IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: CCD30/2018

In the matter between:

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA **FIRST ACCUSED**

THALES SOUTH AFRICA (PTY) LTD **SECOND ACCUSED**

JUDGMENT

Delivered on. 3 June 2025

Chili J:

[1] On 6 February 2025, the second accused, Thales SA (Pty) Ltd (Thales) filed a notice seeking an order in the following terms:

'1. That the state be directed to stop the prosecution of the second accused in this matter as envisaged in s6 of the Criminal Procedure Act 51 of 1977;

2. That the second accused be acquitted on all charges.'

From hereon I refer to Thales's application as the main application.

[2] A month later, on 24 March 2025, Mr Zuma joined issue and filed a notice titled 'Notice of Conditional Counter Application' couched in the following terms:

'Take notice that at the hearing of the main application, the second accused [sic] [clearly referring to the first accused] intends to bring the present conditional counter-application, for an order that, in the event of the relief sought in the main application being granted:-

1. The prosecution against the first accused is set aside;

2. Further and or alternative just and equitable relief in terms of, *inter alia*, s172 (1) (b) of the Constitution.'

[3] In support of their respective applications, both Mr Zuma and Thales filed founding affidavits. The State filed an answering affidavit to which both Mr Zuma and Thales replied. The matter subsequently served before me as an opposed application on 24 April 2025.

[4] It is apposite to mention that the relief based on s 172(1)*(b)* of the Constitution is only set out in Mr Zuma's notice of motion, not Thales's notice. Be that as it may, it is my view that given the history of this matter there is good reason to consider whether Thales succeeded in making out a case for a declaratory order set out in paragraph 2 of Mr Zuma's notice. I begin with the question whether it is competent for this court to grant the relief sought in prayers 1 and 2 of the main application. But before I proceed, I pause to first deal with the position of Mr Zuma.

[5] The success of Mr Zuma is in no uncertain terms conditional upon the success of Thales. This much is evident from his notice where he states, inter alia, that at the hearing of the main application, he would bring 'a conditional counter-application' for an order that in the event of the relief sought by Thales in the main application being granted, he would seek an order setting aside his prosecution. The above averment is repeated verbatim in para 4.3 of Mr Zuma's supporting affidavit. In paragraph 58 Mr Zuma made the following remarks:

'This counter application is essentially premised on the basis that the case against the first and second accused persons is symbiotically conjoined and cannot be artificially separated. *To put it simply, it is in my view totally impossible for the state to pursue the case against me if indeed the prosecution of the second accused must be terminated upon the pleaded grounds, as it must*.' (My emphasis.)

I am therefore satisfied, regard being had to the above, that Mr Zuma's success is dependent on Thales's success. If Thales's case fails, it follows that Mr Zuma's case must also fail.

[6] I now revert to the question of whether it is competent for this court to direct the State to stop the prosecution in accordance with the relief sought by Thales in prayer 1. Section 6 of the Criminal Procedure Act 51 of 1977 (the Act) makes it clear that the power to withdraw a charge or to stop the prosecution rests with the State. Section 6 is divided into subsections *(a)* and *(b)*. Subsection *(a)*, which is not relevant for the purposes of the present application, deals with the withdrawal of a charge by the State prior to a plea. Such withdrawal does not entitle an accused person to an acquittal. The second part, which is applicable in the present application, provides as follows:

'An attorney-general[1] or any person conducting a prosecution at the instance of the state or any body or person conducting a prosecution under section 8, may-

(a) ….

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorised thereto by the attorney-general, whether in general or in any particular case, has consented thereto.'

Again, subsection *(b)* makes it clear that the power to stop the prosecution after an accused person has pleaded to a charge, rests solely with the State. See S v Ngubane 1985 (3) SA 677 (A); S v Gumbi and Others 2018 (2) SACR 676 (SCA) para 10. It also makes it clear that the court can only return a verdict after the State has exercised its exclusive right to stop the prosecution. There is nothing in the Act that empowers the court to direct the State to either withdraw a charge against or to stop the prosecution of an accused person.

[1] In terms of section 45 of the National Prosecuting Authority Act 32 of 1998, attorney-general should be understood to mean the National Director of Public Prosecutions.

[7] I am therefore satisfied that it would be incompetent of this court to grant the relief sought in prayer 1 of the main application. The relief sought in prayer 2 is conditional upon the grant of the relief sought in prayer 1. Put conversely, the court can only acquit an accused person who has pleaded to a charge if the State, in the exercise of its discretion, has stopped the prosecution. Mr Roux readily conceded, correctly in my view, that the prosecution of an accused person is the prerogative of the State.

[8] I now proceed to deal with the question of whether there is justification for the grant of the declaratory order in accordance with s 172(1)*(b)* of the Constitution. Section 172(1)*(b)* permits the court to grant an order that it considers to be just and equitable in the given circumstances, when dealing with a constitutional matter. It was thus contended that the just and equitable order would be to declare that Mr Zuma and Thales would not receive a fair trial if their prosecution were allowed to proceed in the face of the deaths of Messrs Pierre Maynot and Allain Thétard. It is common cause that Messrs Maynot and Thétard died on 31 December 2020 and 5 September 2022, respectively. It was contended on behalf of both Mr Zuma and Thales that without their evidence, both Mr Zuma's and Thales's right to a fair trial would be severely prejudiced. In support of their cases, both Mr Zuma and Thales relied on s 35(3)*(i)* of the Constitution, which provides that every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence.

[9] It is not in issue that at the times relevant to the charges levelled against Mr Zuma and Thales, Messrs Maynot and Thétard were employees of Thales. Mr Maynot was the director of Thales from its incorporation on 21 May 1996 until 1 April 1998. On 24 April 1998, he was appointed as the Chief Executive Officer of African Defence Systems (Pty) Ltd, another entity which features prominently in the State's case against Thales. He again served as Thales's director from 1 October 2002 through to 10 December 2010. Mr Thétard, on the other hand, served as Thales's director from 1 April 1998 through to 30 January 2002. In support of its case, Thales alleged in its founding affidavit that the importance of Messrs Thétard and Maynot in the criminal trial against Thales is unquestionable. They are the only individuals (so it was argued) that would be

able to testify on behalf of Thales and also to assist Thales in challenging any evidence led by the State against it. When joining issue, Mr Zuma reiterated in paragraph 59 of his founding affidavit that the deaths of the two material witnesses have a similar or equal effect on the evidence necessary to convict him. I will revert to the State's answer in due course.

[10] In the papers, the parties spent a considerable amount of time on the issue of delay in the prosecution of Mr Zuma and Thales. It is common cause that there has been a considerable delay in the prosecution of both Mr Zuma and Thales. However, in the light of the view I take of this matter, I do not consider it appropriate to engage in the exercise of attributing blame to any party for the delay. I am satisfied that sufficient facts have been presented to the court to consider whether Mr Zuma's and Thales's rights to a fair trial will be severely prejudiced, as contended, if the State is allowed to continue with the prosecution in the face of the deaths of Messrs Maynot and Thétard.

[11] In support of their contention for and against the grant of declaratory relief, both the State and the accused relied on *Bothma v Els and others*.[2] The facts in *Bothma* can be summarised as follows. The appellant, Ms Bothma, who was 51 years old at the time, had instituted criminal proceedings in the magistrates' court against the respondent, Mr Els, for a rape that had taken place 39 years before, when Ms Bothma was a 13-year-old schoolgirl. While awaiting trial, Mr Els approached the high court for an order permanently staying Ms Bothma's private prosecution on the basis that the undue delay in instituting criminal proceedings amounted to an unfair trial. The high court found in his favour and permanently stayed his prosecution. Aggrieved, Ms Bothma approached the Constitutional Court directly, challenging the decision of the high court.

[12] When finding for Ms Bothma, the Constitutional Court criticised the high court for having given consideration only to three factors, namely, the length of the delay, the

[2] *Bothma v Els and others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC) (*Bothma*).

reasons for the delay, and the trial prejudice caused to Mr Els by the delay. The Constitutional Court made a very crucial observation: it is not only the interests of the accused person that have to be borne in mind when considering fair trial right but also the interests of the society.[3] I am of the view that in a request that will result in the acquittal of an accused person without the production of evidence, in a matter of such a magnitude, the societal interest is but one of the factors that the court should view in a serious light. The Constitutional Court further held that a factor that is of central significance should always be the nature of the offence.[4] It proceeded to say:[5]

'The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial.'

It was correctly conceded in argument that in order for Thales to succeed, it had to advance exceptional facts in support of its case. A court can only shut the door to the prosecution if it is satisfied that the continued prosecution will cause both Mr Zuma and Thales irreparable or insurmountable trial prejudice. Regarding the terms irreparable or insurmountable trial prejudice, the Constitutional Court remarked as follows:[6]

'Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained.'

[13] There are two issues raised by the State in response to Thales's case that require consideration. Firstly, the State disputed Thales's contention that without the evidence of Messrs Thétard and Maynot, Thales would not be able to adduce its evidence or challenge the State's case. In amplification, the State contended that

[3] Ibid para 41.
[4] Ibid para 77.
[5] Ibid.
[6] Ibid para 68.

Messrs Shaik and Driman and Ms Guerrier were available to assist Thales in its defence. In reply, Thales contended that both Mr Driman and Ms Guerrier would be of no assistance to Thales because they did not have first-hand knowledge of the events surrounding the offences charged. Thales further contended that the calling of those witnesses would require Thales to waive its rights to legal privilege and added that in any event, the evidence of Mr Driman and Ms Guerrier would have no probative value.

[14] Firstly, it is clear from the above that there is a dispute regarding the availability of Messrs Shaik and Driman and Ms Guerrier as witnesses for the defence, which cannot be decided on the papers. Given the fact that this matter is to be decided on the papers, it is my view that that dispute should tip the scales in favour of the State.[7] A second dispute relates to the value to be attached to the evidence of Mr Driman and Ms Guerrier, if they are called as witnesses. The argument that the evidence of these witnesses would have no probative value is, in my view, speculative. It has been held that it is not sufficient for an accused person applying for a permanent stay to rely on hypothecated prejudice. It must be actual significant prejudice.[8] The actual position regarding the value to be attached to the evidence sought to be adduced by Thales will only be known once evidence has been presented. The question whether there will be trial prejudice which might result in Thales not receiving a constitutionally fair trial is a matter for the trial court, or at least for assessment as and when it arises, if it does arise. Whether the right to a fair trial is infringed, is the matter best decided by the trial court.[9] I might just add that the standard of proof in criminal and civil cases is completely different. There is no duty on an accused person to prove his or her innocence, instead it is the State that bears the onerous duty to prove the guilt of an accused person beyond reasonable doubt.[10] All that will be expected of Thales at the trial will be to advance a version that is reasonably possibly true.[11]

---

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[8] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) (*Sanderson*) para 38.
[9] *Key v Attorney-General, Cape Provincial Division, and another* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (2) SACR 113 (CC) 1996 (6) BCLR 788 (CC) para 13.
[10] *Ngcobo v S* [2025] ZASCA 12 para 10.
[11] *S v V* 2000 (1) SACR 453 (SCA); [2000] 2 All SA 86 (A) para 3.

[15] The second point raised by the State which I consider to be of vital importance relates to the stance now taken by Thales, vis-a-vis the stance it took in its application for the permanent stay of prosecution, regarding the availability of Mr Thétard as its witness. In the permanent stay application in November 2018, Thales alleged that Mr Thétard was not prepared to assist it in any way.[12] He was not prepared to return to South Africa or to testify in South Africa or any other forum should a trial take place. In support of its case, Thales filed an affidavit deposed to by Mr Thétard dated 11 March 2009.

[16] In the present application, Thales has now adopted a different stance altogether. It now states that had Mr Thétard been alive, he would have been an invaluable witness for the defence. In response to the State's answer, Thales missed the point completely and focused its attention on the assertions made by the State in reply, regarding Mr Thétard's credibility as a witness. That, in my view, is beside the point. It is not the State that seeks a declaratory order. It is Thales. The duty is on Thales, not the State, to persuade the court that without the evidence of Mr Thétard, Thales will not receive a fair trial. In doing so, it would have been expected of Thales to, at the very least, indicate to the court that at a certain point in time, Mr Thétard changed his mind and undertook to assist Thales in its case. Without such evidence, one is tempted to conclude that Thales conveniently decided to move the goalpost in order to bolster its case.

[17] Regarding Mr Maynot it was contended on behalf of the state that he was not a central actor in the events giving rise to the charges against Thales. It is common cause that he was not an officer or employee of Thales between April 1998 and the third quarter of 2000 when most of the events occurred. As aforesaid he only represented Thales before April 1998 and thereafter, late in the year 2000 onwards. It appears to be common cause between the parties that he testified in Mr Shaik's trial. Mr Roux took issue with the state's suggestion that it is up to Thales to introduce the evidence of Mr Maynot tendered in Mr Shaik's trial. Regard being had to the facts at my disposal, it

---

[12] See *S v Zuma and another and a related matter* 2020 (2) BCLR 153 (KZD) for the permanent stay application.

would in my view be speculative to make a factual finding on the value of Mr Maynot's testimony that was presented at Mr Shaik's trial. At this stage of the proceedings there are too many factors this court will have to speculate about which in my view should best be left for consideration by the trial court.

[18] In *Sanderson* the court held:[13]

'Barring the prosecution before the trial begins… 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.'

On facts presented to court, I am not persuaded that it was sufficiently established that Thales will suffer irredeemable, irreparable, or insurmountable prejudice if the State were allowed to continue with the prosecution, in the face of the deaths of Messrs Thétard and Maynot. The court seized with the matter has a duty to consider all the evidence before it, including the non-availability of defence witnesses before returning a verdict. I am not persuaded either that Mr Zuma's right to a fair trial will be prejudiced by the non-availability of Messrs Thétard and Maynot. There is no justification for the grant of the order sought by Mr Zuma in the alternative in accordance with s 172(1)*(b)* of the Constitution.

[19] I therefore make the following order:

1. The application by both Mr Zuma and Thales is dismissed.
2. The matter is adjourned to a holding date on 4 December 2025.

[13] *Sanderson* para 38.