

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 812/2008
Date heard: 2009-02-20
Date delivered:

In the matter of:

PA ELS

APPLICANT

versus

**P S.
C BEZUIDENHOUT N.O.
THE CLERK OF COURT, KIMBERLEY N.O.
THE MINISTER OF JUSTICE, N.O.**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Coram: **MAJIEDT J et TLALETSI J**

JUDGMENT

MAJIEDT J:

- 1.1 The Applicant, an accused in a private prosecution on a charge of rape, seeks a declaratory order and injunctive relief in the form of a permanent stay of prosecution against the First Respondent, who is the private prosecutor and complainant on the rape charge. The Applicant also seeks a review and setting aside of the issuing of the summons in the private prosecution by the Third Respondent on the grounds that no proper procedure had been followed in respect of the determination of security as provided for in s9(1)(b) of the Criminal Procedure Act, 51 of 1977 (*“the*

Criminal Procedure Act”). A challenge against the constitutionality of sec 7 of the Criminal Procedure Act in general, or in the alternative, of sec 7 in relation to this particular case, was, by agreement between the parties, not proceeded with and will only be set down for adjudication in the event that the Applicant is unsuccessful in the present matter.

- 1.2 The Applicant is a Kimberley businessman, presently 78 years of age.
- 1.3 The First Respondent is presently 51 years of age – she is a self-employed lady resident in Pretoria.
- 1.4 The Second Respondent is a senior Magistrate in Kimberley who had presided in the sec 9(1)(b) proceedings referred to above.
- 1.5 The Third Respondent is the Clerk of the Court, Kimberly Magistrate’s Court, who had issued the summons initiating the private prosecution against the Applicant.
- 1.6 The Fourth Respondent is the Minister of Justice and Constitutional Development (incorrectly cited by the Applicant as “the Minister of Justice”) who has been cited in his official capacity by reason of the constitutional challenge against sec. 7 of the Criminal Procedure Act (which, as I have pointed out, is not before us at this juncture).
- 1.7 No costs order is sought against the Second to Fourth Respondents, who have been cited only due to their potential interest in the matter.

2. The gravamen of the Applicant's case in seeking to obtain a permanent stay of the private prosecution as aforementioned, is twofold, namely:
 - a) That he will have an unfair trial and will suffer irreparable trial prejudice due to the extremely long delay between the alleged commission of the offence and the private prosecution being instituted; and
 - b) The Applicant alleges that the private prosecutor (the First Respondent) was actuated by ulterior motives in instituting the private prosecution. He contends that, on this ground too, a permanent stay thereof should consequently be ordered.
- 3.1 The Applicant seeks the review and setting aside of the issuing of the summons as aforementioned, on the grounds that the First Respondent had failed to make full disclosure of all relevant facts in her *ex parte* application before the Second Respondent for the determination of security in terms of sec. 9(1)(b) of the Criminal Procedure Act.
- 3.2 Given the ultimate conclusion in this judgment, it is not necessary to deal with this aspect any further.
4. Most of the salient facts are either common cause or not seriously disputed and can be succinctly summarized as follows:
 - 4.1 The First Respondent alleges that the rapes were perpetrated on her by the Applicant from 1968 to 1970 on

various occasions. When this had commenced in 1968, she was only 13 years old. She alleges further that the Applicant was a family friend of her parents. The Applicant denies the rape allegations, but admits that he had befriended the First Respondent's parents at that time.

- 4.2 During 26 June 2006 a brief letter of demand was sent on behalf of the First Respondent by attorneys in Pretoria to the Applicant, advising him that their client alleged that she had been raped by the Applicant and that they were contemplating legal proceedings.
- 4.3 On 11 October 2006 a second letter of demand was sent to the Applicant by another firm of attorneys acting for the First Respondent. This letter of demand was much more detailed and indicated that the First Respondent was contemplating civil proceedings for damages and also a criminal prosecution.
- 4.4 It appears that just prior to 11 October 2006, when the aforementioned second letter of demand had been sent, the Director of Public Prosecutions had declined to prosecute the Applicant after a charge of rape had been laid by the First Respondent.
- 4.5 On 6 June 2007 a summons for damages in the amount of R3.7 million was issued against the Applicant by the First Respondent in this Court. The Applicant is defending the action and the matter is still pending.

- 4.6 On 27 September 2007, the Director of Public Prosecutions issued a certificate *nolle prosequi* at the request of the First Respondent after the Director of Public Prosecutions had again declined to prosecute the Applicant. This occurred after the First Respondent had apparently threatened to refer the matter to the SAPS Head office after she became aware of the decision not to prosecute the Applicant. The matter was then investigated afresh by the SAPS and the second decision not to prosecute was taken thereafter.
- 4.7 On 21 December 2007 the First Respondent, *qua* private prosecutor, issued summons against the Applicant in a private prosecution. The matter was postponed in the Magistrate's Court on two occasions and is now being held in abeyance until the issues in this application are determined.
- 5.1 To the abovementioned common cause facts must be added the First Respondent's version as to why she had delayed for approximately 40 years in instituting action against the Applicant for the alleged incidents of rape. Her explanation is that she had been haunted by feelings of guilt throughout and that it was only in the course of 2002, while serving a two year sentence for fraud and upon receiving counselling in prison, that she had taken a decision to make full disclosure and to take action against the Applicant. I shall revert to this very important aspect later herein.
- 5.2 I must also make mention of the fact that the Applicant avers that the First Respondent paid him an unexpected visit during early

2006. He had not been in contact with her at all for many years prior to this visit. The Applicant alleges further that, during this visit, the First Respondent borrowed the sum of R300 000,00 from him. He turned down this request and she then left. The Applicant suggests in his papers that this rebuff led to the aforementioned letters of demand and that they, together with the civil claim for damages and the private prosecution, are all indicative of a concerted effort on the part of the First Respondent to extort money from him. The Applicant relies on these aspects aforementioned for his contention that the First Respondent has been actuated by ulterior motives in instituting the private prosecution. The First Respondent flatly denies the alleged visit during early 2006, the alleged request for a loan and the allegation that she is attempting to extort money from the Applicant.

6. Injunctive relief in the form of a permanent stay of prosecution is a drastic remedy. Kriegler J referred to it in **Sanderson v Attorney General, Eastern Cape**¹ as follows:

“... the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching.”

See also: **Zanner v Director of Public Prosecutions, Johannesburg**².

Kriegler J pointed out that this sort of relief would only be warranted where, for example, there exists irreparable prejudice to the accused in the prosecution to be instituted.

¹ 1998(2) SA 38 (CC) at para [38], 58 D – E

² 2006(2) SACR 45 (SCA) at para [10], 50 b-d.

It is well-established in our law that a superior Court is empowered to intervene in a private prosecution in a lower Court by, for example interdicting the private prosecutor from proceeding with the prosecution³.

7. A preliminary aspect raised by the Applicant is an application in terms of Rule 23 for the striking out of a report of one Dr. Eon Frederik Sonnekus, a forensic criminologist. At the hearing we dealt with this issue first, ordered the striking out of the entire report with costs and indicated that our reasons would be incorporated in this judgment on the merits. This is a convenient juncture to furnish the reasons.

- 7.1 The said report deals briefly with the author's conclusions based on various interviews and documents which he had perused. The heading of the report is: "*VICTOMOLOGICAL ALLEGED VICTIM IMPACT REPORT: IN THE CASE PTRUE BOTHMA v PETRUS ARNOLDUS ELS*".

- 7.2 Dr. Sonnekus states in the report that he had insight into various documents and he also had a consultation and interview with First Respondent and her son. He also had a telephonic consultation with the First Respondent's attorney, Mr. Groenewald, who represented her in these proceedings and also represents her in the private prosecution. He had then conducted a study of various works on victomology and expressed what he refers to as an expert opinion on the

³ This holds true for both the pre-constitutional and constitutional eras;
See: Solomon v Magistrate, Pretoria and Another 1950(3) SA 603 (T) at 607 F – H;
Phillips v Botha 1999(1) SACR 1 (SCA) at 11 b.

possible veracity of the allegations of rape made by the First Respondent.

- 7.3 It is important to set out fully the conclusions drawn by Dr. Sonnekus based on his aforementioned methodology. He makes the following submissions:

“11. SUBMISSIONS

11.1 I respectfully submit to the Honourable Court that –

11.1.1 A prima facie case of alleged rape(s) against the accused could exist, subject the Court’s finding;

11.1.2 There are indications of severe trauma in the bodily sexual existence of Mrs Bothma;

11.1.3 There are indications of contact between Mr. Els and Mrs Bothma during her puberty that may need to be properly explained by the accused;

11.1.4 The matter should be adjudicated in the interests of justice;

11.1.5 It may be in the interests of both Mrs Bothma and Mr Els to consider a possible settlement of the matter, as it pleases the Court.”

8. Mr. Cilliers SC, who appeared for the Applicant before us, quite understandably attacked the aforementioned report as irrelevant and its conclusions on the following grounds:

- a) That it is based in its entirety on hearsay; and
- b) That it seeks to usurp the functions of a trial court which has to determine the credibility of the First Respondent as complainant in the rape matter.

In **Golding v Torch Printing and Publishing Co (Pty) Ltd and others**⁴ Ogilvy-Thompson AJ, as he then was, held as follows regarding the striking out of a pleading on the grounds of

⁴ 1948(3) SA 1067 (C)

irrelevance:

“The decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.”⁵

See also in this regard: **Rail Commuters’ Action Group v Transnet Limited**⁶

I am in agreement with Mr. Cilliers’ contentions that the evidence sought to be presented through Dr. Sonnekus’ report would be inadmissible at the trial, by reason of the fact firstly that it consists of hearsay allegations and secondly that there is no basis in law for Dr. Sonnekus’ so-called expert opinion as to the veracity of the allegations by the First Respondent. It is in fact the function of the trial court in the private prosecution to make a finding on the complainant’s credibility. The report is therefore irrelevant to the issues which require determination. Consequently we had struck out the entire report as indicated above.

9. The Applicant relies on the provisions contained in s35(3)(d) and (i) of the Constitution, Act 108 of 1996 (*“the Constitution”*), for his attack on the private prosecution due to the alleged unfairness of the proceedings⁷.

⁵ at 1090

⁶ 2006(6) SA 68 (C) at 83 H – J.

⁷ The relevant section provides as follows:

“35(3) Every accused person has a right to a fair trial, which includes the right –

(a) ...

(b) ...

(c) ...

(d) To have their trial begin and conclude without unreasonable delay;

(e) ...

(f) ...

(g) ...

(h) ...

10. On behalf of the Applicant, Mr. Cilliers' primary attack has been focused on the lengthy delay between the alleged commission of the offence and the institution of the private prosecution proceedings by the Third Respondent. He has submitted, with reference to the averments made by the Applicant in his founding and replying affidavits, that the lengthy delay has caused the following irreparable trial-related prejudice to the Applicant:

10.1 Important witnesses on whose evidence the Applicant could have relied in substantiating his defence, have passed away in the meantime and in this regard mention was made of three particular witnesses, namely the Applicant's brother, his sister-in-law and his domestic assistant at the time.

10.2 Certain documentation which could have assisted the Applicant in his defence can no longer be accessed, for example the motor vehicle registration papers, since it was alleged that the Applicant had on various occasions picked up the First Respondent in his motor vehicle over weekends to take her to his residence where the rapes were allegedly perpetrated. It was further alleged by the First Respondent that the Applicant had at that time owned a Mercedes Benz and an E-type Jaguar motor vehicle which he used to pick her up. The Applicant denies that he had owned these vehicles during 1968 and indicated that the records from the motor vehicle registration authorities would have been of great assistance in this regard, but it is no longer available.

(i) to adduce and challenge evidence;"

11. On behalf of the First Respondent, Mr. Groenewald has submitted that the Applicant's averments with regard to the alleged trial-related prejudice he would suffer are vague and unsubstantiated. He has also forcefully argued that there has been no unreasonable delay in this matter, since the period of time which has elapsed must be calculated from the time that the Applicant was first charged, i.e. when he was first formally notified of the rape charge against him.
12. It is necessary to consider first whether Mr. Groenewald is correct in his latter submission, i.e. to determine whether an accused in a private prosecution can be said to be charged only at the time when he receives formal notification of the charge or charges against him. Mr. Groenewald's contention is that the rights entrenched in *inter alia* sec 35(3)(d) and (i), only accrue to an accused person, i.e. one that has been formally charged.
13. In **Sanderson v Attorney General Eastern Cape**, *supra*, Kriegler J stated that the cases illustrate:

“..... that ‘charged’ can be interpreted very narrowly, so as to refer to formal arraignment or something tantamount thereto, or broadly and imprecisely to signify no more than some or other intimation to the accused of the crime(s) alleged to have been committed.”⁸

The learned Judge pertinently declined to decide which of the two interpretations with regard to the word “charged” in sec 25(3)(a) of the Interim Constitution, Act 200 of 1993 (*“the interim Constitution”*), is to be preferred. It is of considerable importance

⁸ At par. [18], 49 A-B.

See also: *McCarthy v Additional Magistrate, Johannesburg* 2000(2) SACR 542 (SCA) at par [28] – [30], 551, a – g.

Cheadle *et al*: SA Constitutional Law, The Bill of Rights at 29-20 to 29-23.

to set forth in full the *dictum* of the learned judge in this regard:

“It is neither necessary nor desirable to decide where the word ‘charged’ in s 25(3)(a) falls along the continuum of possible meanings of the word. That is so for a number of reasons. First, because it makes no significant difference in this particular case, as will be shown in due course. Second, because the corresponding provision in the final Constitution does not repeat the word and consequently any interpretation will be of transitory importance only. Thirdly and dispositively, it is not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from the particular context in which it may be used. When assessing the anxiety, stress and social embarrassment suffered by a public figure accused of a morally reprehensible crime, it is of little consequence whether nicely worded imputations have been formulated, reduced to writing or put to the person. In the context of s 25(3)(a) and the preservation of the individual’s protection against unfair criminal proceedings it can safely be accepted that ‘having been charged’ includes appearing in the dock for the formal remand of a criminal case.”⁹

14. Mr. Cilliers has laid much emphasis on the fact that the Legislature had deemed it necessary to change the wording of this particular provision in the Constitution. I have already set out the provisions of s35(3)(d) above. Section 25(3)(a) of the Interim Constitution reads as follows:

“Every accused person shall have the right to a fair trial, which shall include the right –

*(a) To a public trial before an ordinary court of law within a reasonable time **after having been charged**” (emphasis supplied).*

Mr. Cilliers has submitted that this is a significant change and that it means that the period to be calculated in terms of s35(3)(d) with regard to the question of delay should start running from the time of the alleged commission of the offence.

⁹ Par [19] at 49 B – E

15. In **Du Preez v Attorney General Eastern Cape**¹⁰ Zietsman J found that “charged” in s25(3)(a) of the Interim Constitution means that a person has been advised by a competent authority of a decision to prosecute him.¹¹

In **Moeketsi v Attorney General Bophuthatswana and Another** Friedman JP held that:

“In South African law therefore, the time period would commence when an accused person is served either with an indictment or summons. That means from the time when an accused person had knowledge of the charge.”¹²

16. In foreign jurisdictions, a similar interpretation is attached to the word “charged”.

- a) Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedom provides as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time”

In **Eckle v Germany (Federal Republic)**¹³ it was held that:

“In criminal matters, the ‘reasonable time’ referred to in article 6(1) (of the European Convention on Human Rights) begins to run as soon as a person is ‘charged’, this may occur at a date

¹⁰ 1997(3) BCLR 329 (E) at 337

¹¹ “In my opinion a person is not ‘charged’ with an offence until he is advised by a competent authority that the decision has been taken to prosecute him. This does not necessarily mean that he must actually be furnished with a summons or a charge sheet. To make this a specific requirement could lead to abuse by the police if, for example, the police over a number of years repeatedly tell a person that he is to be prosecuted for a serious offence and thereby reduce him to a state of anxiety and stress while at the same time declining to serve him with a summons or a charge sheet.”

¹² 1996(1) SACR 675 (B) at 691 i - j.

¹³ (1983) 5 EHRR 1

prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he will be prosecuted or the date when preliminary investigations were opened.”

- b) In **Foti v Italy**¹⁴ the European Court held as follows:

“Whilst ‘charge’ for the purposes of article 6(1) may in general be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, it may in some instance take the form of other measures which carry the implication of such allegation and which likewise substantially affect the situation of the suspect.”

- c) The 6th Amendment of the Constitution of the United States of America provides that:

“In all criminal prosecutions the accused shall enjoy the right to a speedy ... trial ...”

The United States Supreme Court adopted a similar approach in holding that a person is “accused” only for purposes of the 6th Amendment once he/she is indicted.¹⁵

- d) The position appears to be the same in Canada. Section 11(b) of the Canadian Charter provides that:

“any person **charged with an offence** has the right (b) to be tried within a reasonable time.” (emphasis supplied)

In **R v Carter**, Lamer J (as he then was) held that:

“The timeframe to be considered in computing trial within a reasonable time generally runs only from the moment the person is charged. I might add that I say ‘generally’ because

14 (1983) 5 EHRR 313 at 326

15 US v Marion 404 US 307 (1971) at 313-314.

there might be exceptional circumstances under which the time might run prior to the actual charge on which the accused will be tried. As an example, if the Crown withdraws the charge to substitute a different one but for the same transaction, the computation of time might well commence as of the first charge.”¹⁶

17. In sec 1 (the definitions clause) of the Criminal Procedure Act, “charge” is defined as:

“Includes an indictment and a summons”.

18. In general therefore it would appear to me that the weight of the authority, both here and abroad, seems to favour a narrow interpretation of the word “charge” when considered in the context of the right to speedy trial and as regards the question of what constitutes unreasonable delay. For the reasons that follow, however, I am of the view that, given the circumstances of the present matter, a broader definition should be adopted.

- 18.1 In **Coetzee and Others v Attorney General, Kwa-Zulu Natal and Others** ¹⁷Thirion J rejected an argument that the time period should be reckoned from the time of an accused person’s arrest until the commencement of the trial. The learned judge held that such a literal interpretation of the subsection (35(3)(d) of the Constitution) would narrow down, rather than broaden the ambit of the right to a fair trial. The learned Judge states that:

“Delay which occurs before an accused is arrested or served with a summons may be more prejudicial to the accused than the delay which occurs thereafter.”¹⁸

¹⁶ R v Carter (1986) 21 CCR 170 at 173.

¹⁷ 1997(1) SACR 546 (D&CLD) at 556 d-h.

¹⁸ At 560 i

18.2 In **Smyth v Ushewokunze and Another**¹⁹, Gubbay CJ appears somewhat ambivalent with regard to this question. First the learned Chief Justice seems to take the view that the mere fact that a person is under suspicion of having committed an offence, does not set in motion the calculation of the time period of delay, whereas he later seems to agree with Thirion J in the **Coetzee** matter, *supra*, that unreasonable delay prior to official notification of the charge may also be taken into account.²⁰

The learned authors of **Constitutional Law of South Africa** also hold the view that Gubbay CJ seems to contradict himself in the two passages quoted hereinbefore.²¹

18.3 Gubbay CJ held in **In re Mlambo**²² that the time period is to be calculated from the “*start of the impairment of the individual’s interests in the liberty and security of his person*”.

18.4 Admittedly as I have said, most of the decisions seem to favour a narrow interpretation, i.e. that the period of delay is to be calculated only from the time when a person has been formally notified of the preferring of charges against him/her or at the very least from the time when that person acquires knowledge that a prosecution is to be instated against him/her. My difficulty with such an approach is that it offends one’s sense of justice in the

19 1998(2) BCLR 170 (ZS)

20 At 179 H the learned Judge states that: “The fact that the applicant must have realised that he was under suspicion in relation to allegations of crimen injuria and culpable homicide and that investigations were being undertaken on behalf of the second respondent, did not start the clock ticking against the State.” At 180 B on the other hand, the learned Judge states that: “I agree with the submission that the reach of s18(2) of the Constitution (of Zimbabwe) will permit of redress where an unreasonable delay on the part of the State in commencing the trial, preceded the date upon which the accused person was officially notified that he had committed a criminal offence (see *Coetzee and Others v Attorney General Kwa-Zulu Natal and Others* 1997 (8) BCLR 989 D at 999 G – 1000 A.)”

21 Woolman and Others, *Constitutional Law of South Africa*, Vol 3, at 51-130, footnote 4.

22 1992(4) SA 144 (ZSC) at 149 H – J.

circumstances of a case such as the present one, where the private prosecutor has delayed for 40 years to institute prosecution against the perpetrator. Woolman and Others, **Constitutional Law of South Africa**, Vol 3, *supra*, furnishes the following instructive comment in this regard:

“In order to allow for a distinction between arrested and accused persons, and to enable the courts to make appropriate use of comparative jurisprudence in this area, it would make sense to interpret ‘accused’ in s35(3) to refer to someone who has been formally charged. **This bright line rule is always subject to the fact that pre-charge occurrences may affect the right of the accused person to a fair trial.**” (emphasis supplied) ²³

I am also mindful of the dictum of Kriegler J in the **Sanderson** matter quoted above²⁴ that, since sec. 35(3)(d), which corresponds with sec 25(3)(a) of the interim Constitution, does not repeat the word “charged”, any interpretation of that word “**will be of transitory importance only**”.

18.5 In this matter, the Applicant has made specific reference of and has illustrated the potential prejudice which he may suffer due to the pre-charge delays herein. The Applicant has referred to the fact that he could not have committed the rape offences in 1968 at his present residence, as the First Respondent alleges, since he was not occupying that residence at the time. He also alluded to the fact that both his brother and his sister-in-law (i.e. his brother’s wife) were now deceased. They could have attested to the fact that he had not been staying there, since his brother was busy renovating and refurbishing that residence for the Applicant. He furthermore alludes to the fact that his erstwhile domestic

²³ At 51-40

²⁴ See par. 13 and footnote 9, above

assistant, who would have been able to attest to the fact that the Applicant did not rape the First Respondent over the weekends when the latter had spent time there according to her, is also now deceased. These are pertinent and specific instances of trial-related prejudice which the Applicant may face. Similarly, the lack of access to motor vehicle records dating back 40 years, to show that he did not possess a Mercedes or an E-type Jaguar at the time, as alleged by the First Respondent, may also prejudice the Applicant in his trial. These pre-charge occurrences are therefore directly relevant in the context of this case. In addition to those aspects there is of course the very real likelihood of fading memory, not only of the Applicant, but also of any witnesses who may still be alive.

See: **Zanner v Director of Public Prosecutions, Johannesburg²⁵**.

To aggravate matters further, the First Respondent's rape complaint is characterised by a paucity of detail. As an example – she does not furnish any specific dates of the alleged rapes, she merely states that the first rape was allegedly perpetrated “*during March in 1968 ... on a Saturday evening*”. With regard to the rest of the incidents she simply states that:

“The Applicant repeatedly raped me at each and every occasion when he took me to his farm Carter's Ridge during the course of 1968, 1969 and 1970. The exact dates ... which I cannot recall.”

18.6 In my view, given the exceptional circumstances of this case, the pre-charge occurrences are directly relevant to the determination of whether the Applicant will have a fair trial and should

²⁵ *supra* at para [12], 51 a – b.

consequently be taken into account in this determination. In **Dickey v Florida**²⁶ Chief Justice Burger, delivering the opinion of the Court, held that:

“These disabilities, singly or in league, can impair the accused’s ability to mount a defence. The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution’s charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade.”

These remarks are particularly apposite to the circumstances of this case before us.

18.7 Mr. Groenewald has drawn our attention to the minority judgment of Nugent JA in **Zanner**²⁷, where the learned Judge stated that:

“It is not necessary to decide in this case precisely when a person can be said to be an 'accused person' for purposes of s 35(3)(d) and I do not suggest that that requires that he must have been formally charged. But on even the widest construction of that term, I do not think the appellant was an 'accused person' at any time throughout the period that is now in issue. The formal accusation that had been made against him had been withdrawn without any intimation to him that it might be renewed nor any intention that it would be. There is also no suggestion that the withdrawal of the charge was in some way improper or merely a device. On the contrary, the matter remained altogether forgotten in the office of the DPP until the case came to be reinvestigated ten years later. Far from accusing the appellant of having committed an offence the DPP did not even suspect the appellant of having done so. Indeed, even the appellant did not consider himself to be standing accused of the commission of an offence. I do not think that the appellant can be said to have been an 'accused person', even on the widest construction of the term, if nobody, including the appellant himself, considered that he was standing accused of the commission of an offence. “

This dictum is plainly made *obiter dictum* as is evident from the learned Judge’s opening sentence in that paragraph.

²⁶ 398 US 30, 90 S.Ct 1564

²⁷ *Supra*, at par. [30], 55 f – i.

19.1 A further aspect to be considered here is the question of culpability, if any, on the part of the First Respondent for the vast delay in proceedings. I agree with Mr. Cilliers that, on a conspectus of all the sources consulted, a delay of 40 years as is the case here, is quite exceptional. I have already set out the First Respondent's explanation for the enormous delay. I find the First Respondent's explanation, i.e. that she had been haunted by feelings of guilt until 2002 about what had happened to her as a teenager, rather unpersuasive. Furthermore and in any event, there is no explanation for the further unreasonable delay between 2002 (when on her version she decided, after counselling in prison, that she should take action against the Applicant for the wrongs which she had suffered) and the eventual institution of the private prosecution in December 2007. That constituted a further delay of approximately 5 years.

19.2 In **United States v Lovasco**²⁸, Marshall J held that:

“... proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider **the reasons for the delay as well as the prejudice to the accused**” (emphasis supplied).²⁹

19.3 I consequently find that full culpability can be ascribed to the First Respondent for the enormous delay in this case. There has not been any suggestion of any other extraneous factors which had contributed to the delay, nor has it been suggested that the Applicant had done anything to contribute to it.

20.1 As has been pointed out in various authorities, no hard and fast

²⁸ 431 US 783 (1977)

²⁹ At 786

rules should be adopted in laying down specific time periods to determine what would constitute an unreasonable delay.³⁰

20.2 As Kriegler J pointed out in the **Sanderson** matter, the practice in certain jurisdictions to presume prejudice after a lapse of specified time periods, ought not to be adopted by our courts³¹. In **Moeketsi**, Friedman JP set out, with reference to various Canadian decisions, the periods of time which were regarded in those cases as reasonable or unreasonable. The learned Judge, correctly with respect, then points out that there is no discernible pattern that can be drawn from these cases and concludes that

“... indeed it is highly unlikely that any catalogue of periods can be compiled.”³²

The fact of a long delay does not *per se* amount to an infringement of the right to a fair trial. It has to be considered in the context of all the circumstances unique to each case and taking into account factors such as the length of the delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason of the delay and also the accused’s assertion of his right to a speedy trial.

See: **Zanner v Director of Public Prosecutions, Johannesburg**³³;
Sanderson v Attorney General, Eastern Cape³⁴.

30 See *inter alia*: Sanderson v Attorney General Eastern Cape, *supra* at par. [28], 54 B-C.
Moeketsi v Attorney General Bophuthatswana and Another, *supra* at 693 h – i.

31 *Supra* at par. [30], 54 E.

32 *Supra* at 693 c – f.

33 *Supra* at par. [14], 51 f – h.

34 At para [25], [26] and [32].

20.3 In determining what would constitute a reasonable time, the Courts exercise a so-called “*balancing test*”, whereby the conduct of the Prosecution and of the Accused is weighed up and evaluated with reference to the following considerations:

- a) The length of delay;
- b) The reasons advanced by the Prosecution for the delay;
- c) Any waiver of the right to a speedy trial by an accused person;
- d) Prejudice to the accused;
- e) Generally, the interests of justice.

See: **Sanderson**, *supra*³⁵

Barker v Wingo³⁶

R v Askov³⁷

21. I have already discussed these aspects mentioned above in some detail. With regard to the question of waiver, there can be no doubt whatsoever that the Applicant, *qua* Accused in the private prosecution, is unequivocally and decisively asserting his right to a speedy trial herein.

22. The determination of whether a delay has been unreasonable, involves a value judgment and a balancing of these competing interests mentioned above. In **Sanderson**, Kriegler J put it thus:

“The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable.”³⁸

35 At para [25]

36 407 US 514 (1972) at 532.

37 [1990] 2 SCR 1199

38 *Supra* at para [36], 57 F.

In **R v Morin**³⁹, *supra*, the Court held that prejudice may be inferred from the length of the delay. The longer the delay, the more likely such an inference of prejudice would be drawn. Similarly, in **R v Askov**⁴⁰ the Full Court held that:

“There is a general and, in the case of very long delays, an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time.”

With regard to the length of the delay, that Court held that

“the longer the delay, the more difficult it should be for a Court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.”⁴¹

23. The right to a speedy trial, entrenched by sec 35(3)(d) of the Constitution, is aimed at protecting three important interests of an accused person, namely:

- a) The right to security of a person is protected by attempting to minimize the anxiety and stigma that accompanies criminal prosecutions;
- b) The right to liberty;
- c) The right to a fair trial is protected by ensuring that the prosecution occurs while witnesses are available and while events are still fresh in their memories.

See in this regard: **Sanderson** *supra*⁴²;

39 [1992] 1 SCR 771

40 At 1209

41 Ibid.

42 At par. [20] – [22]

R v Morin⁴³;

R v Askov⁴⁴;

Zanner v Director of Public Prosecutions Johannesburg⁴⁵.

The protection against unreasonable delay ranks in the forefront of fair trial rights in the Constitution⁴⁶.

24. In the present matter issues regarding the Applicant's right to liberty do not arise and his right to security arises to a limited extent only. What is of crucial importance, however, is the question of trial-related prejudice which the Applicant relies on. Despite Mr. Groenewald's valiant attempts to persuade this Court to the contrary, I think there can be little doubt that the Applicant will be severely prejudiced at his trial, to answer charges (framed in its detail, as I have indicated above, in only the flimsiest of detail) of events that occurred 40 years ago. He would be severely hampered by:
- a) The unavailability of material witnesses who have since passed away; and
 - b) The dearth of documentation which may be materially relevant to his defence, e.g. motor vehicle registration documents; and
 - c) His and his potential witnesses' faded memories concerning events that occurred four decades ago.

43 [1992] 1 SCR 771

44 [1990] 2 SCR 1191

45 *Supra* at para[12], 5 i - j

46 *Wild and Others v Hoffert NO and Others* 1998(6) BCLR 656 (CC) at par. 11, 661 D.

25. Given the extent of the delay, the First Respondent's rather unpersuasive explanation therefor and the Applicant's invidious position with regard to material witnesses and documentary evidence, in my view the trial-related prejudice should be almost self-evident herein. Of course, the grounds above also establish that the Applicant's right to adduce and challenge evidence (section 35(3)(i)) has also been violated.
26. In **Sanderson** Kriegler J pointed out that a stay of prosecution as injunctive relief will only be warranted in the cases where for example irreparable prejudice to an accused can be proved⁴⁷.
27. In **S v Zuma and Others**⁴⁸ Kentridge AJ stated as follows:

"The right to a fair trial conferred by that provision (sec 25(3) of the interim Constitution) is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."

The learned Judge emphasized that criminal trials should henceforth be conducted in accordance with open-ended notions of basic fairness and justice.

See also: **Sanderson v Attorney General Eastern Cape**⁴⁹.

28. In **Director of Public Prosecutions and Another v Lebona**⁵⁰, the Appeal Court of Lesotho upheld the lower Court's permanent stay of prosecution in circumstances where there had been a delay of

47 At par [39], 58 H.

48 1995(2) SA 642 (CC), para [16].

49 *Supra* at para [22], 51 A - C

50 1998(5) BCLR 618 (LesCA)

three years in commencing the trial, while the accused in that matter had been suspended from her post. The Court held that there had been a vast unreasonable delay in respect of the criminal proceedings and that, given the serious prejudice suffered by the accused, there should be a permanent stay of prosecution. The learned President of the Court, Steyn P, stated that:

“However, apart from the general – often inevitable – prejudicial consequences of delay for those involved, in this case there is a very specific trial prejudice allegedly suffered by respondent which is not denied by the appellants Respondent would have been well advised to have furnished the Court with greater detail of this prejudice and should have particularised these averments so as to establish demonstrably that relevant evidence required for her defence may well be irretrievably lost as a result of the delays. But in the absence of challenge, the Court below in our view was entitled to give due weight to this aspect of respondent’s trial prejudice.”⁵¹

29. In all the circumstances and having given careful consideration to the competing constitutional rights of the Applicant, who is not only entitled to the right to a fair trial, but also to the constitutional right of dignity, and that of the First Respondent, who is entitled to the constitutional rights of dignity, access to court and to equality before the law, I am of the view that the Applicant will undoubtedly be prejudiced and would not have a fair trial, given the considerable difficulties he faces in mounting a proper defence. In my view these obstacles are virtually insurmountable, given the irretrievable loss of documents and of witnesses who have since passed away.
30. In Canada and in the United States of America, the choice of remedy in cases where unreasonable delay is found is stark – there is only a permanent stay of prosecution available in those

⁵¹ At 363 E – G.

jurisdictions. Kriegler J in **Sanderson** refers to this as: “*remedial inflexibility*” and points out that where the prejudice alleged is not trial-related, a range of appropriate remedies less radical than a stay of prosecution is available in our law. A stay of prosecution would be available only in very limited instances..⁵²

31. In my view this is a case where the Applicant has amply demonstrated irreparable trial prejudice as a consequence of the unreasonable delay, which is entirely the fault of the First Respondent. In the circumstances therefore, it seems to me that this is one of those exceptional cases where a permanent stay of prosecution should be ordered, so as to protect the Applicant’s fair trial rights, in particular, the right to a speedy trial. I come to this conclusion after careful and anxious consideration, since I am mindful that this decision effectively shuts the doors of the courts as regards criminal prosecution, to the First Respondent. I do so, further cognisant of the fact that the true effect of the delay on the outcome of the case will never be determined, since it could appropriately only be determined at the trial. Nevertheless, I am satisfied that the evidence before us overwhelmingly demonstrates that the Applicant would suffer irreparable trial-related prejudice due to the delay and that he would therefore not receive a fair trial.
32. Having come to this conclusion, it is not necessary to consider further the balance of the relief sought in the Applicant’s Notice of Motion, namely the review and setting aside of the issuing of the summons, due to the alleged non-compliance of the provisions contained in sec 9(1)(b) of the Criminal Procedure Act and also

⁵² *Supra* at para [38] and [39], 58 D – H.

the question of ulterior motives on the part of the First Respondent in issuing the summons for the private prosecution.

33. Lastly there is the question of costs. During the course of the hearing we made an *ex tempore* ruling regarding the striking out of Dr. Sonnekus' report and also ordered the First Respondent to pay the costs of that application. Mr. Cilliers for the Applicant has pertinently abandoned the order for costs sought in the Notice of Motion. He has indicated that the Applicant would not seek any costs in respect of this application. The Constitutional Court has the very salutary rule (which is not inflexible) that, ordinarily, where substantial constitutional issues are raised, an unsuccessful party ought not to be ordered to pay the successful party's costs.

See: **Zuma v National Director of Public Prosecutions**⁵³.

34. The following order is issued:

It is declared that the private prosecution against the Applicant would lead to an unfair trial as provided in section 35(3)(d) and (i) of the Constitution of the Republic of South Africa, Act 108 of 1996 and the First Respondent is prohibited from continuing with such private prosecution.

**SA MAJIEDT
JUDGE**

⁵³ 2009(1) SA 141 (CC) at par [67], 161 E.

I CONCUR:

**PL TLALETSI
JUDGE**

FOR THE APPLICANT:

ADV JG CILLIERS SC INSTRUCTED BY ENGELSMAN MAGABANE

FOR THE FIRST RESPONDENT:

MR. SJ GROENEWALD INSTRUCTED BY TOWELL AND GROENEWALD