



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

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

Case no: **3518 /2023**

In the appeal of:

IGBO MOSES

1st Applicant

JOHN OBIASOR

2nd Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **12 DECEMBER 2023**

DELIVERED ON: **29 APRIL 2024**

- [1] The Applicants seek permanent stay of the prosecution in the pending criminal trial in the Bloemfontein Regional Court under case number 20/189/20. The Respondent opposes the application.

- [2] The facts surrounding this matter are largely common cause and I summarise same hereinafter. The Applicants were arrested on 23 March 2020 on various offences of contravention of section 5(a) and (b) of the Drug and Drug Trafficking Act 140 of 1992. The offences were allegedly committed in 2018 and 2019. They made various appearances in the district and regional courts.
- [3] On 28 May 2021 they appeared in the Regional Court and their case was postponed to 8-10 September 2021 for trial. Prior to this postponement date, they had been supplied with copies of the contents of the docket. On 8 September 2021 the Prosecution applied for the remand of the matter with a view to discover over 800 pages of documents to the defence. The Applicants did not object to the postponement. The case was then postponed to 29 November 2021. On 9 September 2021 the prosecution provided the Applicants with two volumes of evidential material. On 8 October 2021 the Applicants were informed that another Prosecutor had been assigned to deal with the case and that there was "further new information in a form of video material that will be used" in the trial.
- [4] On the day of the trial, 29 November 2021, the trial could not be commenced with because the Applicants filed a Request for Further Particulars in terms of section 87 of the Criminal Procedure Act 51 of 1977. What the Applicants sought with regard to this request was "*the application in terms of section 252A of the Criminal Procedure Act 51 of 1977, which was made to the Director of the Public Prosecutions.*" The applicants also applied for the transcription of the audio recording of the video footages. The Applicants then applied for the postponement and same was granted and the matter postponed to 10 December 2021. On 10 May 2021 the transcription was still outstanding. On 24 February 2022 the Applicants were handed the transcribed recordings.
- [5] On 10 March 2022 the Applicants filed the second Request for Further Particulars. The case was struck off the roll on 25 April 2022 due the prosecution's failure to provide further particulars as requested in the second request. The case was reinstated towards the end of 2022. On the said date it was postponed to 13 March 2023 for trial. On 8 March 2023 the State

supplied the defence with phone extraction report, affidavit in terms of section 212(4) as well as a new charge sheet. The phone report and the section 212(4) report were dated August 2019.

- [6] The applicants contend that they were supplied with video footage materials contained in four CD's. They instructed a transcription entity to transcribe the four CD's. The said company only managed to transcribe three of the said CD's. The end result is that they could not obtain information in the fourth CD and the prosecution could also not provide same. According to the Applicants, the fourth CD apparently contained recording pertaining to the incident of 6 August 2019. It is thus contended that the Applicants are unable to mount a defence on the recorded conduct of the trap contained in the fourth CD.
- [7] The respondents contend as follows: *"...it might be favourable for the Applicants during the trial on a particular charge. Missing footage in respect of one incident is however not a reason to grant a permanent stay of prosecution."*
- [8] The applicant also contends that they requested an application by Captain Huysteen in terms of the Regulation of Interception of Communication and Provision of Communication Related Information Act 70 of 2000. It also appears, so it is contended, that Captain Huysteen had resubmitted the application. The prosecution refused to supply the requested particulars on the basis that it is classified information.
- [9] The case of the applicants is that the failure to provide the requested documents is in breach of the applicants' constitutional rights to have adequate time and facilities to prepare their defences. For this alleged failure, so it is submitted, the applicants have established trial related prejudice.
- [10] Every accused person has a right to a fair trial, which includes the right to have their trial commence and conclude without unreasonable delay. Our courts in determining the unreasonableness or otherwise of the delay, perform a balancing act. See *Moeketsi v Attorney General Bophuthatswana and Another*

1996(1) SACR 675 (B) and *Du Preez v Attorney General of the Eastern Cape* 1997(2) SACR 357 (E). The court in this balancing act looks at the conduct of both the prosecutor and the accused.

- [11] The court in *Rodrigues v The National Director of Public Prosecution and Others* (1186/2019 [2021] ZASCXX 87 (21June2021) said the following:

" [32]In *Bothma v Els*, the Constitutional Court reiterated the approach taken in *Sanderson*. It held that in determining relief for a permanent stay of prosecution, the court is required to engage in a balancing exercise in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay, the reasons the government assigns to justify the delay, the accused's assertion of a right to a speedy trial and prejudice to the accused. The Constitutional Court, however, did not regard these factors as constituting a closed list and indicated that the nature of the offence and the public policy considerations that may be attached to it would also be a relevant consideration. It is ultimately a value judgment the court brings to bear after a proper consideration of the evidential material relating to the relevant factors." (Footnotes omitted)

- [12] It is common cause that there was a delay in this case. The applicants appeared in court for the first time in 2020 and about 3 years later the trial had not commenced. However, it has to be borne in mind that the prosecution was downright tardy in the handling of this matter. The delay was primarily occasioned by the Request For Further Particulars which was not attended to in time as well as supplying further evidential material at times closer to the trial dates. The prosecution gave the requested particulars in piecemeal format. While I accept that such conduct might be prejudicial to the preparation of the defence cases, I cannot say that such prejudice was essentially trial related. The reason for saying so, is that of the time when this application was launched, the requested particulars had been given save for the particulars which the prosecution alleges was confidential and the fourth CD which could not be transcribed.

- [13] Both the state and the defence had at different times applied for the postponement of this matter. The presiding officer is also enjoined by section

342A of the Criminal Procedure Act 51 of 1977 to investigate any unreasonable delay in these proceedings. The application before me does not show that such an application was ever embarked upon. Apart from that, there is no indication on record that the applicants also sought to compel the prosecution to furnish them with the requested particulars. One would have expected the applicants to also demonstrate the actions they took in order to pursue the remedies available to them before embarking on a drastic step of seeking the permanent stay of the proceedings.

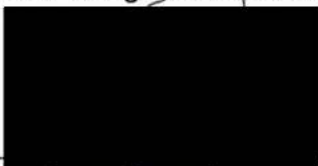
- [14] Some delays occurred as a result of the failure to provide the defence with the transcribed record of the fourth CD. The evidence however, makes it apparent that the fourth CD cannot be transcribed. If indeed it is so, I cannot see how the state will use such evidence against the applicants. According to the Applicants, this fourth CD is only applicable to the incident of 6 August 2019. Failure to provide the CD will thus only impact the charge relating to the said date. I agree with the state that the failure to provide that single CD, which only pertains to the events of 6 August 2019 cannot be a reason to order permanent stay of all the proceedings.
- [15] The applicants complain that they were not furnished with the documents relating to an application and re-application of a section 252A authority to set a trap. As alluded to above, the prosecution contends that such particulars are privileged. In my view, the rights to adduce and challenge such evidence can best be dealt with by the trial court during the proceedings. The applicants are well entitled to approach the trial court to challenge the leading of such evidence. The evidence goes to the heart of the merits of this case and would best be left to the trial court.
- [16] I have said earlier that when this application was launched, the prosecution had already furnished all the particulars requested. The reason for saying that is that the state cannot be compelled to furnish a CD, which the defence themselves have failed to transcribe. Surely, if the state would use such a CD, which is alleged to be damaged, it will be prejudicial to the defence and they are at liberty to raise it with the trial court. As indicated, the issue of the

documents in respect of the section 252A are best left to the trial court. The application must thus fail.

- [17] The applicants came before this court to vindicate their constitutional right. I accordingly hold the view that they should not be mulcted with costs. I accordingly make this order:

ORDER

1. The application for a permanent stay of the proceedings is dismissed.
2. There is no order as to costs



P. E. MOLITSOANE, J

On behalf of the Applicants: Adv. Nkhahle
Instructed by Motaung Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. Mkhabela
Instructed by Director of Public Prosecutions
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