IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

A747 and A748/12

CASE NO: ~~A338/2011~~

15/3/2013

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

15 March 2013 ....

In the matter between:-

J.J. ELEVELD	1ST APPLICANT
L. ELEVELD	2ND APPLICANT
M. ELEVELD	3RD APPLICANT
R. ELEVELD	4TH APPLICANT
and	
L. MABILE	1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTION	2ND RESPONDENT

JUDGMENT

ALBERTS, AJ

[1] These Applications concern the review of orders by the First Respondent, a Regional Magistrate sitting at Potchefstroom and Fochville, refusing to permanently stay the criminal proceedings pending against the Applicants.

[2] The Second Respondent is the National Director of Public Prosecutions who ultimately controls all prosecutions in the Republic of South Africa.

[3] The review applications were brought in motion applications in which the First, Second and Third Applicants pray for an order in the following terms:

> "1. That the late bringing of this application for review be condoned insofar same may be necessary;
>
> AGAINST THE FIRST RESPONDENT:
> 2. That the order of the First Respondent not to grant a permanent stay of prosecution in favour of the Applicants on 11 November 2011 under the Regional Court case numberRC17/2011 in the Regional Division of North West held at Fochville be reviewed and corrected and/or set aside;
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> 3.That the order of the First Respondent be substituted with an order that a permanent stay of prosecution be granted in favour of the Applicants in respect of all the case dockets forming part of the case under Regional Court case number RC 17/2011 against the Applicants, which include Fochville MAS 249/06/2003, Fochville MAS 77/01/2004, Fochville MAS 176/01/2004, Fochville MAS 93/07/2003, Fochville MAS 94/07/2003, Fochville MAS 95/07/2003 and Fochville MAS 198/08/2005;
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> 4.In the alternative to prayer 2:

That the matter be determined by the Honourable Court in a manner deemed fit by the Honourable Court;

5. ....

6. ....

AGAINST THE SECOND RESPONDENT:

7.That the Second Respondent, pursuant to an order for permanent stay of prosecution granted in favour of the Applicants, be interdicted and restrained from prosecuting the Applicants now and in future in all cases or dockets forming part of the case under Regional Court case number RC 17/2011 against the Applicants, which include Fochville MAS 249/06/2003, Fochville MAS 77/01/2004, Fochville MAS 176/01/2004, Fochville MAS 93/07/2003, Fochville MAS 94/07/2003, Fochville MAS 95/07/2003 and Fochville MAS 198/08/2005;"

[4] The Third Applicant subsequently lodged a separate Application praying for essentially the same relief, as did the last Applicant.

[5] At this point I interpose to mention that the prayer for condonation was not opposed in this Court, and condonation was consequently granted.

[6] During December of 2010 the Applicants were served with summonses to appear in court on 20 January 2011. Although the Applicants were arraigned on separate charge sheets the matters were almost invariably postponed to the same dates and essentially treated as one prosecution with individual components.

[7] The matters were transferred to the Fochville court and on 10 February 2011 the matter was postponed in order to provide the defence with

copies of the police dockets, and to give them an opportunity to make representations.

[8] On 11 March 2011 the matters were postponed in order to provide the defence with further particulars and, on 20 May 2011and on 10 June 2011 the matters had to be postponed again as not all further particulars had been provided.

[9] I must add that the requests for further particulars that form part of the record are comprehensive and on face value these postponements do not appear to be unreasonable.

[10] The First and Second Applicants were each absent on separate days during these initial proceedings, but I do not think that this should have any effect, as there was no demure in this regard in the court *a quo*.

[11] The upshot was that the prosecution was ready to set a trial date on 22 July 2011, but this prompted a series of Applications for the permanent stay of the prosecution. Some of these Applications were heard on 10 February 2012 after the matter had already been set down for trial on 6 March 2012, less than a month in the future.

[12] From this synopsis it should be clear that there were no inordinate delays in the court procedures *per se*, and that is also not the case of the Applicants.

[13] The complaint relates to delays that occurred before they were summoned to court, and I will now turn to the relevant issues in order to determine whether the Applicants should be entitled to the relief they claim.

[14] These two matters are closely related as they follow from the same investigation involving a number of different police dockets.

[15] As appear from the aforesaid each Applicant lodged a separate review Application, claiming that the First Respondent committed a number of irregularities when dealing with their Applications for a permanent stay of prosecution, under two separate case numbers in the Regional Court. These Applications were brought in the form of Motion proceedings in the Criminal Regional Court where they were arraigned.

[16] The First two Applicants in case no. 748/12 are husband and wife who brought a separate Application for a permanent stay of prosecution, which was dismissed on 11 November 2011.

[17] The Third Applicant, Accused three, in that matter in the Regional Court is the sister in law of the First Applicant as she is married to his brother who is the Applicant in case no. 747/12.

[18] To avoid confusion I will refer to the Applicant in case 747/12 as the Fourth Applicant.

[19] The Third and Fourth Applicants brought similar Applications on different case numbers in the Regional Court, the one being heard after the other.

[20] Although the Applicants are before Court on different case numbers the Third and Fourth Applicant have throughout been represented by the same legal representative and the Arguments on behalf of all the Applicants are essentially the same.

[21] With the expected differences in detail the factual foundation on which the Applicants rely is similar and the same legal principles are applicable to all the Applications.

[22] Although the First Respondent declined to hear the Third and Fourth Applicants' Applications simultaneously, their Applications were dismissed in a single Judgment on 17 February 2012.

[23] For reasons stated above, I intend dealing simultaneously with all the Applications in this Judgment.

[24] The background to these Applications is set out in the affidavits of the different Applicants. The prosecution of the Applicants relate to some fifteen case dockets, some of which the brothers Eleveld were arrested and charged with since 11 July 2004.

[25] The charges relate to the Applicants' business of rebuilding and selling damaged motor vehicles. The allegation appears to be that either stolen motor vehicles are sold, or that parts from stolen motor vehicles are used in the rebuilding of the vehicles.

[26] The First and Fourth Applicants appeared in the Regional Court on some of these dockets, and the matter was withdrawn by the Public Prosecutor on 12 December 2005.

[27] This was the last time any of these Applicants appeared in court on any of these matters until they received summonses to appear in Court during December 2010.

[28] It does not appear that the Second Applicant was ever a suspect in these matters, and the Third Respondent states that she was not aware that she was a suspect in the matter. The sole interaction she had with the investigation was to provide a witness statement.

[29] It is common cause that a Public Prosecutor, whose identity cannot be established, issued a *Nolle Prosequi* certificate on the majority of these dockets on 31 July 2007, indicating that the Director of Public Prosecutions declined to prosecute on those matters.

[30] It appears that the investigating officer, Detective Inspector Ras, believed that he had stumbled upon a syndicate, and he seemingly continued referring the matter to higher authority within the National Prosecuting Authority.

[31] The upshot was that early in 2009 there was an exchange of correspondence between personnel of the Prosecuting Authority and legal representatives for the First and Second Respondents, culminating in the summonses being issued almost two years later.

[32] In the result a period of five years expired between the charges being withdrawn during 2005 and reinstating the prosecution in 2010.

[33] The Applicants further allege that during this period very little further evidence, if any, came to light. This contention was not placed in dispute.

[34] I am prepared to accept that matters where the identity of motor vehicles are altered, or stolen vehicle parts are used to rebuild vehicles could become just as complex as Fraud matters to investigate.

[35] It is also clear from the summary of the different trials the prosecution envisaged, as contained in the Founding affidavits, that six different trials were anticipated to accommodate various combinations of the four Applicants, as well as three other individuals.

[36] I am, however, of the view that the prosecuting authority should be criticized for their tardiness, or inability to bring these matters to trial earlier.

[37] Despite this criticism that can be levelled at the Prosecuting Authority, the Applicants are still required to prove irreparable trial related prejudice before a permanent stay of prosecution could be ordered.

[38] From the recent authorities it is clear that a permanent stay of prosecution will only be granted in extraordinary circumstances where significant trial related prejudice to the Accused is proven.

> **See: Bothma** v **Els and others 2010 (1) SACR 184 (CC) at par. 70 – 76** and the authorities quoted there.

[39] In the absence of a detailed exposition of the missing material and a full explanation of their significance it is difficult to see how prejudice to the Applicants can be adequately adjudicated upon without all the evidence being properly canvassed at the trial.

[40] The current Applicants broadly refer to documents that are lost without any detailed explanation how these documents fit into the wider context of the trial, and without specifying to which individual counts the prejudice would relate. The only indication of how the documents would relate to a specific defence refers to a trial within a trial they envisage regarding the admissibility of searches and seizures. In my view the Second Respondent would be the party who would be at a distinct disadvantage during this trial within a trial, in the absence of the supporting documentation.

[41] The further contention that could be gleamed from the founding affidavits is that the Third Applicant intends relying on a lease agreement, which would be difficult to substantiate after the fact. There is, however, no elucidation as to how this aspect would impact on an allegation that she provided false information in order to facilitate the registration of a motor vehicle.

[42] The Applicants additionally rely on pecuniary burdens which would be placed on them in order to defend themselves at the trial. In my view the authorities referred to above make it clear that this is not a factor that could play a decisive, or even significant, role in permanently staying the prosecution.

[43] The Applicants' challenge to the orders by the First Respondent is based on the allegation that several irregularities were committed, mainly by virtue of not holding the Second Respondents bound to the provisions of **rule 55** of the **Rules Regulating the conduct of proceedings in the Magistrates' Courts**.

[44] In essence the Second Respondent did not comply with the Rules relating to motion proceedings, the Applicants attempted to rely on. The Second Respondent failed to file any notices or affidavits in opposition to the Application, save for an affidavit from the investigating officer that was handed in from the bar at the hearing of the Fourth Applicant's Application.

[45] Before the merits of this argument can be considered we must first decide whether the First Respondent, sitting as a Lower Court, had the jurisdiction to review the decision by the Second Respondent, and whether it is competent to institute civil motion proceedings in a Criminal Regional Court.

[46] In argument before us and supplementary heads of argument, which the parties requested to deliver, it was argued that their original application is not for a review of the second respondent's decision to prosecute, but that they are seeking an interdict in order to avoid injustice and hardship.

[47] The Applicants state that they "are trying to prevent ... the execution of the decision by the prosecution."

[48] I find this distinction to be artificial, as the Applicants admit that the Second Respondent has the authority to institute the prosecution.

[49] An interdict in terms of **the Magistrates' Courts Act, 32 of 1944**, is defined as "a judicial process whereby a person is ordered to refrain from doing a particular act, or is ordered to perform a particular act. It is a remedy of a summary and extraordinary nature, allowed in cases where a person requires protection against an unlawful interference, or threatened interference, with his rights." (my underlining)

(See: Jones & Buckle; the Civil Practice of the Magistrates' Courts in South Africa, Tenth Edition, vol. 1 at 165)

[50] The concession by the Applicants, that the Second Respondent had the authority to institute the prosecution, was properly made. The Second Respondent acted within the scope of its duties and authority, and their actions were clearly not unlawful, and do not stand to be interdicted.

[51] If on the other hand the actions of the Second Respondent were found to be unlawful or illegal it would stand to be reviewed and set aside.

[52] The Applicants rely on the term "avoid injustice and hardship", which would denote unfair or unjust administrative action.

[53] The only reference I could find for this ground for an interdict is in relation to a High Court granting an interim order, pending the outcome of review proceedings.

(See: Airoadexpress v LRTB, Durban 1986 (2) 663 (A))

[54] That matter related to a transport company that could not proceed with its business, pending an administrative review of a licence the authorities refused to reissue on slightly different terms. Although the Supreme Court of Appeal was clearly of the view that the licence should be issued, they still refrained from finally interdicting the Respondents.

[55] I cannot agree with the Applicant's contention that a review would not be a competent remedy if they are dissatisfied with the Second Respondent's decision to institute the prosecution against them. The Court's powers of review are clearly wider than an interdict which is aimed at preventing unlawful or illegal actions. In review Applications the Courts has a wide discretion not only to set aside illegal and irregular administrative action, but also where the organ held a wrong view of the law.

(See: Herbstein & Van Winsen; the Civil Practice of the High Courts of South Africa, 5th edition, vol. 2 at p. 1287)

[56] This is exactly what the Applicants claim in relying on **section 38** of **The Constitution of the Republic of South Africa**. The Applicants claim that their right to a fair trial was infringed by the Second Respondent's decision to prosecute after an inordinate delay. The Applicants' contention is, broadly stated, that they are being prejudiced by the decision to prosecute, and the insistence to act on this decision, which is unlawful or illegal.

[57] In the result I am not convinced that the continuing prosecution could be divorced from the decision to persist with the prosecution, and this concern is only capable of adjudication as a judicial review of the Second Respondent's resolution.

[58] In coming to this conclusion I also have regard to the **Promotion of Administrative Justice Act, 3 of 2000** which was brought into operation "To give effect to the right to administrative action that is lawful, reasonable and procedurally fair".

[59] This act specifies which administrative actions are governed by the act, and **section 1 (ff)** explicitly brings "a decision to institute or continue a prosecution" within the ambit of judicial review.

[60] This serves to further strengthen my view that the appropriate procedure to challenge a continued prosecution would be a review, and not an interdict. This act does endow the magistrates' courts with jurisdiction to review administrative action in terms of this act, but it will not avail the Applicants as the application was not brought in terms of **the Act** and the Applicants did not comply with the procedure and requirements set out in **section 7**. I will revert to this act presently, relating to a further difficulty I have with the Application.

[61] In proceeding with the matter before the Regional Magistrate the Applicants relied on the Judgment in **Director of Public Prosecutions: Kwa-Zulu Natal v Regional Magistrate, Durban and another 2001 (2) SACR 463 (N)** where such a procedure was condoned.

[62] The Second Respondent argues that the above decision should not be followed and they rely on the subsequent Judgement in **S v Naidoo 2012 (2) SACR 126 (WCC).**

[63] In **Director of Public Prosecutions: Kwa-Zulu Natal v Regional Magistrate, Durban and another** the provisions of **section 170** of **The Constitution of the Republic of South Africa** was interpreted as an empowering provision.

[64] The Judgment in **S v Naidoo** differs with this interpretation and convincingly interprets this section as a restrictive clause.

[65] Without repeating the complete Judgement and, to avoid undue prolixity, I agree that the preceding sections of the **The Constitution** bestow wide powers on the Higher Courts, while providing for the extent to which those powers might be restricted, which should be the guiding factor in interpreting **section 170.**

[66] **Section 170** provides that the Magistrates Courts "may decide any matter determined by an act of Parliament" (My underlining) which accord with the trite principle that Magistrates Courts are creatures of statute.

[67] Read with **section 173** of **The Constitution** which bestows the Higher Courts with inherent Jurisdiction, and not the lower Courts, it must be clear that **section 170** is intended to stipulate that the Lower Courts' Jurisdiction is limited to what is statutorily authorized.

[68] In addition **section 19** of the **Supreme Court Act, 59 of 1959** similarly bestow wide powers on the High Courts while the **Magistrates Courts Act, 32 of 1944** does not contain similar provisions.

[69] The Magistrates Courts derive their powers to prevent undue delays from **section 342A** of the **Criminal Procedure Act, 51 of 1977** which does not provide for a permanent stay of prosecution. The strongest measure the Magistrate is empowered to take before the Accused has pleaded, and therefore entitled to a final judgement in the ordinary course of the proceedings, would be an order striking the matter of the roll with the proviso that a further prosecution may not be instituted without the written consent of the Director of Public Prosecutions. This is a far cry from finally interdicting the Prosecuting Authority from prosecuting an Accused person.

[70] I am further in agreement with the **Naidoo** Judgment that the Magistrate would, and should have the authority to consider any manner of trial related prejudice when evaluating the evidence, and ameliorating it with the appropriate order which could include ruling evidence inadmissible or an acquittal.

[71] The Trial Court would in fact be in the best position to evaluate this issue, in the absence of detailed, unambiguous and uncontested facts clearly manifesting the nature and extent of prejudice.

[72] I am therefore of the view that the First Respondent did not have the authority to grant a permanent stay of prosecution.

[73] I further find the process the Applicants followed, in bringing civil motion proceedings before a Criminal Regional Court incompetent.

The Criminal Regional Court does not have the jurisdiction to entertain Civil Applications.

[74] **Section 2(1)(f)** and **(g)** of the **Magistrates Court Act** provides for the Minister of Justice and Constitutional Development's powers to establish Courts, and these sections clearly differentiate between civil and criminal courts. This is so despite the word "or" separating the sub sections. Clearly the Minister has the authority to demarcate an individual court to act as both a criminal and civil court, depending on operational requirements. There is a clear distinction between the two subsections, which makes the suggestion that a court established as a criminal court could simply function as a civil court preposterous.

[75] This reasoning becomes irrefutable having regard to **section 12 (6), (7), and (8)** of the Magistrates' Courts Act which requires a Regional Court Magistrate's name to be entered on a list further demarcating his or her functions in terms of **section 29 (1) or 29 (1B),** regulating which causes of action the Regional Magistrate may adjudicate on.

> 12(6) Only a magistrate of a regional division whose name appears on the list referred to in subsection (7), may adjudicate on civil disputes contemplated in section 29 (1) or 29 (1B), in accordance with the criteria set out in subsection (8).
>
> (7) The Magistrates Commission must enter the names of magistrates of regional divisions on a list of magistrates who may adjudicate on civil disputes contemplated in-
> *(a)* section 29 (1) or 29 (1B); or
> *(b)* both sections 29 (1) and 29 (1B).
>
> (8) The Magistrates Commission may only enter the name of a magistrate on the list in terms of subsection (7) if one or more places have been appointed in terms of section 2 (1) *(i*A*)* within the regional division in respect of which the magistrate in question had been appointed for the adjudication of civil disputes, and-
> *(a)* the head of the South African Judicial Education Institute has issued a duly signed certificate that the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes; or
> *(b)* the Magistrates Commission is satisfied that, before the establishment of the Institute referred to in paragraph *(a)*, the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes; or
> *(c)* the Magistrates Commission is satisfied that the magistrate, on account of previous experience, has suitable knowledge of, and expertise in, civil litigation matters to preside over the adjudication of civil disputes contemplated in section 29 (1) or 29 (1B) or both sections 29 (1) and 29 (1B).

Only a Regional Magistrate whose name was placed on the list by the Magistrates' Commission may adjudicate in Civil Matters, determined by the proviso, that the matters they are permitted to hear are qualified. Before a Regional Magistrate's name may be placed on the list it has to be established through specified mechanisms that he or she is sufficiently qualified and experienced to deal with civil matters.

[76] The Minister would evidently only be entitled to appoint a Regional Magistrate to adjudicate in civil matters they are eligible to hear in terms of these sections.

[77] At this stage I have to pause and consider the impact of the **Promotion of Administrative Justice Act** on this reasoning. **Section 9A** provides for similar, but separate, requirements for training and designation of magistrates to adjudicate these matters, and therefore this act would similarly not avail the Applicants.

[78] Moreover, I doubt that it would be competent for a court to review a matter that is currently under consideration in another court, with equal or higher status, and in my view applications for permanent stay of prosecution should be the exclusive domain of the Superior Courts.

[79] Once the Minister has demarcated the function of a Court, I do not see how a party to the proceedings could be entitled to transform the nature of the court and proceedings.

[80] The irregularities the Applicants rely on in this Application are apposite in this regard and probably occurred as a result of the foreign procedure they introduced into a Criminal Court. From the manner in which the Trial Court adjudicated the issues in the present case, and the failure to apply the rules regarding factual disputes in motion proceedings laid down in **Plascon-Evans Paints LTD v van Riebeeck Paints (PTY) LTD 1984 (3) SA 623 (A)**, it is evident that the Regional Magistrate did not possess the prerequisite experience and training to adjudicate Civil matters.

[81] This position is even more intolerable when considering that the prosecutors in the lower courts are appointed in terms of **section 16** of the **National Prosecuting Authority Act, 32 of 1998** which provides for academic qualifications, and does not require a prosecutor to be a member of the organized professions, being Attorneys or Advocates. The question arises whether the introduction of such civil proceedings could result in a prosecutor suddenly not having *locus standi* in his own court. At the very least Prosecutors who are experts in criminal litigation might be at a distinct disadvantage if they are suddenly confronted with a procedure they are not ordinarily required to be experienced in. This is evident from the current Prosecutor's failure to file a Notice of Intention to Oppose and opposing affidavits.

[82] Although the first two Applicants specifically state that they do not rely on **section 342A**, the Third and Fourth Applicants did rely on these provisions and the First Respondent properly, and correctly, dealt with these provisions as far as there were limited delays during the course of the Court proceedings, and the Prosecution was in a position to arrange a trial date.

[83] The remedies provided in **Section 342A** are not available for pre-trial delays, although I am of the view that a Presiding officer would be entitled to take cognisance of such delays when adjudicating on delays encountered during the trial.

See: Director of Public Prosecutions: Kwa-Zulu Natal v Regional Magistrate, Durban and another 2001 (2) SACR 463 (N)

S v Naidoo 2012 (2) SACR 126 (WCC)

[84] In the result I am of the view that First Respondent was correct in refusing to grant a permanent stay of prosecution and propose the following order:

The Applications by all four Applicants are dismissed.

H.L. Alberts

(Acting Judge of the North Gauteng High Court)

I agree, and it is so ordered

V.V. Tlhapi

(Judge of the North Gauteng High Court)