



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1439/2024

In the matter between:

MPINA ABEDNEGO MATHEBULA

APPELLANT

and

THE STATE

FIRST RESPONDENT

TSWANTSO PHILLEMOM MELATO

SECOND RESPONDENT

Neutral Citation: *Mathebula v The State and Another* (1439/2024) [2025]
ZASCA 189 (12 December 2025)

Coram: MAKGOKA ADP and MOKGOHLOA, MOTHLE and MOLEFE JJA and
HENNEY AJA

Heard: 10 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 December 2025.

Summary: Criminal law and procedure – permanent stay of prosecution – restatement of the principles – whether exceptional or compelling circumstances present.

ORDER

On appeal from: Free State Division of the High Court (Erasmus J sitting as court of first instance):

The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

THE COURT

[1] The issue in this appeal is whether there are exceptional circumstances to warrant a permanent stay of prosecution. The Free State Division of the High Court, (the high court) concluded that there are no such circumstances, and consequently dismissed the appellant's application for a permanent stay of criminal proceedings which he is facing in a regional court. The appeal is with the leave of this Court.

[2] The appellant, Mr Mpina Abednego Mathebula, is a Judge of the high court in Bloemfontein. Before his appointment as a Judge, the appellant was a practising attorney. He conducted his practice under the name and style of 'Uys Mathebula Attorneys', in Sasolburg, Free State. The criminal charges the appellant faces arise from his practice as an attorney, and have nothing to do with the performance of the appellant's duties and service as a Judge. The State, represented by the Director of Public Prosecutions, Free State, is the first respondent. The second respondent was the appellant's candidate attorney at the appellant's law firm. Upon his admission as an attorney, and the appellant's appointment as a Judge, the second respondent took over the appellant's law firm. He has since been struck off the roll of attorneys. He is the appellant's co-accused in the criminal proceedings. The second respondent did not participate in this appeal.

[3] The charges against the appellant arise from an alleged misappropriation of funds received by the appellant's law firm from the Road Accident Fund (the RAF). The appellant is alleged to have committed the crimes between July 2012 and May 2018, while practising as an attorney. This is how it is alleged the misappropriation occurred. On 3 August 2010 at Sasolburg, Mrs Dimakatso Selina Makhethhe, an elderly woman (the complainant), instructed the appellant's law firm to institute an action against the RAF on behalf of her minor grandson (the child), who had sustained bodily injuries in a motor vehicle accident.

[4] Following the institution of the claim in the high court, the claim was settled with the RAF. On 20 August 2013, the high court made part of the settlement agreement an order of court, awarding the child R2.2 million plus costs, to be paid by the RAF. Paragraphs 2, 3 and 4 of the high court's order stated as follows:

'1. ...

2. The amount of R2 200 000.00 shall be payable directly into the following bank account: Uys Mathebula Attorneys,

3. The amount of R2 200 000.00 shall be kept in the trust account of Uys Mathebula Attorneys in an interest bearing account in terms of Section 78(2)(A)¹ of the Attorneys Act, No. 53 of 1979 [trust investment account], for the sole benefit of the plaintiff, until paid over to the trust referred to below.

4. Plaintiff's attorneys [the law firm] shall:

4.1 cause a trust to be established in accordance with the provisions of the Trust Property Control Act, No. 57 of 1988 in favour of the plaintiff;

4.2 be entitled to deduct their agreed attorney and own client fees or contingency fee and disbursements for professional services from the capital amount of R2 200 000.00 upon receipt of payment; and

4.3 the trustee shall be entitled to call for an appropriate taxation of the attorney and client costs and disbursements of plaintiff's attorneys, if deemed necessary.'

[5] The State summoned the appellant to appear in the Specialised Commercial Crimes Court, Kroonstad (the regional court), on 9 March 2023, to answer three criminal charges. The charges as amended, include theft, alternatively fraud, money

¹ The Attorneys Act 53 of 1979, made provision for s 78(2)(a) and s 78(2A). It should not be 's 78(2)(A)' as it appears in the draft court order submitted to the high court. The Attorneys Act was repealed by the Legal Practice Act 28 of 2014 with effect from 1 November 2018.

laundering and contempt of court. The State alleges in the charge sheet that the appellant failed to comply with paragraphs 3 and 4 of the high court's order by not depositing and keeping the amount of R2.2 million into a trust investment account, for the plaintiff's sole benefit, and also failed to establish a trust as ordered by the high court. This alleged failure constitutes the contempt of court charge.

[6] It is the State's case that in addition to the amount of R2.2 million awarded by the high court, the RAF made interim settlement payments to the appellant's law firm of two amounts, R500 000 and R442 089.70, the latter being for party and party costs in the high court. The total amount paid to the appellant's law firm, inclusive of the award by the high court, is alleged to be R3 142 089.70, out of which R111 500 was paid to the complainant by the law firm and an amount of R1 258 110.13 was recovered from the second respondent by way of settlement of an action instituted by the complainant against him. From the calculations made by its expert witness, attached to the charge sheet, there remains a balance of R1 329 092.44 unaccounted for.

[7] In this regard, the allegation in the charge sheet is that the appellant made various unlawful transfers from the law firm's trust account into his business account. These transfers were allegedly effected from the money held in trust to the plaintiff's credit. These alleged transfers constitute the charges of theft, alternatively fraud, and money laundering. The money laundering charges are based on the provisions of s 4 read with ss 1 and 8 of the Prevention of Organised Crime Act 121 of 1998 as amended. The appellant disputes the accuracy of the calculations and denies the charges against him.

[8] Before his first appearance in the regional court, scheduled for 9 March 2023, the appellant, by that time appointed as a Judge, instructed his attorneys to make representations to the Director of Public Prosecutions, Free State, to have the criminal charges against him withdrawn. The request was declined. A further request to the National Director of Public Prosecutions met the same fate. The appellant then turned to the high court with an application for a permanent stay of prosecution.

[9] The high court concluded that the relief sought by the appellant was drastic and should only be granted sparingly and in compelling circumstances. The high court also observed that the permanent stay of prosecution constitutes a final interdict, thus requiring the appellant to establish that he has no alternative remedy. This, the high court found, the appellant had failed to prove, since he can assert his defence at his trial.

[10] The appellant submitted that the decision to prosecute him was based on a lack of appreciation for how attorney-and-client fees are computed. Thus, so went the argument, the decision was arbitrary, irrational and offended the principle of legality and the rule of law. Furthermore, the appellant argued that his right to dignity was impaired merely by having to face a prosecution in which there were no facts to support a rational decision to authorise it in the first place. On these bases, the appellant sought to impugn the State's decision to charge him as being inconsistent with the Constitution, as envisaged in s 172(1). He therefore sought a declaration to that effect in terms of s 172(1)(a).²

[11] In addition, the appellant, for the first time in this Court, sought to launch a frontal challenge³ against the merits of the allegations against him. For this, he relied on *Moyo v Minister of Police and Others (Moyo)*.⁴ There, the applicants were facing criminal charges under the Intimidation Act 72 of 1982. They launched a frontal challenge to the constitutionality of s 1(1)(b) of that Act. On appeal to it against certain orders of this Court, the Constitutional Court considered the constitutional validity of the definitions of the impugned offences, and declared them unconstitutional. However, it expressly refrained from addressing the merits of the

² Section 172(1) of the Constitution reads:

'When deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable ...'

³ In *President of the Republic of South Africa v Zuma and Others* [2023] 3 All SA 853 (GJ); 2024 (1) SACR 32 (GJ) para 82.1, the full court held: '...A frontal challenge ought to be discouraged and pertinent issues left to the trial court, where it lacks merit and only mainly serves to delay the commencement of the criminal trial. It ought to be allowed where a litigant wishes to challenge a clearly unlawful process in order to enforce his or her fundamental rights.'

⁴ *Moyo and Another v Minister of Police and Others* [2019] ZACC 40; 2020 BCLR 91 (CC); 2020 (1) SACR 373 (CC) para 25.

case.⁵ It held that '[a] trial court is the appropriate forum in which to decide whether their alleged conduct in fact occurred and constituted a statutory crime.'

[12] The grounds of attack raised in this Court, in the form of the rationality and legality review, as well as that of the frontal challenge, constitute a departure from the appellant's pleaded case. The appellant made no mention of these grounds, either in his founding affidavit or in his replying affidavits in the high court. In his founding affidavit, the appellant alleged that the NPA applied a 'flawed method' in calculating the fees due to him, glaringly omitting to plead what he regards as a contrary and proper method of calculation. The appellant further alleged, that there were other fora, to which the complainant should have directed her complaint, such as the Legal Practice Council.

[13] The appellant also alleged that by being charged and appearing in the criminal court, the prosecution subjected him to embarrassment, ridicule and insults by members of the public and that his reputation and standing had been 'brought down to ground zero.' In addition, the appellant pleaded that being made to defend himself against the charges in the criminal trial, cost him a substantial amount of money. Consequently, he concluded, he was being subjected to an '*unfair, unlawful and unconstitutional prosecution*'. (Our emphasis.)

[14] This departure from the pleaded case is impermissible. As this Court explained in *Minister of Safety and Security v Slabbert*:⁶

'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.' (Citation omitted.)

[15] We must hasten to add that there is no absolute bar against raising new points of law on appeal. But that is subject to two important provisos: the point must

⁵ Ibid para 12.

⁶ *Minister of Safety & Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 11.

be foreshadowed in the papers, and no prejudice should occur to the other party. As explained by the Constitutional Court in *Barkhuizen v Napier*.⁷

'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.'⁸ (Footnote omitted.)

[16] In the present case, none of the grounds the appellant seeks to argue are covered in the pleadings. The high court did not consider any of them in its judgment. In any event, there is no merit in any of the appellant's submissions. Our jurisprudence on the permanent stay of criminal prosecutions was settled in two key judgments of the Constitutional Court, namely, *Sanderson v Attorney-General Eastern Cape (Sanderson)*,⁹ and in *Wild and Another v Hoffert NO and Others (Wild)*.¹⁰

[17] The upshot of these decisions is that to succeed with an application for a permanent stay of a criminal prosecution, an applicant must, in the main, prove trial-related prejudice. In *Sanderson*, the Constitutional Court accepted that there may be cases in which a permanent stay is appropriate without there being trial-related prejudice.¹¹ Under those circumstances, an applicant would have to establish extraordinary circumstances.

[18] Both *Sanderson* and *Wild* concerned applications for a permanent stay of proceedings in the context of alleged unreasonable delay as a violation of an accused's right to be tried within a reasonable time.¹² In both cases, the Constitutional Court recognised that a permanent stay of prosecution is a drastic, far-reaching radical step, which should be used sparingly as a remedy to an

⁷ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

⁸ *Ibid* para 39.

⁹ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC).

¹⁰ *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC); 1998 (2) SACR 1 (CC) paras 9 and 11.

¹¹ *Sanderson* para 42.

¹² At that time, the right, often referred to as a right to a speedy trial, was provided for in s 25(3)(a) of the Interim Constitution.

infringement of the right to a speedy trial.¹³ In *Wild*,¹⁴ the Constitutional Court, following *Sanderson*, held that '[t]he only relief sought . . . in these proceedings is a stay of prosecution. *But such relief, so it was held in Sanderson, cannot be granted in the absence of trial-related prejudice or extraordinary circumstances.*' (Emphasis added.)

[19] Thus, a court seized with such an application has to balance a complainant's right to access justice, and an accused's right to a speedy trial. Whether a court would grant a permanent stay of prosecution will therefore depend on the circumstances of each case, which would include instances where an infringement of the right to a fair trial, as provided for in s 35(3) of the Constitution, results in prejudice.

[20] In the present case, the appellant does not raise a trial-related prejudice such as an unreasonable delay in the commencement and finalisation of his criminal trial. His complaint is essentially two-fold. First, that the charges have no proper legal foundation. Second, and flowing from the first, that he is suffering undue social prejudice and financial loss because of the prosecution. None of these constitutes trial-related prejudice. As to the first, it goes to the merits of the State's case. Needless to say, only the trial court can determine that. As to social prejudice and financial loss, these are inherent inconveniences suffered by every accused and are not regarded as trial-related prejudice.

[21] In *Sanderson*,¹⁵ the Constitutional Court remarked thus:

'...The profound difficulty with which we are confronted in this case is that an accused person - despite being presumptively innocent - is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system....'

¹³ *Sanderson* para 38 and *Wild* para 11.

¹⁴ *Wild* para 26.

¹⁵ *Sanderson* para 23.

[22] In *Wild*, the Constitutional Court held as follows:

‘...The latter kind of prejudice [general delay-related prejudice not having a bearing on the trial itself], so it was held, fell into two broad categories. First there was prejudice related to an awaiting-trial person’s loss of personal liberty, eg resulting from pre-trial detention or restrictive bail conditions. In the second instance there was a whole range of disadvantages inherent in the public nature of our criminal justice system, *such as loss of reputation, social ostracism and loss of employment or income*. In both instances speedy trial protection seeks to avoid or minimise prolongation of the train of events inevitably set in motion by arraignment and continuing until completion of the trial.’¹⁶

...

The first appellant is an advocate, the second an attorney. Both are in private practice in Durban. Understandably their arrest, arraignment and appearance in court on such serious charges [dealing in or possessing cocaine and attempted murder] attracted publicity in national radio news bulletins as well as the Sunday and daily press. *Equally understandably, such publicity caused them a great deal of social and professional harm and embarrassment, both at the outset and following their subsequent appearances in court.*¹⁷ (Emphasis added.)

[23] We agree with the high court that the appellant had made out neither a case of trial-related prejudice, nor proved, on a balance of probability, extraordinary circumstances that warrant a permanent stay of prosecution. The appeal must thus fail.

[24] There remains the issue of costs. In matters of this nature, it does not necessarily follow that the dismissal of the application must result in an adverse costs order. The rationale was explained in *Sanderson*:¹⁸

‘[O]rdinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the State and in which cost orders are not competent; and the cause of action is that the State allegedly breached an accused’s constitutional right to a fair trial...’.

¹⁶ *Wild* para 4.

¹⁷ *Wild* para 14.

¹⁸ *Sanderson*, para 44.

[25] However, this is not an immutable rule. There is a qualification to it. The application must be *bona fide* and not merely intended to delay or frustrate the pending criminal proceedings. It must not be hopelessly without merit. Where it is, courts would not hesitate to mulct an unsuccessful litigant in costs. In *Sanderson*,¹⁹ with reference to *Motsepe v Commissioner for Inland Revenue*²⁰ the Court warned that frivolous challenges will be met with an adverse costs order. ‘... *disabuse the minds of potential litigants of the notion that they can approach this Court without any risk of having an adverse costs order being made against them, no matter how groundless the merits of such approach*’.²¹ (Emphasis added.)

[26] Although counsel were not invited specifically to make submissions on the issue of costs, the approach to costs in these applications is settled, as discussed above. The appellant would have been aware that there was no trial-related prejudice in the grounds he relied upon in support of his application. As discussed above, similar grounds have been considered insufficient for a permanent stay of proceedings in *Wild* and *Sanderson*. Further, the appellant established no exceptional circumstances for the court’s intervention in the pending criminal proceedings. As the authorities make plain, frontal challenges that serve only to delay criminal trials and should be discouraged, unless well-grounded. For these reasons, we are entitled to deviate from the default position and order that costs should follow the result. The State employed three counsel but sought costs for only two. We agree, as we do not consider costs of three counsel to be warranted.

[27] The following order is made:

The appeal is dismissed with costs, including costs of two counsel.

¹⁹ *Sanderson*, para 43.

²⁰ *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC).

²¹ *Id* at para 32.

T MAKGOKA
ACTING DEPUTY PRESIDENT

F E MOKGOHLOA
JUDGE OF APPEAL

S P MOTHLE
JUDGE OF APPEAL

D S MOLEFE
JUDGE OF APPEAL

R HENNEY
ACTING JUDGE OF APPEAL

Appearances:

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Instructed by: NW Phalatsi and Partners, Bloemfontein

For first respondent: NA Cassim SC (with EB Yawa and S Freese)

Instructed by: State Attorney, Bloemfontein.