

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

CASE NUMBER: 2377/02

In the matter between:

YOSHEN NAIDOO

First Applicant

THANASELVAN KISTA PILLAY

Second Applicant

JAYESH VINOED LALLOO

Third Applicant

RAVINDREN NAIDOO

Fourth Applicant

and

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Respondent

**THE DIRECTOR OF PUBLIC
PROSECUTIONS: CAPE OF GOOD HOPE**

Second Respondent

MR A LE GRANGE

Third Respondent

JUDGMENT DELIVERED 17 SEPTEMBER 2003

Introduction

On 28 February 2002 the applicants applied for an order –

- 1.1 Reviewing and setting aside the issuing of a certificate in terms of section 342A(3)(c) of Act 51 of 1977 by second respondent dated 20 November 2000;

AND

that the prosecution in Case No RC (2) 38/2001 in the Regional Court Bellville be permanently stayed;

- 1.2 Reviewing and setting aside third respondent's dismissal of applicants' application to have the matter struck from the roll in terms of section 342A(3)(c) of Act 51 of 1977 in Case No RC (2) 38/2001 in the Regional Court Bellville;

AND

that the prosecution in Case No RC (2) 38/2001 in the Regional Court Bellville be permanently stayed;

- 1.3 Reviewing and setting aside third respondent's dismissal of applicants' application to have the charges quashed in Case No RC (2) 38/2001 in the Regional Court Bellville;

AND

that the prosecution in Case No RC (2) 38/2001 in the Regional Court Bellville be permanently stayed;

- 1.4 that the prosecution in Case No RC (2) 38/2001 in the Regional Court Bellville be permanently stayed in the event of the reviews not being upheld by this Honourable Court.

At the hearing, the applicants were represented by Mr CJ Hartzenberg SC, Mr GP Scheltema SC and Mr CG van der Walt for the first, third and fourth

applicants, and Mr CJ Van Schalkwyk for the second applicant. The second respondent was represented by Mr J Slabbert. The first and third respondents were not represented at the hearing of the application.

The background

The applicants were arrested during November 1997 and charged (under case number SHS/15/99) with the armed robbery of seven motor vehicles. They were subsequently released on bail.

Disputes on various issues arose between the State and the defence as a result of which the prosecution of the matter was delayed. Some of the reasons for the delays will be dealt with later in this judgment.

The matter was set down for trial in the Regional Court, Bellville on 25 January 1999. The matter did not proceed to trial and further delays ensued.

On 24 August 2000 Regional Magistrate Botes struck the matter from the roll in terms of section 342A(3)(c) of the Criminal Procedure Act 51 of 1977 (“the Act”).

On 20 November 2000, the second respondent, acting in terms of section 342A(3)(c) of the Act, ordered that the prosecution of the applicants be re-instituted. This was done under case number RC(2) 38/2001 and the applicants appeared in the Regional Court, Bellville on 26 April 2001.

Disputes between the prosecution and the defence continued to bedevil the progress of the matter. On 12 October 2001, Regional Magistrate A La Grange (the third respondent) found that “(the accused) have been sufficiently advised as to the alleged charges against them”, and their application to have the matter struck from the roll once more was refused.

The case was set down for trial in the Regional Court, Belville on 20-24 May 2002.

On 3 April 2002 the present application was launched.

The issues

The issues raised by the applicants will be dealt with under three heads:

1. The setting aside of the certificate in terms of section 342A(3)(c) of the Act issued by second respondent on 20 November 2000.
2. The review and setting aside of the third respondent's dismissal of the applicants' application (i) to have the matter struck from the roll in terms of section 342A(3)(c) of the Act, and (ii) to have the charges quashed.
3. The permanent stay of the prosecution.

The setting aside of the certificate

The applicants seek an order reviewing and setting aside the certificate dated 20 November 2000 issued by the second respondent in terms of section 342A(3)(c) of the Act re-instituting the prosecution of the applicants. They base their attack on three submissions:

1. The reference to “attorney-general” in section 342A(3)(c) of the Act is a reference to the National Director of Public Prosecutions and not to a Director of Public Prosecutions.
2. Ms SM Galloway had no authority to issue the certificate.
3. The issue of a certificate in terms of section 342A(3)(c) is not the sort of day-to-day decision that prosecutors are called upon to make and this function was reserved for the National Director.

I shall deal with these submissions *seriatim*.

Section 342A(3)(c) of the Act provides as follows:

- 3) If the court finds that the completion of 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 –
 - (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.

Section 179(1) of the Constitution of the Republic of South Africa 108 of 1996 (“the Constitution”) provides for a “national prosecuting authority”. Section 179(1)(a) provides that the national prosecuting authority shall consist of the National Director as head of the prosecuting authority and (sub-section (1)(b)) of the Directors and prosecutors. In terms of section 179(2) the prosecuting authority “has the power to institute criminal proceedings on behalf of the State, and to carry out the necessary functions incidental to instituting criminal proceedings.”

The Prosecuting Authority Act 32 of 1998 (“the Prosecuting Authority Act”) in section 2 thereof establishes a single national prosecuting authority under the provisions of section 179 of the Constitution. The structure of the prosecuting authority consists of the office of the National Director and the offices of the prosecuting authority at the High Courts (section 3). The prosecuting authority comprises the National Director, Deputy National Directors, Directors, Deputy Directors and prosecutors (section 4).

Section 6 of the Prosecuting Authority Act establishes an office of the prosecuting authority at the seat of each High Court in the Republic, headed by either a Director or Deputy Director. It is common cause that the office of the prosecuting authority at the seat of the High Court in Cape Town is headed by a Director.

In terms of section 20(1) of the Prosecuting Authority Act, the power, as contemplated by section 179(2) of the Constitution to, *inter alia*, institute and conduct criminal proceedings on behalf of the State vests in the prosecuting authority.

In terms of section 20(3) of the Prosecuting Authority Act, any Director shall, subject to the control of the National Director, exercise the powers referred to in subsection (1) [which includes the power to institute and conduct criminal proceedings on behalf of the State] in respect of (a) the area of jurisdiction for which he or she has been appointed, and (b) any

offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.

From this subsection it is clear that the responsibility for the institution and conduct of criminal proceedings vests in the Director in respect of offences committed within his or her area of jurisdiction. This is confirmed by the Policy Directives (paragraphs A3 and B6) issued by the National Director in accordance with section 179(5)(b) of the Constitution and section 21(1)(b) of the Prosecuting Authority Act.

Section 45(a) of the Prosecuting Authority Act provides that any reference in any law to “an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the national director”.

The section clearly envisages that there are contexts in which “attorney-general” is not to be construed as a reference to the National Director. Section 342A(3)(c) of the Act is such a context. The function described in the section -- the resumption or institution of a prosecution -- is a function previously exercised by an attorney-general which now falls squarely within the powers of a Director as set out in the Prosecuting Authority Act. In my view, Mr Slabbert is correct when he submits that the authority to act in terms of section 342A(3)(c) of the Act is (i) a day to day function of the Director which (ii) does not require a delegation from the National Director.

The National Director’s exclusive authority is set out in section 22 of the Prosecuting Authority Act and in paragraph A2 of the Policy Directives. The authority to act in terms of section 342(3)(c) is not reserved for the National Director, nor has the authority to act in terms of that section been expressly excluded from a Director’s jurisdiction, either generally or in a specific case, by the National Director acting under the provisions of section 20(3) of the Prosecuting Authority Act.

Mr Slabbert, who is a Deputy Director, stated in argument that he would find it most surprising if the authority to act in terms of section 342A(3)(c) were

to be reserved for the National Director, as the National Director would be inundated with requests to issue certificates. This is confirmed by Mr FW Kahn SC, the Director of Public Prosecutions who at the time headed the Cape Town office of the prosecuting authority.

The applicants say that Ms Galloway had no authority to issue a certificate in terms of section 342A(3)(c) (the section speaks of a “written instruction”) in that she had not in terms of section 20(5) of the Prosecuting Authority Act been authorised in writing by the National Director to exercise any of the powers referred to in section 20(1).

In a supplementary affidavit, Mr Kahn says the following:

“... and the certificates in terms of Sec 342A(3)(c) of Act 51/1977 are not ordinarily done by me personally, but since the issue of such certificates is considered to be of a serious nature they are issued by a minimum of two senior members, in this case by a Deputy Director of Public Prosecutions and a Senior State Advocate who are acting under my direct supervision and control”

Mr Kahn is mistaken when he says that certificates “are issued by a minimum of two senior members, in this case by a Deputy Director of Public Prosecutions and a Senior State Advocate”. It has never been suggested that the certificate in this case was *issued* by Mr Niehaus, the Deputy Director who discussed the matter with Ms Galloway. But neither was the certificate *issued* by Ms Galloway, the Senior State--Advocate concerned. The certificate emanates from the office of “Die Direkteur van Openbare Vervolgings, Kaap die Goeie Hoop”. At the end of the document, the source of the authority underlying the certificate is given as –

VAN OPENBARE VERVOLGINGS: KAAP DIE GOEIE HOOP

Ex facie the document, the certificate was issued by the Director of Public Prosecutions of the Cape of Good Hope. It was signed on his behalf by Ms Erasmus. It has never been suggested that she issued the certificate.

It is clear what happened. The matter was considered by Ms Galloway in consultation with Mr Niehaus. She decided that it was appropriate that a certificate be issued in terms of section 342A(3)(c). In doing so she acted under the direct supervision and control of the Director. The certificate was in effect issued by the Director. In terms of section 20(3) he has the authority to do so. The Director was entitled to rely on the conclusions reached by two senior members of his staff when he issued the certificate.

It is not without interest, and significance, that in their Notice of Motion, the applicants ask for an order reviewing and setting aside *the certificate issued by the second respondent*.

The applicants further contend that in coming to the decision that the prosecution is to be re-instated, Ms Galloway did not apply her mind to the issues and that the decision to re-instate the prosecution is for that reason liable to be set aside on review. Assuming that a decision to issue a certificate under section 342A(3)(c) of the Act is reviewable, I am of the view that Ms Galloway, in consultation with Mr Niehaus, properly applied her mind to the issues. The fact that the applicants differ from her evaluation of the material in the docket does not render the issue of the certificate irregular. Indeed, it is only to be expected that persons charged with serious crimes may differ from the prosecution in the evaluation of the situation.

In my view, the certificate dated 20 November 2000 issued by the second respondent in terms of section 342A(3)(c) of the Act re-instituting the prosecution of the applicants was properly issued.

The review of the third respondent's decisions

The general rule in regard to review of the decision of an inferior court given before a conviction is set out in the well-known, and frequently followed, judgment in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119D--120D. At 120A—B the following passage from *Gardiner and Lansdown* (6th ed vol 1 750) is quoted as correctly reflecting the position in relation to unconcluded criminal proceedings in the magistrates' courts:

“While a superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the untermiated course of criminal proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. In general, however, it will hesitate to intervene, especially having regard to the result of such a procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily become available.”

In *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, supra*, at 120D it is stressed that even if a preliminary point decided against an accused by a magistrate is fundamental to the accused's guilt, a superior court will not ordinarily interfere, whether by way of appeal or by way of review, before a conviction has taken place in the inferior court. Thus in *Ismail and Others v Additional Magistrate, Wynberg* 1963 (1) SA 1 (A) a postponement was sought in the magistrate's court so that a point of law, which would have been decisive of the validity of a proclamation which the accused were charged with contravening, had been decided in proceedings already pending in the Supreme Court. The magistrate refused a postponement. The Appellate Division was not prepared to interfere on

review. In *Lawrence v ARM of Johannesburg* 1908 TS 525 an objection was raised on the ground that certain counts of a criminal charge were laid at a place outside the territorial jurisdiction of the magistrate's court. The magistrate overruled the objection and an application was made to the Supreme Court for an order interdicting the magistrate from proceeding with those counts. In dismissing the application, Innes CJ said (at 526):

"This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter."

(see also *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, supra*, at 119D—120A; *Ismail and Others v Additional Magistrate, Wynberg, supra*, at 5G—H and *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T) at 203E--G).

These principles found application in, for example, *S v Mhlungu and others* 1995 (3) SA 867 (CC) at 894I—895G; *S v Friedman* (2) 1996 (1) SACR 196 (W); *Slingsby v Attorney-General, Western Cape* 1999 (2) SACR 13 (C); *Levack v Regional Magistrate, Wynberg* 1999 (2) SACR 151 (C); *S v The Attorney-General of the Western Cape*; *S v The Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) and *Sapat and Others v The Director: Directorate of Organised Crime and Public Safety and Others* 1999 (2) SACR 435 (C).

The question arises whether this is one of those rare cases where grave injustice might otherwise result if the Court does not interfere before criminal proceedings have been finalised.

The applicants complain, and that complaint has been at the centre of the drawn out dispute between the prosecution and the defence which accounts for much of the delay in this matter, that the prosecution has furnished them with vague and inadequate further particulars. The applicants contend that by reason of the inadequacy of the further particulars, they are not fully apprised of the case they have to meet and that as a result they will suffer irreparable prejudice at the trial. The prosecution says that it is unable to furnish any further particulars and that, in any event, the applicants have

access to the witness statements in the docket. It is clear from the reasons that he gave for his ruling, that the third respondent gave careful consideration to the question of the adequacy or otherwise of the further particulars. Indicative of the fact that the third respondent applied his mind to the question of the further particulars is his earlier order (made on 13 August 2001) that the State amplify the particulars. He made his final ruling only after he had considered the new particulars. In making his final ruling on 3 September 2001, he says that having carefully and repeatedly perused the documentation –

“.... I’m of the view that accused 1, 4 and 5 have been sufficiently advised as to the alleged charges against them. In terms of fairness, in terms of justice to all the accused and to the State, I’m of the view that they are aware of the charges against them; that the State has given them all the necessary information needed to plead to these charges, and therefore the application by Adv Scheltema that the matter be strike (*sic*) off the roll is denied.”

The applicants have not shown that the third respondent did not properly apply his mind to the question before him or that he acted irregularly in coming to the conclusion which he reached.

The alleged inadequacy of the further particulars forms the cornerstone of the application for the review of the third respondent’s refusal of the applicants’ application to have the matter struck from the roll and to have the charges quashed. In view of the fact that the prosecution says that it is unable to furnish any further particulars and that the applicants have access to the witness statements and the docket, the question whether or not the applicants are prejudiced by the allegedly inadequate particulars furnished to them can best be determined by the trial court when apprised of the full evidential and factual context within which those particulars operate. In other words, any actual trial-related prejudice can properly be determined only by the trial court (see *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another*, *supra*, at 25j—26a where

the following *dictum* from *US v Marion* 404 US 307 is cited with approval:

“Events at the trial may demonstrate actual prejudice, but at the present time appellee’s due process claims are speculative and premature.”)

The following statement, cited in *R v Francois* 18 CCR (2nd) 187 (Ontario) at 190 from an unreported judgment, is also, in my view, apposite in the present context:

“The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal. The Crown’s submission was, in our view, right. The motion was premature and the stay should not have been granted when it was.”

In my view the applicants have not made out a case for departing from the general rule against interlocutory appeals and reviews.

The permanent stay of the prosecution

In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) where a stay of prosecution was sought on the ground that there had been an unreasonable delay in the prosecution, it is stated (at par [38]) that the relief sought --

"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. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."

The principle enunciated by Kriegler J is one of long standing in our law. In *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 at 261 Schreiner JA said:

"Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of cases such an order would be entirely out of place".

There have been lengthy delays in this matter. In *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC) at 702B (par [8]) Kriegler J says:

"Although the ultimate enquiry is whether the time between the charge and the

trial is unreasonable, it is obviously relevant that the one or the other party is to blame, in whole or in part, for the delay.”

The applicants were arrested on 4 November 1997. Under the current adversarial system, an accused is entitled to exercise his or her rights to the fullest extent permitted by law. He or she is under no obligation to assist the State in its task of pursuing the prosecution. However, the refusal to cooperate with the State has consequences and in many instances may result in the pre-trial proceedings or the trial itself being prolonged. In such circumstances the State’s “fault” is somewhat mitigated (see *Sanderson v Attorney-General, Eastern Cape, supra*, at 56B—C (par [33]); *Wild and Another v Hoffert NO and Others, supra*, at 702A (par [8]), and *R v Morin* 8 CCR (2nd) 193 (SCC) at 207).

It is apparent from the documentation herein that from the outset the various applicants have elected to conduct their defence in an aggressive manner. The circumstances in which the identity parade was to be held was vigorously challenged. Several requests for further particulars were lodged. The requests were long and, at times, fatuous. There was a great deal of unnecessary quibbling about the sufficiency of the replies received. Dates for the postponed hearings could not easily be arranged. In effect, few concessions, if any, were made by counsel acting for the defence. In the light of this attitude, the applicants must bear some responsibility also for the initial delays in the progress of this trial.

The applicants say that the prosecution was responsible for the delay in bringing the matter to trial, and as a result of the delay they have been prejudiced. There is no doubt that the State was responsible for some of the delay. Thus, for example, fingerprints were lost and fresh prints had to be taken. Considerable delay was caused by the disputes about the adequacy or otherwise of the particulars furnished to the applicants. The particulars are replete with spelling errors and the use of “and/or”, an expression which has elicited much judicial criticism and scorn. Thus in *Ex parte McDuling* 1944 OPD 187 at 189 Van de Heever (J) (as he then was) referred to “daardie Engelse ongerymdheid” and adds:

“Dit is ‘n greep om helder begrippe te ontwyk, nie om hulle uit te druk nie; mens kan net so wel sê, ‘trousers is and/or are’.”

The inept manner in which the further particulars were dealt with is an adverse reflection on the office of the second respondent. Mr Slabbert offered no excuses for what he admitted to have been an inept performance. I may add that he was not one of those responsible for drafting the particulars.

Mr Slabbert submitted that the prosecution was not exclusively to be blamed for the delays. Delays were caused by matters beyond the control of both the prosecution and the defence. Thus the withdrawal of the attorney of one of the accused (Moodley) caused a delay and on 23 August 2000 Moodley’s counsel was not available. The offer, on 25 January 1999, by one of the other accused to give evidence on behalf of the State changed the whole course of the prosecution and brought inevitable delay. The unavailability of a magistrate on occasion caused delay.

After the re-instatement of the matter on 20 November 2000, the defence on 20 March 2001 requested timeous service of the summons on all the accused in order to prevent further delays. On 26 April 2001, the first appearance on summons, the matter was postponed to enable the (then) second accused to obtain legal representation. At the next appearance on 31 May 2001 the Legal Aid Board advises that no one is prepared to take on the case of the second accused. It is only on 18 June 2001 that he obtained legal representation.

On 3 May 2001 a request for further particulars is filed. The prosecution supplies the particulars on 4 July 2001. The skirmishing about the adequacy of the particulars resumes. On 12 October 2001, the third respondent rules that the applicants have been sufficiently advised as to the alleged charges against them, and that they have the necessary information to plead to the charges.

The case was set down for trial in the Regional Court, Belville on 20-24 May 2002, but instead of going to trial, the present application was launched

on 3 April 2002.

The position in regard to delay can be summarised as follows: Much of the delay, but by no means all of it, during the period from the time of the arrest of the applicants in November 1997 to 24 August 2000 when the matter was struck from the roll in terms of section 342A(3)(c) of the Act, can be attributed to the prosecution. There was, in my view, no dilatoriness or tardiness on the part of the prosecution after the reinstatement of the matter on 20 November 2000. Such delays as there were, were in the nature of systemic delays in our courts.

The delay from 20 May 2002 to date is wholly for the account of the applicants. They are entitled to exercise their right to take matters on review in the High Court, but the delay caused thereby and the consequences of the delay are to be laid to the applicants' own charge (see *Sanderson v Attorney-General, Eastern Cape, supra*, at 56B—C (par [33]); *Wild and Another v Hoffert NO and Others, supra*, at 702A (par [8]) and *McCarthy v Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA)* at 555g—556b).

In *Sanderson v Attorney-General, Eastern Cape, supra*, at 56B—C (par [33]) and *Wild and Another v Hoffert NO and Others, supra*, at 702A (par [8]) it is emphasised that an accused who had been a party to or the primary cause of delay cannot be heard to complain of such delay. As I have already stated, an accused person is entitled to enforce all the rights available to him or her, but if the enforcement of such rights gives rise to delay of a systemic nature within the system, such delay cannot be laid at the door of the prosecution. For example, in a letter dated 6 March 1998 addressed to a Cape Town correspondent (the letter is included in the Bundle which forms part of the documentation in the matter) the attorney representing the first, third and fourth applicant states:

“Furthermore as far as possible avoid furnishing the State with hair samples, unless ordered otherwise by the Court.”

The applicants are perfectly entitled to take up this attitude but any resulting delay in obtaining an order of court would not be for the account of the

State.

In *Sanderson v Attorney-General, Eastern Cape, supra*, it is stated (at 58 D—F (par [38])) that a stay of prosecution on the ground that there had been an unreasonable delay in the prosecution, will seldom be warranted in the absence of significant prejudice to the accused. Significant prejudice which would warrant the stay of a prosecution is clearly something more than prejudice to an accused which can be remedied by another, appropriate remedy such as, for example, a *mandamus* requiring the prosecution to commence a case or a refusal to grant the prosecution a remand (*Sanderson v Attorney-General, Eastern Cape, supra*, at 58G—H ([par 39])).

Prejudice which is not trial related may involve matters such as pre-trial incarceration, social and occupational disruption, and social stigma. The applicants are out on bail and thus not subject to the serious prejudice of pre-trial incarceration. The delay of the trial is certainly socially disruptive for the applicants. The studies of the first, third and fourth applicants have suffered. The second applicant says that his panel-beating business has suffered. The applicants have shown no more than the usual strains and anxieties suffered by persons who are accused of serious offences. It has not been shown that any prejudice to the applicants on this score is such as to justify a permanent stay of the prosecution.

In *Sanderson v Attorney-General, Eastern Cape, supra*, at 58H ([par 39]) it is said that a stay of prosecution –

“is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.”

Trial-related prejudice is not easy to establish (*Sanderson v Attorney-General, Eastern Cape, supra*, at 55B ([par 30])). In *S v A* 1995 (2) BCLR 153 (C) at 158C—D it is said:

“Getuienis gaan verlore as gevolg van vertraging, feite se bepaalbaarheid vervaag;

inderdaad doeltreffende regspleging vereis spoedeisende afhandeling van geskille hetsy tussen Staat en onderdaan, hetsy tussen landsburgers onderling. Vertraging is die vyand van gesonde regspraak.”

The applicants aver that memories have faded and a possible witness for the defence has in the meantime died. It borders on the impossible for this Court to determine the impact of the loss of a witness, or the effect of the lapse of time on the reliability of the recall of events by witnesses (I have in mind the words of Brennan J in *Dickey v Florida* 398 US 30 (1970) at 53 that “it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and the available witnesses”). The State faces the same prejudice and the extent of the prejudice can only be properly measured by the trial court hearing all the relevant evidence.

The other form of trial-related prejudice on which the applicants rely, is the prejudice caused by the alleged vagueness and inadequacy of the further particulars. In this regard, the applicants have a recognised alternative remedy: they may seek a *mandamus* directed to the regional magistrate (third respondent) that he order that the prosecutor furnish the particulars asked for (*Behrman v Regional Magistrate, Southern Transvaal and Another* 1956 (1) SA 318 (T) at 319-320; *Weber and Another v Regional Magistrate, Windhoek* 1969 (4) SA 394 (SWA) at 397F—398A; *Goncalves v Addisionele Landdros, Pretoria en ‘n Ander* 1973 (4) SA 587 (T) at 596H; *Du Toit et al Commentary of the Criminal Procedure Act* 14-28). From these authorities it is apparent that although the High Court is reluctant to intervene in criminal proceedings that are still pending in a lower court, it will direct a magistrate to order delivery of particulars if the magistrate’s refusal would seriously prejudice the accused.

If, however, the prosecution has given the defence all the information it has, and the prosecution is not able to furnish the further particulars asked for, it would be proper to proceed with the trial and to deal with the question of prejudice as and when it should arise (*Green and Others v Assistant Magistrate, Johannesburg, and Another* 1954 (4) SA 580 (T) at 584B; *Behrman v Regional Magistrate, Southern Transvaal and Another, supra*, at 321B—C).

The relief the applicants do seek, cannot be granted. As I have pointed out above, the applicants have not made out a case for the review of the third respondent's decision that the applicants have been given sufficient particulars in order to prepare their defence and of his dismissal of their application to have the matter struck from the roll and to have the charges quashed.

The applicants have also not made out a case for the drastic remedy, a permanent stay of the prosecution, which they seek from this Court.

In my view, the application falls to be dismissed and the trial in the regional court must proceed. Mr Slabbert has indicated that the second respondent would not seek an order for costs should he succeed.

During the course of the skirmishing about further particulars, an alleged confession by one of the accused was included in particulars which were supplied. Mr Slabbert agrees that the inclusion of the alleged confession in the particulars was inappropriate. The offending document should be removed from the court file before the matter goes to trial before the regional magistrate.

In view of the foregoing, I would dismiss the application and refer the matter back to the regional court for trial.

HJ ERASMUS, J

I agree and it is so ordered.

DESAI, J

