

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED

26 September 2024

DATE

SIGNATURE

**CASE NUMBER: SS33/2022**

In the matter between:

**THE STATE**

and

**NTHAI AZWIHANGWISI SETH**

**Accused**

**Coram:** DOSIO J

**Heard:** 17 September 2024

**Delivered:** 26 September 2024

---

**ORDER**

---

The matter is accordingly postponed to 14 October 2024 for the accused to plead and for the criminal trial to commence.

The accused's bail is extended, and he is warned to appear at 9h30.

---

## JUDGMENT

---

**DOSIO J:**

### ***Introduction***

- [1] The crisp issue before this Court is whether a criminal trial can commence whilst a review application is pending. The review application is to challenge and set aside the decision of the National Director of Public Prosecutions ('NDPP') to prosecute Mr Seth Nthai ('Mr Nthai'). The review has been filed under case number 021256/2024.

### ***Background***

- [2] Mr Nthai first appeared in the High Court on 4 May 2022 and was represented by advocate Shakoane SC. The criminal trial was to commence on 24 October 2022. On this date, the accused's advocate indicated that Mr Nthai was going to make representations to the Director of Public Prosecutions ('DPP'). The matter was accordingly postponed to 3 June 2022 and once again to 15 June 2022. On 15 June 2022 it was made known to Karam AJ that the representations were unsuccessful and that further representations would be made to the NDPP. The matter was postponed to 11 August 2022. On 11 August 2022 it was made known to Ismail J that the representations to the NDPP were dismissed and the matter was postponed to 2 December 2022. On 2 December 2022 the matter was postponed to 2 February 2023 on application for the NDPP to reconsider the recommendations made by the accused to it.
- [3] On 2 February 2023 Mr Nthai was still represented by advocate Shakoane and advocate Ntshangase. No reasons for the application to reconsider were received by the NDPP and accordingly the matter was postponed to 17 February 2023 for same.
- [4] On 17 February 2023 the NDPP responded that reasons had been furnished. Mr Nthai stated that it would pursue one of two avenues:
- (a) to request the NDPP to review its decision based on further facts, or
  - (b) In the event of this avenue being unsuccessful to pursue a judicial review.

- [5] The matter was accordingly postponed to 15 March 2023 and again to 21 April 2023 for the NDPP to review its decision. It was once again indicated that should the NDPP fail to review its decision, Mr Nthai would pursue a judicial review.
- [6] On 21 April 2023 the Court before Karam AJ was informed that the NDPP had responded and had once again dismissed the representations of Mr Nthai. Mr Nthai was represented by advocate Ntshangase on this date, who informed the Court that the reasons furnished were insufficient. By agreement between the State and the Defence, the matter was postponed by Karam AJ to 28 April 2023 for Mr Nthai to apply to the NDPP for it to furnish full reasons for the dismissal of his application. The matter was postponed to 2 June 2023.
- [7] On 2 June 2023, Karam AJ was informed that the NDPP had responded stating that full reasons had previously been supplied and that the representations had been refused. However, due to the leaking of information to the media, there was a pending internal investigation. Mr Nthai requested an indefinite postponement pending the outcome of this internal investigation, as he intended to use this in the proposed review. The State opposed this application for postponement, stating that this was a delaying tactic. The matter was accordingly postponed to 5 June 2023 to allow Mr Nthai to respond to the State's opposition to the postponement.
- [8] On 5 June 2023, Mr Nthai's legal representative responded to the States' opposition and Karam AJ delivered an ex tempore judgment refusing an application for a postponement. The reasons for the refusal of the postponement by Karam AJ were principally by virtue of the fact that:
- (a) the Defence wanted an indefinite postponement pending the outcome of the NDPP's internal investigation into the alleged leakage of information to the media,
  - (b) the inability of the Defence to give the Court an indication as to the length of the postponement sought, and
  - (c) the inability of the Defence to advise the Court that, assuming there was in fact leaking of information to the media, how the accused was allegedly prejudiced thereby and how this would allegedly impact on his fair trial rights.
- By agreement the matter was postponed to 8 June 2023 for the Defence to provide a date on which the pre-trial would be conducted.

- [9] On 8 June 2023, Karam AJ was informed that a pre-trial would be conducted on 4 August 2023. The Court was informed on 8 June 2023 that the State had previously been advised by the Defence that there would be no admissions in terms of s220 of Act 51 of 1977. The matter was postponed to 4 August 2023 for a pre-trial.
- [10] On 4 August 2023 Mr Nthai's advocate, namely advocate Ntshangase handed up to Karam AJ an application for leave to appeal Karam AJ's orders dated 5 and 8 June 2023. The matter was postponed to 8 August 2023 for advocate Ntshangase to ascertain advocate Shakoane's availability to argue the leave to appeal. The matter was postponed to 8 August 2023.
- [11] On 8 August 2023 advocate Ntshangase advised Karam AJ that the first available date for advocate Shakoane to argue the leave to appeal would be either 6 or 7 November 2023. The State opposed this lengthy postponement and stated that a trial date had been set for 13 to 17 November 2023. Karam AJ postponed the matter to 16 August 2023 for the accused's counsel, namely, advocate Ntshangase to ascertain advocate Shakoane's availability for the proposed trial dates and to enable Mr Nthai to get another legal representative to argue the leave to appeal which was set to be argued on 23 August 2023.
- [12] On 16 August 2023 Karam AJ was advised by the State counsel that advocate Shakoane had advised him that he did not have instructions to proceed with trial, but that he would only argue the leave to appeal on 6 or 7 November 2023. Advocate Ntshangase who was present, confirmed advocate Shakoane's lack of instructions for the trial. The matter was postponed to 23 August 2023 for argument on the leave to appeal application.
- [13] On 23 August 2023 Mr Nthai appeared in person and requested the matter to be postponed to either 6 or 7 November 2023. The State opposed this application for a further postponement and the Court refused a further postponement. Mr Nthai accordingly argued the application before Karam AJ himself. The matter was then postponed to 6 September 2023 for judgment. Further, on 23 August 2023, Karam AJ received an application for leave to appeal the orders made on 4, 8 and 16 August 2023.
- [14] On 6 September 2023, Karam AJ delivered his judgment on the application for leave to appeal his judgment dated 5 June 2023. The application for leave to appeal was refused. Mr Nthai requested a postponement to obtain the transcripts and to supplement his notice of appeal and to file his heads of argument, pertaining to his application for leave

to appeal the rulings of 4, 8 and 16 August 2023. Mr Nthai further proposed that oral argument be waived and that Karam AJ decide the matter on the papers before him. The State agreed to the proposal and by agreement, Mr Nthai was ordered to file his papers by 15 September 2023 in respect of these rulings of 4, 8 and 16 August 2023. The matter was postponed by Karam AJ to 29 September 2023 for judgment. On 29 September 2023 judgment was postponed to 13 October 2023 whereupon the application for leave to appeal was again refused in respect of the rulings of 4, 8 and 16 August 2023.

- [15] The State proposed a new trial date for 12 to 16 February 2024. Mr Nthai advised the Court that advocate Shakoane was indeed representing him in his trial. Karam AJ postponed the matter to 20 October 2023 to obtain clarity as to whether advocate Shakoane was still representing Mr Nthai at the trial and to determine his availability on those dates and a date on which to hold a pre-trial.
- [16] On 20 October 2023, Karam AJ was handed a letter from Mr Nthai's attorney addressed to the DPP, advocate Chauke, that advocate Shakoane was only available to conduct the pre-trial on 7 or 8 December 2023 and would only be available for trial on 25 to 29 March 2024. Karam AJ postponed the matter to 12 February 2024 for trial.
- [17] The matter appeared before me on 12 February 2024. Mr Nthai was absent and accordingly a warrant of arrest was authorised and the issuing thereof was held over to 16 February 2024 and his bail was provisionally forfeited to the State.
- [18] On 16 February 2024, Mr Nthai appeared before me, the warrant of arrest was cancelled and bail was reinstated.
- [19] The matter was postponed to 28 February 2024 for the State to bring an application against Mr Nthai in terms of s342A of Act 51 of 1977.
- [20] On 27 February 2024 a review application was served on the State. As a result, on 28 February 2024 the State withdrew their application in terms of s342A and requested the matter to be postponed to August 2024. This was an unreasonably long date to postpone the matter. As a result, I postponed the matter to 14 March 2024 in order to hold a pre-trial and to case manage the review application. The purpose of the case manage was not to apprise myself of the merits of the review application, but to set fixed time frames for the filing of affidavits. I deemed it necessary to case manage this matter as Mr Nthai

had indicated as far back as 17 February 2023, before Karam AJ, that if the NDPP did not review its decision, he would then pursue a judicial review. As at 16 February 2024, no founding affidavit had yet been filed by Mr Nthai.

- [21] On 14 March 2024 a pre-trial was concluded before me. Advocate Kolbe SC was the legal representative for Mr Nthai. The State now had eleven witnesses as compared to the original two state witnesses and as a result, the State nor the Defence, were ready to proceed to trial. Advocate Kolbe requested a fresh disclosure of the docket in order to obtain new instructions from Mr Nthai. The criminal trial was postponed to 25 March 2024 for a provisional date.
- [22] A case management of the review application was held on 25 March 2024 and the following time frames were set:
- (a) The respondents, namely, (NDPP as first respondent), (DPP as second respondent) and (the Director of Public Prosecutions, Gauteng as third respondent) were to file a notice to oppose by 8 April 2024.
  - (b) The record and contents upon which the DPP based its decision to prosecute, were to be filed by 29 April 2024.
  - (c) Mr Nthai would then file a supplementary founding affidavit by 21 May 2024.
  - (d) The answering affidavit of the respondents was to be filed by 3 July 2024.
  - (e) The replying affidavit of Mr Nthai was to be filed by 17 July 2024.
- [23] The case management of the review application, as well as the criminal trial were postponed to 23 July 2024.
- [24] On 23 July 2024, the State attorney, in respect of the review application, advised that there were problems in obtaining the full record. As a result, the respondents had not yet supplied the applicant, Mr Nthai, with the full record, which resulted in the inability of Mr Nthai to complete his supplementary founding affidavit.
- [25] On 24 July 2024, I made a court order to the following effect, namely:
1. The first to third respondents shall file their supplementary records on 23 August 2024.
  2. The applicant shall file his supplementary affidavit on 10 September 2024.
  3. The first to third respondents shall file their answering affidavit on 24 October 2024.
  4. The applicant shall file his replying affidavit on 16 November 2024.

I then instructed both the State and Mr Nthai that the criminal trial would proceed on 14 October 2024, as this was the date that was suggested by the State advocate. Mr Nthai's legal representative stated that the criminal trial cannot proceed until the review has been disposed of. The State disagreed. I accordingly placed this matter down for 17 September 2024 for the parties to argue before me whether a criminal trial can commence whilst a review application is pending. The Court order dated 23 July 2024 states at paragraph 5 the following:

'The matter is set down on 17 September 2024 for the parties to argue whether the criminal trial is able to proceed parallel to a review application.'

[26] Mr Nthai, as the 'respondent', filed an application on 14 August 2024 to the following effect:

'KINDLY TAKE NOTICE THAT the respondent intends applying to this Court on 17 September 2024, for an order in the following terms:

1. The trial under case number: SS033/2022 is adjourned to 17 February 2025 at 10h00 as a holding date, pending the decision in respect of the respondent's review application under case number: 021256/2024, Gauteng Division of the High Court, Johannesburg.
2. The adjournment is granted on the basis that if the review application has been determined and is successful then the holding date will fall away.
3. If the review application is unsuccessful by the holding date of 17 February 2025, trial dates will be determined by the court.
4. The respondent undertakes to appear in court on 17 February 2025 and any other trial dates to be determined by the court.
5. Further and/or alternative relief.'

[27] A founding affidavit compiled by Mr Nthai, as the 'respondent', set out the reasons for the requested order.

[28] On 17 September 2024, advocate Mokhare SC appeared to argue this matter. The State was represented by advocate Masedi.

[29] At the inception of the argument I asked both parties if we could rather refer to the parties as the State and the accused, as the application filed by Mr Nthai referred to himself as the 'respondent', yet there was no answering affidavit by the State, who is cited as the 'applicant' which confused matters. Both parties agreed to refer to the parties as the State and the accused.

- [30] Advocate Mokhare commenced with his address and stated that he was complying with paragraph five of this Court's order dated 23 July 2024 and he sought an adjournment of the criminal trial to 17 February 2025 as a holding date, pending the decision of the accused's review application.
- [31] The State opposed this application, arguing that the prospects of success of this review application were slim to none. As a result, the State Advocate contended that there was nothing stopping the criminal trial from commencing while the accused's review application was pending. The State advocate submitted that should the accused's review be successful, the State had a right to stop the prosecution in terms of s6 of Act 51 of 1977.

***Argument presented by the accused's advocate***

- [32] The accused's counsel argued that the review application seeks to challenge the unlawful, unconstitutional and invalid decision of the NDPP in dismissing the representations made for the withdrawal of criminal charges preferred against the accused. It was contended that due to the fact that the review was not before me, no further comments in respect to the merits of the review would be dealt with. As a result, counsel argued that the criminal trial be adjourned to 17 February 2025 as a holding date, pending the decision of the accused's review application, under case number: 021256/2024, in the Gauteng Division of the High Court, Johannesburg.
- [33] It was contended that if the review application once determined, was successful, then the holding date would fall away. Furthermore, if the review application was unsuccessful, then on 17 February 2025 this Court can determine a trial date.
- [34] Counsel referred to the matter of *Pikoli v President of the Republic of South Africa*,<sup>1</sup> ('*Pikoli*') where the Court stated that once a court pronounces that an administrative action or decision is invalid, the administrative decision or action not only ceases to have effect but may be treated as if it never existed. Reference was also made to the matter of *Trencon Construction (PTY) Ltd v Industrial Development of South Africa Limited and*

---

<sup>1</sup> *Pikoli v President of the Republic of South Africa* 2010 (1) GNP 408-9



*Another*<sup>2</sup> where the Constitutional Court held that if exceptional circumstances are proven, the Court will grant a substitution order.<sup>3</sup>

- [35] Counsel contended that the outcome of the review application will have a bearing on the criminal trial in that should the criminal trial proceed, whilst the review application is pending, the accused will have to plead and the Court will have to hand down a judgment of either guilty or not guilty. Should the accused be found guilty and be sentenced to a term of imprisonment, it will cause the accused irreparable harm in that the accused's constitutional rights would be infringed. These rights include the right to dignity, liberty and to a fair trial. It was argued that there is nothing to justify the limitation of those fundamental rights in terms of s36 of the Constitution and that this limitation is not justifiable in an open and free society. It was argued that even if there is pain caused to some people who want the accused to stand trial, Constitutional democracy dictates that justice is to be seen to be done. As a result, it was submitted that the accused has a constitutional right to challenge the decision of the NDPP.
- [36] It was further contended that should the criminal trial proceed whilst awaiting the outcome of the review application it will cause irreparable prejudice to the accused and deny him of his right to a fair trial as he cannot be expected to prepare fully for the criminal trial whilst filing papers in the review application. It was contended such parallel processes would be a waste of State and judicial resources and would lead to financial prejudice on the part of the accused as well. It was argued that it would not be in the interests of justice for the accused to pay legal fees to cover the two potential mutually destructive processes.
- [37] Counsel argued that the delay in commencing the review cannot be placed at the doorstep of the accused. It was submitted that the State attorney has still not filed an answering affidavit or supplied a full court record. Had the State attorney complied with the timeframes imposed by the Court in the case management, a date for the review application would have already been assigned. Accordingly, counsel argued that the case management should be terminated in order that the review application can be placed down on the unopposed court roll.

---

<sup>2</sup> *Trencon Construction (PTY) Ltd v Industrial Development of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC)

<sup>3</sup> *Ibid* para 47-55

- [38] Counsel argued that in the absence of an answering affidavit, the allegations in the founding affidavit remain strong and uncontested.
- [39] Counsel referred to various court challenges, with specific reference to the matter of *Zuma v Downer and Another*<sup>4</sup> ('*Zuma v Downer*') as providing clear jurisprudence and guidance regarding the suspension of the commencement of criminal proceedings, pending the outcome of various challenges. It was contended that although Mr Zuma appeared in court on 29 June 2005, charged with multiple charges of corruption, fraud, racketeering and money laundering, his criminal trial has still not commenced. It was contended that the accused has no intention of launching multiple applications as has happened in the Zuma matters or adopting the 'Stalingrad' strategy. However, the above case demonstrates that the launching of the review application or any other challenge has the effect of suspending the commencement of a criminal trial.
- [40] It was submitted that apart from the delay in the commencement of the trial, there would be no prejudice on the part of the State as it would still pursue the criminal trial once the review proceedings are finalised.
- [41] It was submitted that the proposed holding date namely, 17 February 2025, must be understood in the context of the right to a fair trial which includes the right to choose, and be represented by a legal practitioner. It was contended that should the trial proceed on 14 October 2024, new counsel would not have time to familiarise themselves with the matter. It was argued that it matters not that the accused is a lawyer himself.

### ***Argument presented by the State***

- [42] The State filed very brief heads of argument and counsel for the State added that it would abide by the Court's decision.
- [43] The State Advocate had no knowledge as to whether the answering affidavit in respect to the review application was ready or whether the court record had been handed to the accused's legal representative.

---

<sup>4</sup> *Zuma v Downer and Another* [2023] ZASCA 132; [2023] 4 ALL SA 644 (SCA); 2024 (2) SA 346 (SCA)

- [44] The State Advocate did state that it would want the criminal trial to proceed on 14 October 2024. It was submitted that should the judicial review make its way to the Supreme Court of Appeal, the accused's chances of success are slim to none.
- [45] It was contended that there is nothing stopping the criminal trial from commencing while the accused is dealing with his judicial review.
- [46] It was contended that the circumstances of case law referred to by the accused are not the same as this particular case.
- [47] It was contended that should the accused succeed in the Supreme Court of Appeal the State will exercise its right to stop the prosecution in terms of s6 of Act 51 of 1977.

### ***Evaluation***

- [48] The accused's counsel relied on the cases of *Zuma v Downer*<sup>5</sup> and *Rodrigues v National Director of Public Prosecutions and Others*<sup>6</sup> ('*Rodrigues*') to emphasize the point that a criminal trial should not proceed if there is a pending legal challenge that could potentially cause prejudice.
- [49] In the matter of *Zuma v Downer*,<sup>7</sup> the High Court ruled that the private prosecution against Downer (the lead prosecutor) and Ms Maughan (a journalist), was an abuse of process and set it aside. On appeal, the Supreme Court of Appeal agreed with the High Court that the private prosecution was a clear case of abuse of process. The Supreme Court of Appeal found that allowing the private prosecution to proceed would compromise public confidence in the courts and the administration of justice. The Supreme Court of Appeal confirmed that civil courts have the power to intervene in private prosecutions that are abusive or vexatious.
- [50] It is important to note that Mr Jacob Zuma pleaded in 2021 in respect to the charges in which he first appeared on 29 June 2005. The accused in the matter in casu has still not pleaded.

---

<sup>5</sup> Ibid

<sup>6</sup> *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 (SCA)

<sup>7</sup> *Zuma v Downer* (note 4 above)

- [51] In the matter of *Zuma v Downer*<sup>8</sup> the Supreme Court of Appeal held that:  
 ‘The facts demonstrate that the private prosecution of Mr Downer is an abuse of the process of the court, for multiple reasons: first, as the High Court found, it was instituted as a further step in a sustained attempt by Mr Zuma to obstruct, delay and prevent his criminal trial – this is an ulterior purpose, and the institution of the private prosecution was accordingly unlawful; second, it was instituted in order to have Mr Downer removed as the prosecutor in Mr Zuma’s trial – this too is an ulterior purpose, which renders the private prosecution unlawful; and, third, the contemplated private prosecution is patently a hopeless case.’<sup>9</sup> [my emphasis]
- [52] It is clear that the matter of *Zuma v Downer*<sup>10</sup> is a clear example where the Supreme Court of Appeal has uttered its displeasure at attempts to question the credibility of the National Prosecuting Authority and to voice its disapproval at frivolous attempts not to commence the criminal trial.
- [53] Prior to the enactment of s18 of the Superior Courts Act 10 of 2023 (‘Act 10 of 2023’) and thereafter, it has been common practice that the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that pending an appeal, the judgment cannot be carried out. However, this arises only if the court hearing the application, grants such leave to appeal.
- [54] In the matter in casu, there is no appeal. The founding affidavit which is filed by the accused basically has the effect of staying the prosecution of the criminal trial, pending the finalisation of the review application.
- [55] In *Minister of Public Works v MXN Development Construction CC*<sup>11</sup> the court said the following about the staying of proceedings:  
 ‘Proceedings will be stayed when they are vexatious or frivolous or when their continuance, in all the circumstances of the case, is, or may prove, to be an injustice or serious embarrassment to one or other parties.’<sup>12</sup>

---

<sup>8</sup> Ibid

<sup>9</sup> Ibid para 11

<sup>10</sup> Ibid

<sup>11</sup> *Minister of Public Works v MXN Development Construction CC* [2007] ZAWCHC 38

<sup>12</sup> Ibid para 9

[56] In the matter of *Rodrigues*,<sup>13</sup> Mr Joao Rodrigues (the appellant), was indicted for the murder of Ahmed Timol, an anti-apartheid activist who died in police custody in 1971. Mr Rodrigues applied for a permanent stay of prosecution, arguing the delay violated his rights to a fair trial and that political interference tainted the process. The Full Court dismissed Rodrigues's application and he appealed to the Supreme Court of Appeal.

[57] The Supreme Court of Appeal acknowledged the extraordinary delay but found it did not automatically violate Mr Rodrigues's right to a fair trial. The Supreme Court of Appeal found no evidence showing how it impacted on the fairness of Rodrigues's trial.<sup>14</sup> The Supreme Court of Appeal held that:

'It is firmly established that an application for the permanent stay of prosecution should not be easily granted. In *Sanderson v AG Eastern Cape* [1998 (2) SA 38 (CC)], the Constitutional Court pointed out that such an application has the effect of depriving society of presenting a complaint against someone who has transgressed its rules. This is such a central feature of any functioning democracy that it should never become diluted or distorted. On the contrary, any application for a stay must be considered in the context of how it impacts on the ability and the imperative of the State to carry out this important function.<sup>15</sup> [my emphasis]

Further

'In *Bothma v Els* [2009 ZACC 27; 2010 (2) SA 622 (CC)], 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.'<sup>16</sup>

And further:

'There is another important factor to consider. In *Zanner v Director of Public Prosecutions, Johannesburg* [2006 (2) SACR 45 (SCA)], this court said:

'The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness

---

<sup>13</sup> *Rodrigues* (note 6 above)

<sup>14</sup> *Ibid* para 30

<sup>15</sup> *Ibid* para 31

<sup>16</sup> *Ibid* para 32

not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay.<sup>17</sup> [my emphasis]

- [58] The Supreme Court of Appeal in the matter of *Rodrigues*<sup>18</sup> dismissed the appeal. The court upheld the High Court's decision to deny Rodrigues's application for a permanent stay of prosecution.<sup>19</sup> In a minority judgment, the learned Cachalia JA held that: 'Permanent stays are almost never granted following delays in the commencement and conclusion of a trial. This is because a permanent stay is an exceptional remedy. It may only be granted where the delay is egregious and has resulted in irreparable trial-related prejudice. Moreover the trial-related prejudice must be demonstrably clear ('definite not speculative'). More often than not, where there is a delay, but no clear trial-related prejudice, there are a range of less drastic remedies available to ameliorate any broader prejudice an accused may suffer.<sup>20</sup> [my emphasis]
- [59] In the recent case of *S v Richard Mdluli and Others*<sup>21</sup> ('*Mdluli*'), the accused faced challenges securing legal funding. In 2022, the accused filed a review application. The court was tasked to decide whether the delay caused by the accused pending a review application was unreasonable and prejudicial under s342A of Act 51 of 1977. Additionally, the court considered the accused's right to a fair and speedy trial, as enshrined in s35(3) of the Constitution.
- [60] It was clear in the *Mdluli*<sup>22</sup> matter that the accused did not want to proceed with the criminal trial until the review application was finalised. The State submitted that the review application could be heard in the 4<sup>th</sup> term of 2024, placing the postponement of the trial until 2028. The Court held that waiting for such a long period of time to commence trial was not in the interests of any party, including the accused.

---

<sup>17</sup> Ibid para 34

<sup>18</sup> Ibid

<sup>19</sup> Ibid para 41

<sup>20</sup> Ibid para 51

<sup>21</sup> *S v Richard Mdluli and Others* 2024 ZAGPPHC 353

<sup>22</sup> Ibid

- [61] The court in *Mdluli*<sup>23</sup> deemed the pending review application as an 'unreasonable delay' under s342A of Act 51 of 1977. The Court further held that the delay had the effect of causing substantial prejudice to the State, who were ready to proceed with the trial. Such delay also impacted on the accused's right to a speedy trial. In conclusion, the court held that the trial matter must proceed awaiting the resolution of the review application.
- [62] In the matter in casu, the accused's counsel argued that his pending review application should preclude the criminal trial from proceeding. It was pointed out that if the matter proceeds, this will prejudice and violate the accused's right to a fair trial as it will violate the accused's right to have a legal representative of his choice. It was contended that the accused's current legal representative will only be available after 17 February 2025. Reference was made to s35(3)(f) of the Constitution which provides that an accused has a right to choose and be represented by a legal practitioner of their choice.
- [63] In the matter of *City of Tshwane Metropolitan Municipality v Afriforum*,<sup>24</sup> the Constitutional Court said a prima facie right can be open to some doubt.<sup>25</sup>
- [64] It is trite law that the Bill of Rights, including s35 of the Constitution, which protects the rights of arrested, detained and accused persons, can be limited. Section 36 of the Constitution allows the Bill of Rights to be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.
- [65] This current matter in my view warrants such limitation. I say this for the following reasons.

***Right to stay the commencement of the criminal trial pending finalisation of the review application***

- [66] I do not see any prejudice to the accused should the criminal trial proceed whilst the pending review application is pending. The accused has filed all his papers and in the absence of an answering affidavit being filed this matter will proceed to the unopposed

---

<sup>23</sup> Ibid

<sup>24</sup> *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC)

<sup>25</sup> Ibid para 50

roll. Therefore, there will be no further time wasted. Until such stage as the State stops these criminal proceedings in terms of s6 of Act 51 of 1977, the matter must proceed.

- [67] As stated in the matter of *Mdluli*,<sup>26</sup> a legality review, like the review application in the matter in casu, where the accused challenges the unlawful, unconstitutional and invalid decision, should be resolved in a reasonable timeframe if it remains unopposed. This suggests that the delay caused by the review application should not be unreasonable or unduly prejudicial. This Court agrees that to case manage the review application further is a futile effort as it is clear that the State Attorney, for unknown reasons, is unable to supply the accused with a full record. Accordingly, the case management of the review application is terminated with immediate effect.
- [68] Should the State attorney file an answering affidavit and should the accused fail in his review, he will seek to appeal the decision, which will cause further postponements, preventing the criminal trial from commencing. This delay is unreasonable under s342A of Act 51 of 1977 and amounts to a 'Stalingrad defence', which will inevitably cost the State and the taxpayer a considerable amount of money. There is no mention made in the accused's argument that the charges he is facing are complicated. To argue that a criminal trial should not proceed because of a pending review application has a serious effect on the administration of justice and offends s165 of the Constitution.
- [69] The main grounds for the accused's reason to stay the prosecution is mainly that the grounds for review are strong and to run the review application parallel to the criminal trial will disable him to prepare adequately for the criminal trial. This court disagrees. The accused has been aware of the charges since the indictment was served on him. In addition, since the pre-trial was held on 14 March 2024 and a fresh discovery of the docket was handed to his present counsel, namely, Advocate Kolbe, the accused has been aware of the contents of the docket and has everything he needs to proceed to trial.
- [70] From what has been placed before this Court, I find no egregious behaviour on the part of the prosecution to commence this trial and neither do I find any irreparable trial-related prejudice to the accused. The grounds alluded to by the accused not to proceed with this criminal trial are speculative and not definitive. There are also no grounds to suggest any misconduct or vexatiousness on the part of the prosecution or any ulterior motive to

---

<sup>26</sup> *Mdluli* (note 21 above)



prosecute the accused. Should there be any defective aspects pertaining to the charges brought by the DPP, these are all aspects that can best be challenged once the trial has commenced and evidence has been adduced.

- [71] Whilst it may be argued that an accused facing a criminal trial may suffer reputational damage, this unfortunately is a consequence he must bear until such stage that he is acquitted.
  
- [72] To stay the commencement of the criminal proceedings can lead to witnesses forgetting crucial details or becoming unavailable due to death or relocation. This directly impacts the quality of evidence to be presented by the State and the State's ability to prove its case beyond a reasonable doubt. In the matter in casu, the previous postponements caused by the accused's change of counsel already contributed to these risks.
  
- [73] The right to a fair trial is not only concerned with the accused's rights, but also considers and includes the public. Thus, a delay in the finalisation of a matter will violate the public's right to fairness and affect the administration of justice. This court has a duty to insist on the speedy finalisation of criminal trials and must instil confidence in the criminal justice system, not only for the accused but also the public. Had this court not placed time frames for the review application to be filed, such application might have been delayed even further.
  
- [74] Case law, such as the matter of *Mdluli*,<sup>27</sup> demonstrates that courts are becoming reluctant to automatically stay criminal proceedings based solely on pending reviews.
  
- [75] The accused's counsel referred to the matter of *Pikoli*.<sup>28</sup> All that this case illustrates is that once a court pronounces an administrative action or decision to be invalid, the administrative decision or action not only ceases to have effect but may be treated as if it never existed. This case added no value in answering whether a criminal trial may proceed parallel with a review application.

---

<sup>27</sup> Ibid

<sup>28</sup> *Pikoli* (note 1 above)

- [76] The matter in casu has faced numerous postponements from an incident that took place in 2009. This has significantly impacted the accused and the State's right to a fair trial. This court wants to put an end to this.
- [77] This Court finds that after consideration of the delay and any further possible delays by the accused, the criminal trial must proceed despite the pending review application of the accused. This court relies on s342A(3)(d) of Act 51 of 1977 which states that:
- ‘(3) If the court finds that the completion of the 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- . . .
- (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution...’
- [78] In the absence of any exceptional circumstances, the remedy of a stay of the prosecution, pending a review application, is simply not competent. To postpone this matter to 17 February 2025 as a provisional date, goes against ensuring a speedy trial

### ***Right to legal representation***

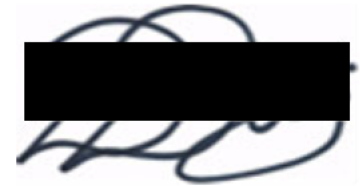
- [79] On the right to a legal representative, it has been held that it is a limited right that can be limited based on reasonableness. In the matter of *S v Halgryn*,<sup>29</sup> the Supreme Court of Appeal stated that although the right to choose a legal representative is a fundamental right in terms of s35(3)(f) of the Constitution, it is not an absolute right and is subject to reasonable limitations. It presupposes that the accused can make the necessary financial or other arrangements to engage the services of the chosen lawyer and that the lawyer is readily available to perform the mandate, having due regard to the court's organisation and the prompt despatch of the business of the court. An accused cannot, through the choice of any particular counsel, ignore all other considerations and the convenience of counsel is not overriding.
- [80] This means that while the court may accommodate a legal representative's schedules or preferences to some extent, these considerations should not take precedence over more

---

<sup>29</sup> *S v Halgryn* [2002] ZASCA 59; [2002] 4 All SA 157 (SCA)

important matters such as the administration of justice, prejudice to the public and the finalisation of the matter.

- [81] In the matter of *S v Prinsloo & Another*,<sup>30</sup> the court held if an accused person is allowed to impede the continuation of or derail a trial for unfounded tactical reasons, then the entire system of the administration of the criminal justice system will be cast into disrepute. No judicial officer can countenance such a situation even though an accused has a fundamental right to a fair trial, including the right to legal representation.<sup>31</sup>
- [82] The matter is accordingly postponed to 14 October 2024 for the accused to plead and for the criminal trial to commence.
- [83] The accused's bail is extended, and he is warned to appear at 9h30.



---

D DOSIO  
JUDGE OF THE HIGH COURT  
JOHANNESBURG

*This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 September 2024.*

---

<sup>30</sup> *S v Prinsloo & Another* [2007] JOL 18956

<sup>31</sup> *Ibid* para 35

APPEARANCES

ON BEHALF OF THE STATE:

Adv. B Masedi

Instructed by the Office of the National  
Director of Public Prosecutions

ON BEHALF OF THE ACCUSED:

Adv. W Mokhare SC

Denga Incorporated