REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: CC07/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

17/01/2025 [redacted]
DATE SIGNATURE

In the matter between:

THE STATE

V

WILLAH JOSEPH MUDOLO	**ACCUSED 1**
ZETHU ONDOWA MATSHINGANA MUDOLO	**ACCUSED 2**
RISING ESTATES (Pty) Ltd	**ACCUSED 3**
(As represented by accused 1)	
LANDIWE NTLOKWANA SINDANI	**ACCUSED 4**
NOMALARVASAGIE REDDY	**ACCUSED 5**
SATEESH ISSERY	**ACCUSED 6**
STEPHANIE OLIVER	**ACCUSED 7**

JUDGMENT

MOSOPA J

1. In this matter, two applications in terms of the provisions of section 342A(1) of Act 51 of 1977 were brought before this court to investigate any delay in the completion of the criminal proceedings, the applications where brought by the state, accused 1 and 2. On the 10 December 2024 counsel representing accused 3 (a juristic person) made an undertaking of his intention to join the application brought by accused 1 and 2, however no papers were served and filed by accused 3 in support of such application.

2. In addition to that, despite counsel indicating his availability for the court appearance of the 13 January 2025, he did not forward a reasonable explanation of his absence on that day, and this was also despite the fact that Mr Malungana, an attorney for accused 1 and 2, tried to reach to him on his phone when the court adjourned briefly to allow the state an opportunity to go through accused 1 and 2 answering and replying papers to the state's application which were only uploaded on Caselines on the 12 January 2025. This was despite the fact that accused 1 and 2 were served with the application by the state on the 13 December 2024.

3. Conspicuous absence of Mr Maphanga representing accused 3, is a point of concern looking on the fact that the state averred that accused 3 is also responsible for delaying the commencement of the trial matter and also the averment by accused 1 that he is not representing accused 3 because of the company resolution that was adopted on the 02 November 2024 and more especially summons served on accused 1 on the 05 November 2024 securing attendance of accused 3 to court.

BACKGROUND

4. Accused 1 and 2 were arrested on the 17 October 2020 and made their first appearances in the lower court on the 19 October 2020. They are arraigned on a number of counts which consist of amongst others, contravention of the Prevention of Organised Crime Act, 121 of 1998 ("POCA"), fraud, theft and contravention of several sections of the Companies Act 71 of 2008. The accused are arraigned with other accused who elected not to participate in these proceedings and accused 3 which is a company and the state alleging that accused 1 is a sole director of that company.

5. I do not intend to dwell much on the history of the matter while it was still serving in the lower court, but I can mention that there are number of interlocutory applications that were determined and that the accused were granted bail before the matter was transferred to this court. The matter was eventually transferred to this court to the 20 November 2023.

6. While still awaiting the High Court trial date, the indictment was served on all the accused, except for the then accused 4 and 5 because of their absence, for details to emerge later in this judgment. A glaring aspect on the indictment served on the accused, is the fact that accused 3 is cited as being represented by accused 1, meaning that accused 3 indictment was served on accused 1 when the matter was transferred to this court.

7. In this court, a separation of trial was ordered by Holland-Muter J after the erstwhile accused 4 and 5 (Mr Shepered Huxley Bushiri and has with Mrs Mary Bushiri) absconded on the 19 October 2024. The abovementioned accused were permitted to bail while the matter was still serving in the lower court and defaulted on their bail conditions. They never made any appearance in this court after the matter was transferred to this court. I must pause to mention that prior to that Munzhelele J and De Vos J held numerous pre-trial conferences with the remaining accused. The accused also saw a change in their legal

representatives. The trial was supposed to have commenced on the 14 October 2024 but could not for the following reasons;

7.1. That Mr Mnisi appearing on behalf of accused 1 and 2 indicated to the trial court that the matter is not trial ready,

7.2. That accused 3 is not properly before court in that the company was not served with the J175 summons,

7.3. That accused 1 and 2 are not served with section 2(4) POCA authorisation and,

7.4. That accused 1 and 2 are not furnished with the request for further particulars.

8. The trial court on three different occasions determined the issue of the representation of accused 3 and made a pronouncement that accused 3 was represented by accused 1 in the proceedings. Munzhelele J also decided on the issue pertaining to the request for further particulars as furnished by the state and made a pronouncement that particulars furnished were sufficient on the 19 April 2024.

9. An application for the recusal, which was refused by the trial judge, was brought by Mr Mnisi representing accused 1 and 2. When counsel representing accused 3 came on record on the 04 November 2024, it was clear based on the number of counts accused 3 was facing and the volumes of the disclosed docket that he was not ready to proceed with the trial. Accused 1 dissociated himself with accused 3 despite the court's finding and appointed Mr Maphanga to legally represent accused 3. The company further adopted a resolution that Mr Ndlovu must represent accused 3 in these proceedings, a resolution which was adopted after the court had already made a pronouncement on the representative of accused 3.

10. Given the history of the matter, I then received instructions from Mlambo JP to preside on the pre-trial conference which was held on the 08 December 2024

and 09 December 2024. I was hesitant to temper with the set trial date, which is the 20 January 2024 and indicated to the parties that I do not have authority to do so despite the contentions that they made.

LEGAL PRINCIPLE

11. An unreasonable delay or unreasonable duration of the case can affect the fairness of the trial (see ***S v Maredi* 2000 (1) SACR 611 at par 7**). Fairness of the trial is not only applicable to the defence, but also to the state.

12. Section 342A of Act 51 of 1977, governs unreasonable delays in trial matters, and provides that;

> "(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
>
> (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
>
> (a) The duration of the delay;
>
> (b) the reasons advanced for the delay;
>
> (c) whether any person can be blamed for the delay;
>
> (d) the effect of the delay on the personal circumstances of the accused and witnesses;
>
> (e) the seriousness, extent or complexity of the charge or charges;
>
> (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

(g) the effect of the delay on the administration of justice;
(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor which in the opinion of the court ought to be taken into account.

(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-

(a) refusing further postponement of the proceedings;

(b) granting a postponement subject to any such conditions as the court may determine;

(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;

(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 or the defence, as the case may be, has been closed;

(e) that-

(i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;

(ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs

incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay..."

13. The Constitutional Court in ***S v Ramabele and Others* 2020 (2) SACR 604 at par 59**, when dealing with considerations to be taken into account when dealing with section 342A applications and the nature of the test, made the following pronouncement;

"[59] This court has proffered guidance to determine whether a particular lapse of time is reasonable. With reference to foreign law, including American jurisprudence, such as *Barker v Wingo*, this court in *Sanderson* stated that the inquiry requires a flexible balancing test. However, the court accepted that the specific South African context requires its own home-baked approach. Therefore, the approach is as follows: courts ought to consider whether a lapse of time is reasonable by considering an array of factors, including:

(a) The nature of the prejudice suffered by the accused;

(b) the nature of the case; and

(c) systemic delay. Courts have developed further factors, such as the nature of the offence, as well as the interests of the family and/or the victims of the alleged crime. A proper consideration of these factors requires a value judgment with reasonableness as the qualifier. Furthermore, it is a fact-specific inquiry."

14. In ***S v Ndibe* (14/544/2010) (2012) ZAWCHC 245 (14 December 2012) at par 6**, the court when dealing with the nature of the enquiry envisaged by section 342A stated;

"[6] A holistic reading of the provisions of s 342 A leaves me with the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course necessitates an enquiry. The investigation includes taking into account the factors listed in s 2. Those factors are not limited to the prejudice suffered by an accused person and also include the impact an unreasonable delay may have in the administration of justice, the victim, and the States case. Even though S 342 (3) does not specifically state that a 'formal' enquiry be held, it does call at the very least for an enquiry, on the basis of which a finding must be made. Such an enquiry must have regard to the full conspectus of the factors in s 3 (2). In the absence of an enquiry, a court may find it difficult to assess whether a delay is unreasonable or how much systemic delay to tolerate. (See *Sanderson v Attorney-General* 1998 (1) SACR (227 CC) at page 243 para 35). That can only be determined when there has been an enquiry albeit informal, in which the conspectuses of the factors listed have been considered. This I say mindful of the fact that the bulk of the criminal cases are heard before the magistrate's court, and to insist on a formal enquiry is likely to be burdensome to the already overstretched court rolls. The finding should be followed by a remedy the court considers appropriate, depending on whether the accused person had already pleaded or evidence led. It seems to me that, once the provisions of s 342 are invoked, the following three stages must be followed:

(1) investigation of the cause of the delay in the finalisation of the case, taking into account the listed factors;

(2) making of a finding whether the delay is reasonable or unreasonable;

(3) depending on the stage of the proceedings, the application of the remedies provided."

15. A further layer of what is expected of the enquiry when invoking the provisions of section 342A was added in ***S v Ramabele* (*supra*) at par 57**, when the following was stated;

> "[57] It has been said that s 342A is 'the vehicle for giving practical application to the s 35(3)*(d)* right to have a trial begin and conclude without unreasonable delay'. Therefore, when considering s 342A, one must be mindful of s 35(3)*(d)* of the Constitution which entrenches an accused's constitutional right to an expeditious trial. This section provides:
>
> 'Every accused person has a right to a fair trial, which includes the right —
>
> *(d)* to have their trial begin and conclude without unreasonable delay; . . . ."

ANALYSIS

16. Accused 1 and 2 were arrested on the 17 October 2020 until now, a period of approximately four years and it is a considerable period of the time which has lapsed and their trial matters have not yet commenced. This, in my considered view affects the constitutional rights conferred on all the accused in this matter in terms of section 35(3)(d) of the Constitution of the Republic of South Africa, 1996. The fact that accused 4,5,6 and 7 are not participants in these proceedings also needs to be considered when an enquiry is made, and they had already expressed their readiness to commence with the trial matters.

17. Equally so, it is trite that the parties either the accused or the state are legally entitled to exercise their rights but that must not have the effect of offending on the constitutionally enshrined right in the form of section 35(3)(d).

18. Most factors in this matter are common factors and I fully agree with Mr Mnisi that the two applications are intertwined, and it is for that reason that they are going to be determined at the same time.

19. Before Mr Mnisi came into record, representing accused 1 and 2, there was no issue with the representation of the company and accused 1 was always cited in the representative capacity of accused 3 because of his directorship of the company. The previous counsel representing accused 1 and 2, Mr Venter did not have any legal challenge to accused 1 cited in the representative capacity of accused 3. The issue of whether accused 3 was properly or not properly brought before court was only raised at the time of the involvement of Mr Mnisi in this matter.

20. A further development was when Mr Maphanga was briefed to appear on behalf of accused 3, by accused 1 and the company's resolution of appointing Mr Ndlovu as the company's representative in these proceedings.

21. It is trite that the accused are arraigned on very serious and complex charges and the state has already indicated that they will be involving the services of an expert witness as a state witness. At this stage, the accused have not yet pleaded to the charges they are arraigned on.

22. On the 18 October 2024, the trial judge determined the issue of accused 3's legal representative and found that since a determination was made on the 20 November 2023 by De Vos J, nothing changed and the position remains. However, the pronouncement by the trial judge, did not put an end to the issue of representation of accused 3. On the 28 October 2024, this issue arose, Mr Mnisi allowed the trial judge to directly probe accused 1, this was despite him legally representing accused 1, about accused 3's representative. Accused 1 distanced himself from accused 3 and declared that he was not representing accused 3. On that occasion, the trial judge repeated his pronouncement that accused 1 in his position as director of accused 3 was accused 3's representative in these proceedings. The trial judge also stated that when the

matter served before Munzhelele J in a pre-trial, accused 1 was cited as representing accused 3.

23. On the 1 November 2024, for the third time, a similar pronouncement by the trial judge that accused 3 is duly represented by accused 1 was made. It is because of this pronouncement that accused 1 made a request to be allowed to instruct counsel to represent accused 3, which request was granted, hence the accused is now legally represented.

24. After all these pronouncements were made by the trial judge, two important developments took place, which are;
    24.1. On the 02 November 2024 a company resolution appointing Mr Ndlovu as the company representative was adopted by the director, accused 1 and some individuals who are cited in their representative capacity in the company, and
    24.2. On the 05 November 2024, the state issued and served summons on accused 1 in an attempt to secure attendance of accused 3 at court.

25. It is because of the issuing of the summons that, Mr Mnisi contended in this court, that the state should be held liable for unreasonably delaying the matter and that is compounded by stringent bail conditions attached to accused 1's release on bail. I was informed in argument that the issue pertaining to the bail conditions of accused 1 found its way up to the Constitutional Court with no success.
26. The issue raised by Mr Mnisi that accused 3 was not properly before court was dealt with by various judges who presided over this matter and notably at length by the trial judge in his judgment for recusal. Before the matter was transferred to this court, accused 3 has always been cited in the charge sheet and it has always been cited that accused 1 was the representative of accused 3. I also find no basis for Mr Mnisi to challenge the manner in which accused 3 was arraigned to this court as he is not representing accused 3.

27. Neither of the pronouncements made by the trial judge on three separate occasions were challenged by accused 1,2 and 3. The effect of it, is that right or wrong, they remain binding on the parties, until it is set aside. In ***Municipal Manager OR Tambo District- Municipality v Ndabeni*** **[2022] ZACC 3** the Constitutional Court reaffirmed that a court order is binding until it is set aside by a competent court and that this necessitates compliance, regardless of whether the party against when the order is granted believes it to be a nullity or not. Importantly, however, the court further confirmed that where an organ of the state genuinely believes that an order of court is a nullity, then it has a duty in the public interest to pursue on appeal to correct the illegality.

28. The contention by Mr Mnisi that the issuing of summons by the state served on accused 1 has an effect of unduly delaying the proceedings, in my considered view, it lacks merit and the process done after the pronouncement is of less significance and lacks relevance. I fail to understand why the state served summons on accused 1, despite pronouncements made by the trial judge.

29. Similarly, the resolution adopted by members of accused 3 is of little significance and lacks relevance and as a result cannot have an effect of amending the citation of accused 1 as representative of accused 3. No formal application after the resolution was adopted to amend the citation of the representative if accused 3 was made by accused 3. Therefore, the representation of accused 3 by Mr Ndlovu is only meant to delay the matter further in the absence of an application to amend accused 3's representation.

30. A holistic reading of the entire court records shows that Mr Mnisi has repeatedly dealt with the same issues, except for the summons of the 05 November 2024, which I have already made a pronouncement on, and this has the effect of unduly delaying the commencement of the trial matter.

31. When the matter was adjourned to commence in October 2024 for a period of six months, the state reserved an expert witness with the anticipation that the trial will commence. It is trite that reservation of expert witness has a financial impact on the party making such reservation. This means the state suffered financial prejudice when the matter could not commence and not of their making, but based on the requests made by accused 1, 2 and 3, more especially on aspects in which pronouncements have already made.

32. The state also reserved a witness who travelled all the way from Cape Town and some of the witnesses were travelling locally. This also has the effect of financially prejudicing the state as they must pay for the travelling allowances and accommodation of such witness. This also relates to the co-accused of accused 1 and 2, who travelled from outside the Gauteng province as they are from other provinces and the fact that they have to pay reservation fees for their respective counsel.

33. Erstwhile accused 4 and 5 who were released on bail have since absconded and returned to their native country, Malawi. Extradition attempts yielded no positive results. All these factors have the effect on prejudicing the state's case. The rest of the accused are prepared and ready to commence trial safe for accused 1,2 and 3. This has a negative impact on their co-accused.

34. It is therefore my considered view that blame should be laid on the door of accused 1, 2 and 3 for unreasonably delaying the matter. The court must now make orders which will have the effect of eliminating the delay and prejudice from further arising. In addition to the above, more especially based on Mr Maphanga's undertaking, that on the 15 January 2025 he would have fully finalised instructions of accused 3, it is taken that at the time of delivery of this judgment he would have finalised such instructions. Mr Maphanga has been on record since November 2024 and has been furnished with the contents of the

docket, meaning that he had ample time to consult with his client and to prepare for the commencement of the trial.

Absence of Counsel representing accused 3 in the proceedings of 13 January 2025

35. I must place on record that all the accused were excused from appearing at court on the 13 January 2025. Counsel representing accused 7 also asked to be excused from appearing on that day as he was not going to participate in such proceedings.

36. Mr Maphanga on record said that he will be available to appear on behalf of accused 3 on the 13 January 2025 and will also file papers on behalf of accused 3 for the purposes of the court appearances of the 13 January 2025. This is despite the fact that he had partial instructions on behalf of accused 3 and that he will be having full instructions on the 15 January 2025. Mr Maphanga failed to appear in court on behalf of accused 3.

37. This is unethical conduct on the part of Mr Maphanga and he failed to advance the interest of his client. Mr Maphanga knows that ethically he must advance the interests of his client without fail. Despite attempts made by Mr Mnisi's instructing attorney to reach out to him telephonically, nothing came out of Mr Maphanga.

38. He failed on his own to convey the message either through his colleagues, the state or through my registrar of the fact that he cannot be able to attend court. It is for this reason that I am imploring upon the LPC to investigate the conduct of Mr Maphanga and more importantly, whether or not he was placed on funds to represent accused 3.

ORDER

39. In the result the following order is made;

1. The postponement date of 20 January 2025 for the commencement of the trial matter stands, subject to the dates counsel confirmed that they are available for court attendance.

2. The request for postponement of the matter on the 20 January 2025, subject to what is stated at paragraph 1 above, is hereby refused.
3. All the interlocutory applications that have been dealt with and determined, either by the trial court or this court or any other judge of this division need not be repeated.
4. Application in terms of section 342A by accused 1 and 2 is hereby dismissed.
5. The registrar is hereby requested to hand over the copy of this judgment which includes the transcribed records of 09 and 10 December 2024 to the Legal Practice Council to investigate the conduct of Mr Maphanga representing accused 3 and in the event, they found any wrong doing on his side, to order disciplinary hearing against him.
6. No order as to costs.

[redacted]

M.J. MOSOPA

JUDGE OF THE HIGH COURT, PRETORIA

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 17 January 2025.

APPEARANCES:

FOR THE STATE	:	ADVOCATE D ROSENBLATT & ADVOCATE R VAN DEVENTER
FOR ACCUSED 1 AND 2:		ADVOCATE J MNISI
FOR ACCUSED 3	:	NO APPEARANCE
FOR ACCUSED 4	:	MR P DU PLESSIS
FOR ACCUSED 5 AND 6:		MR J MOTHILALL

FOR ACCUSED 7	:	MR A STEENKAMP (EXCUSED)
Date of hearing	:	13 January 2025
Date of Judgment	:	17 January 2025