. One of the grounds on which leave to appeal was subsequently sought by the appellant was that the court *a quo* had failed to consider so-called less drastic remedies like these.
6. Lever AJ granted leave to appeal only "*on the issue of whether or not (he) could have refused a further postponement or whether or not (he) should have struck the matter from the roll insofar as it concerns the Applicant in the relevant criminal trial*". He stated that he had not decided these issues as he had been of the view that the criminal trial was not before him.
7. Before us Mr Mpofu SC, counsel for the appellant, abandoned the submission in his heads of argument that this court was not bound by the limited basis upon which leave to appeal was granted and that the refusal to order a stay of prosecution should also be considered on appeal. The appeal should therefore be considered on the limited basis that leave was granted on.
8. I cannot agree with the submissions in Mr Mpofu's heads of argument that the order granting leave to appeal should be seen as a tacit admission by Lever AJ that this court would have to consider whether a further postponement should be refused or whether the criminal proceedings should be struck off the roll, and as a concession by Lever AJ that he had erred in not considering whether any

one of those remedies **should**³ be granted. Lever AJ explained that he had not considered making orders like those as he had been of the view that the criminal proceedings were not before him⁴. His reference to Mr Cloete's concession that the criminal proceedings had in fact been before the court *a quo* can in no way be seen to have been a tacit admission or concession by Lever AJ that his own view had been wrong, or even that he agreed with Mr Cloete's concession. In my view there can be no doubt that the effect of the order granting leave to appeal is that this court would have to consider, as a starting point, whether Lever AJ could legally have considered making such orders. Only in the event of this question then being answered in the affirmative, and even then only if this court should decide not to remit the matter to the court *a quo* for such purposes, would this court go on to consider whether, on the evidence, the criminal proceedings should have been struck off the roll⁵.

9. At the hearing of the application counsel for the appellant relied upon the provisions of section 342A of the Criminal Procedure Act⁶ ("*the Act*") and those of section 35(3) of the Constitution.
10. In terms of section 342A(1) of the Act a court "*before which criminal proceedings are pending*" would indeed be competent to make an order:

"(a) *refusing further postponements of the proceedings:*

(b) ...

³ As opposed to **could** legally be granted by him.

⁴ In other words for him to consider its postponement or striking off.

⁵ In the course of his argument Mr Mpofu conceded that, in view of the existing order postponing the criminal proceedings to February 2016, and in view of the fact that the appellant's co-accused were not present or represented when the application was heard, the refusal of a postponement would in fact not have been an appropriate order.

⁶ 51 of 1977

(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 (Director of Public Prosecutions)”⁷.*

11. The first question is therefore whether the court *a quo* in this instance was a court before which the criminal proceedings were pending, as envisaged in sub-section (1) of section 342A of the Act.
12. The criminal proceedings could obviously not have been pending before the court *a quo* for the purposes of pleading and trial. The indictment was not even initially made available to Lever AJ. The co-accused of the appellant were not present⁸. The trial of the appellant had not been separated from that of her co-accused⁹ and it was in any event clearly never contemplated that, in the event that the prosecution not be ordered stayed, she could be asked to plead to the charges in the absence of her co-accused. Could it be said that the criminal proceedings were pending before Lever AJ for any other purpose¹⁰, and once again specifically as envisaged in section 342A?
13. At the hearing of the application Mr Cloete, counsel for the respondent, argued that “*this matter*” (presumably referring to the criminal proceedings) was in effect before the court *a quo* “*because of this application*” (presumably referring to the motion proceedings). In my view this would be putting the cart before the horse.

⁷ Section 342A (3) of the Act

⁸ Compare section 158 of the Act.

⁹ Compare section 157(2) of the Act.

¹⁰ Compare *S v Khalema and Five Similar Cases* 2008 (1) SACR 165 (C) paras [26] to [30]

14. The plain grammatical meaning of the wording of sub-section (1) of section 342A of the Act is that only a court before which criminal proceedings are indeed already pending would in terms of section 342A(1) of the Act be enjoined to investigate a delay in the completion of those proceedings and that would therefore be competent to consider sanctions or remedies like refusing a further postponement or striking the case off the roll. An accused can therefore not, it seems to me, in a court before which the particular criminal proceedings against him or her are not in any way pending, apply for relief on the basis of the provisions of section 342A of the Act, and such an application would not then magically transform such a court into one before which the criminal proceedings are pending. In my view it is clear that the criminal proceedings should be pending before the court at the stage when the application is made to that particular court.
15. Put another way, the presence of the particular pending criminal proceedings before a court is a jurisdictional requirement for the exercise by that court of the powers provided for in terms of sub-section (3) of section 342A of the Act¹¹.
16. Could the application for a permanent stay of the prosecution have resulted in the criminal proceedings in some way being drawn into what was before the court *a quo*, or in the conversion of the proceedings before the court *a quo* into the criminal proceedings concerned here, namely a case in which the appellant and five other persons or entities have been joined as co-accused to face various charges?

¹¹ Compare **Roberts v Chairman Local Road Transportation Board, and Another (I)** 1980 (2) SA 472 (C) at 476G-H

17. The appellant's co-accused were, as already mentioned, not before the court *a quo*, as mentioned before. It is difficult to conceive that the criminal proceedings could have been pending before the court *a quo*, as envisaged in section 342A(1) of the Act, in respect of only one of several accused if there had not been a separation of the trial of that accused from the trial of the others¹² in terms of section 157 of the Act.
18. It is equally difficult to conceive that there could, as a result of the application and at the time of its hearing, in effect have been two parallel sets of criminal proceedings in a single criminal matter with a single indictment, the one set in which only one of the accused in the indictment featured and the other in which the other five accused featured and which stood postponed to February 2016.
19. Section 342A(2), in listing the factors to be considered by a court in deciding whether a delay has been unreasonable, makes no specific mention of the position where criminal proceedings involve multiple accused and of what role this should play where it is being investigated whether the delay had been unreasonable in respect of only one of them, and more particularly when an appropriate remedy is considered. The same applies to the provisions of sub-section (3), in setting out some of the relief that a court may grant when concluding that there had been an unreasonable delay.
20. It must, however, be presumed that the legislature had, in enacting and inserting section 342A into the Act¹³, been aware of the reality that multiple accused could be involved in the criminal proceedings in a single case¹⁴ and of

¹² In other words, even if it could be argued that the criminal proceedings were in some way indeed before the Court *a quo*.

¹³ By section 13 of Act number 86 of 1996

¹⁴ Sections 155 and 156 of the Act

the fact that a separation of their trials could only be effected through an order in terms of section 157(2) of the Act¹⁵.

21. The question is therefore whether it could, in circumstances where the appellant's co-accused were not parties to the proceedings before the court *a quo*, be said that the criminal proceedings, as a whole and against all of the accused in the criminal proceedings concerned here, were pending before court *a quo*. The criminal proceedings concerned here, being proceedings in which six accused had been joined, were in fact pending in a different court; one which was to reconvene in February 2016.
22. Mr Mpofu argued that the "court" referred to in section 342A(1) of the Act should be interpreted generously, and in the spirit of leaning towards the protection of the fundamental rights of an accused person, to mean any judge of the particular division of the high court¹⁶, and therefore not necessarily the court before which the trial is to take place. The problem would however remain that, because of the failure to join the appellant's co-accused, the proceedings before Lever AJ did not involve all of the accused. What served before Lever AJ were motion proceedings, albeit possibly with a criminal substance¹⁷, in which only one of those accused was involved.
23. The further complication is that the criminal proceedings as a whole had already previously been postponed to a date well beyond the date of the hearing and the judgment in the application concerned here. The criminal proceedings against all the accused were therefore set to resume on that date. Even if it could possibly be argued that the section 342A application had, as far as the appellant had been concerned, in a way anticipated the

¹⁵ Compare *Monamodi v Sentra-boer Co-operative* 1984 (4) SA 845 (W) at 851 D; *Stellenbosch Wine Trust Ltd and Others v Oude Meester Group Ltd and Others* 1977 (2) SA 221 (C) at 240D

¹⁶ In the case where the trial is to take place in a high court of that division.

¹⁷ Compare *S v Botha en 'n Ander* 2002 (2) SA 680 (SCA) paras [4], [5]

February 2016 date, the same could certainly not be said as far as her co-accused were concerned.

24. The question whether the criminal proceedings were pending before the court *a quo* was, however, not addressed in either counsel's heads of argument, and Mr Mpofu's submission regarding the interpretation of section 342A(1) was only made when the requirement of pending criminal proceedings was taken up with him. The submissions in the heads of argument of both counsel were in fact premised on the assumption that the court *a quo* would have been entitled and competent to act in terms of section 342A. The question has therefore not been properly ventilated and in view of this, and also insofar as the application may in any event have been made in terms of the provisions of the Constitution, I will refrain from deciding the question and instead proceed to consider the appeal on the basis that the court *a quo* would have been competent to strike the criminal proceedings as far as the appellant was concerned.
25. The other five accused were aware of the application and of the date of hearing. None of them attempted to become involved in the application. They were legally represented at the time and against this background I will therefore proceed to consider the question whether, insofar as an order striking the criminal proceedings against the appellant off the roll would have been competent in the circumstances, the court *a quo* should have granted such an order. Counsel were in agreement that remitting the matter to the court *a quo* for this purpose would result in further unnecessary delay.
26. It is common cause that the appellant has suffered non-trial related prejudice as a result of what has really been an extraordinary long delay in the criminal proceedings. She has been unable to obtain gainful employment because of the case hanging over her head and, as one can imagine, it has caused her and

her family considerable stress, and this will probably continue to be the case until finality is reached.

27. The matter in which she is involved will in all probability not proceed until several other related matters in which her co-accused are involved, have been finalised. The same sets of legal teams that are representing her co-accused in this matter are involved in those other cases. The finalisation of the other cases¹⁸ have been delayed because of constitutional challenges to the indictments and applications for the stay of those prosecutions. At this stage the Kwazulu-Natal case is set to be heard from 10 June 2016, and the present criminal proceedings have in the meantime yet again been postponed (to 26 August 2016), on a provisional basis. There is therefore at this stage no end in sight as far as the appellant is concerned.
28. On the other hand it is also common cause that the prosecution is not to blame for any part of the delay. The delays have been the result of the exercise of their constitutional rights by other accused, and because of logistical realities concerning legal representation. Also the appellant has not alleged any trial related prejudice on her part. The postponements have been for long periods, which at least limited the frequency of trips by the appellant to Kimberley to attend court, and on occasion the prosecution has even cooperated in having the case postponed in the absence of the appellant.
29. It is unnecessary to decide whether, in circumstances where none of the parties are to blame for a delay, that delay could be seen as "*unreasonable*" for the purposes of section 342A(1) of the Act. I am satisfied that it would in any event, on the facts of this matter, not be appropriate to strike the criminal proceedings in respect of the appellant of the roll at this stage. Such an order may prejudice the prosecution, at the very least in the sense that the

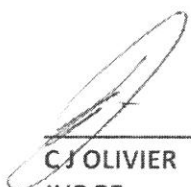
¹⁸ Some of which are pending in courts in Kwazulu-Natal.

reinstitution of the proceedings will require a written instruction¹⁹, the issue of which might conceivably in itself then be challenged. At the same time I sincerely doubt whether the striking off of the case against the appellant would really alleviate the emotional anguish that she is suffering. It is abundantly clear that the prosecution intends reinstituting the proceedings against her in such an event, and because the prosecution would not have been responsible for the delay, such a written instruction by the Director of Public Prosecutions could then be very difficult to challenge.

30. Counsel was in agreement that, in the event of the appeal not succeeding, the parties should bear their own costs. In my view this would indeed be appropriate and therefore no costs order will be made.

31. The following order is therefore made:

THE APPEAL IS DISMISSED.



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree.



V M PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION

¹⁹ Section 342A(3)(c) of the Act.

I agree.

M Mamosebo

M MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

For the Appellant: Adv. Mpofu S.C.
Instructed by: Mzuzu Attorneys, Kimberley

For the Respondent: Adv J J Cloete
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