

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: **CA&R 77/2024**

In the matter between:

WONDER VILJOEN DIMAKATSO MOTHIBI

First Appellant

FEZILE MAKIWANE

Second Appellant

and

THE STATE

Respondent

Neutral Citation: *WK Mothibi & Another v The State (CA&R77/2024)*
 Heard on: 21 July 2025
 Delivered on: 04 May 2026
 Coram: Mamosebo J et Olivier AJ
 Summary: Appeal against decision by Regional Magistrate to refuse a permanent stay of prosecution. Section 342A of Criminal Procedure Act 51 of 1977. Magistrate obliged to conduct enquiry in terms of Section 342A – Magistrate failing to conduct such an enquiry – Magistrate's failure is misdirection and procedural error – Courts of Appeal should not step into the shoes of Courts a quo in these circumstances – Matter to be remitted in terms of Section 19 of the Superior Courts Act 10 of 2013.

ORDER

In the result, the following order is made:

1. The appeal is upheld.

2. The order of the Regional Magistrate, Mr. Smit, of 11 July 2022 to refuse an application brought on behalf of the appellants in terms of Section 342A of the Criminal Procedure Act 51 of 1977, for the permanent stay of prosecution is hereby set aside.
3. The matter is remitted to the Regional Magistrate to conduct an enquiry into the reasonableness of the alleged delays in the criminal prosecution of the first and second appellants as contemplated in Section 342A(1) read with Section 342A(2) of the Criminal Procedure Act 51 of 1977, and to make an order permitted by Section 342A(3) of said Criminal Procedure Act.

JUDGMENT

OLIVIER AJ

- [1] This is an appeal against a decision by the Regional Magistrate, Mr. Smit, ("the Magistrate") to refuse an application brought on behalf of the appellants in terms of Section 342A of the Criminal Procedure Act 51 of 1977 (*"the CPA"*) for the permanent stay of prosecution in respect of the appellants. The appellants were granted leave to appeal on 22 September 2022.
- [2] Although the trial record that accompanied the papers in the appeal was not complete, the representatives of the respective parties agreed that the available record was adequate for the proper consideration of the appeal.
- [3] The charges brought against the appellants are closely related to the much-publicized Trifecta trial and it appears from the record and specifically from the provisional indictment that we were provided with, that the first appellant, Mr. Mothibi, is being charged with 1 (one) count

of allegedly contravening the provisions of the Public Finance Management Act, Act 1 of 1999 (*"the PFMA"*) read with the provisions of Section 217(1) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) relating to the signing of a lease agreement without following proper procurement processes.

- [4] Mr. Mothibi is accused 2 in the criminal proceedings and it is alleged that at the time of the commissioning of the alleged offence, he was the Head of the Department of Agriculture and Land Reform in the Northern Cape Province and by virtue of his portfolio, also the accounting officer of the said department.
- [5] It is further alleged that the aforesaid lease agreement was allegedly unlawfully signed on 9 November 2005.
- [6] Mr. Makiwane (the second appellant and accused 4 in the criminal proceedings) is being charged with 5 (five) counts of allegedly contravening the provisions of the PFMA read with the provisions of Section 217(1) of the Constitution.
- [7] The charges against the second appellant vary between allegations of the unlawful awarding of contracts and the unlawful signing of lease agreements.
- [8] It is alleged that, at the time of the commissioning of the alleged offences, Mr. Makiwane was the Chief Executive Officer of the South African Social Security Agency (*"SASSA"*) and it appears that the alleged offences were commissioned during August 2006 to June 2007.
- [9] The aforementioned indictment is dated 11 December 2019 and this is also the date upon which the appellants appeared in court for the first time.

[10] The criminal trial was thereafter postponed on several occasions until eventually on 12 April 2022 when the application for permanent stay of prosecution was lodged. The Magistrate dismissed the application on 11 June 2022.

[11] Central to this appeal, is Section 35 of the Constitution that affords every accused person the right to a fair trial and specifically the right to have his/her trial commence and conclude without unreasonable delay.¹

[12] Section 342A(1) of the CPA underlines the constitutional right of accused persons to a speedy trial where it states as follows:

‘A court before which criminal proceedings are pending shall investigate any delays 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 ...’ (my underlining)

[13] Section 342A(3) of the CPA provides as follows:

“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 ...”

[14] Although Section 342A of the CPA does not specifically mention the permanent stay of prosecution amongst the list of possible orders that may be made in terms of Section 342A(3), it is trite that an order of a permanent stay of prosecution would resort under such possible orders and it was further never in dispute that it is within the powers of a Magistrate to make such an order.

[15] Section 342A(2) of the CPA reads as follows:

¹ See Section 35(3)(d) of the Constitution

'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.' (my underlining)

[16] The *crux* of the Magistrate's findings and reasons for judgment as gleaned from the record, is as follows:

'One must know that the court will protect a person's constitutional rights even if it sometimes [has] (sic) a drastic impact on the desires of the general public, however all the relevant factors should be considered.

In this case it is not in dispute that there was a ...[indistinct] time lapse since the allege[d] (sic) commission of the offence and the indictment in 2019. The ... [indistinct] delays [were] (sic) not caused by the applicants except for the representations which they were in any way entitled to.

I have however listened to the arguments of the applicants. At this stage it is mere remarks with council (sic) what could possibly happen, what could have happened and what may have happened. This is vague and in my mind without substance. At the end of the day the trial court will be the best to decide on the fairness of the trial. That court will be in a better position to diligently examine the facts and decide whether the accused had a fair trial or not.

One should always remember a fair trial also requires fairness to the public as represented by the state. It has to ...[indistinct] confidence in the criminal justice system with the public, those close to the accused as well as those distressed by the audacity ...[indistinct] of the crime... however when one balance (sic) all the pro and cons I cannot say that the eventual trial will not be fair. Further delays by the state might be treated differently but at this stage I have to dismiss the application for permanent stay of prosecution by the applicants.'

- [17] If proper regard is given to the provisions of Section 342A of the CPA it is clear that when a court faces an application for the permanent stay of prosecution, such court is compelled to investigate whether the alleged delay is unreasonable by taking into account the factors listed in Section 342A(2) and to, thereafter, make an order as provided for in Section 342A(3) of the CPA which may include an order for the permanent stay of prosecution. This is underlined by the use of the word "*shall*" in the opening lines of both Section 342A(1) and Section 342A(2) of the CPA.²
- [18] The Magistrate however and despite declaring that all factors must be considered, then fails to deal with any of the factors listed in Section 342(2) of the CPA.

² See also *S v Ndibe* [2012] ZAWCHC 245 (14 December 2012), para 6

[19] The Magistrate merely mentions a delay between the commissioning of the alleged offences by the appellants and the serving of an indictment in 2019 which delay, so it appears from the record, was regarded by the Magistrate as sufficiently long to warrant a mention, but then fails to deal with or even properly deal with, *inter alia*:

19.1 The duration of the delay;

19.2 The effect of the delay on the personal circumstances of the accused and witnesses;

19.3 The seriousness, extent or complexity of the charge or charges;

19.4 The effect of the delay on the administration of justice; and/or

19.5 The adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued.

[20] It was held as follows in ***Director of Public Prosecutions North Gauteng v Makhubela***³:

"It is clear, in casu, that the court could not have taken this decision without holding an enquiry whereupon facts from which it could determine if the exceptional circumstances for it to issue the order in terms of s 342A(3)(d) exist. I am of the view that the court misdirected itself when it failed to consider the appropriate aspects provided in s 342A(2) ...Its misapplication of the law resulted in a gross irregularity." (my omissions)

[21] In ***Ndibe***⁴ the court confirmed that the record of proceedings must reflect that Section 342A has been fully complied with and further held as follows:

³ [2014] ZAGPPHC 535 (6 August 2014), para 19

⁴ *Supra*

‘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.’

- [22] The constitutional court effectively underlined the above where it held as follows:⁵

‘A proper reading of Section 342A as a whole reveals that the Section requires an investigation into the reasonableness of the delay. Courts have grappled with this provision and held that an enquiry is necessary in order to sufficiently consider the reasonableness of the delay.’

- [23] It is clear from the above quoted authorities that a court that is faced with an application in terms of Section 342A of the CPA is compelled to hold an enquiry into the reasonableness of the delay and in doing so, to have regard to the factors listed in Section 342A(2), to make a finding in terms of Section 342A(3) and to make sure that the enquiry and finding form part of the record of the proceedings.

- [24] I take the view that the failure by the Magistrate in the present matter to properly deal with the factors listed in Section 342A(2) of the CPA, coupled with the suggestion by the Magistrate that the trial court is the appropriate forum to determine the fairness of the trial/delay, is a misdirection by the Magistrate and is a significant procedural error.

- [25] I am of the considered view that Section 342A was specifically enacted to provide courts with a tool to manage unreasonable delays in criminal proceedings and to give effect to the constitutional right entrenched in Section 35(3)(d) of the Constitution to have a trial commence and finalise without unreasonable delays.

⁵ *Ramabele v S; Msimango v S* [2020] ZACC 22 (16 September 2020), para 61

- [26] I am further of the view that Section 342A is intended to be a pre-emptive remedy and that, if the view of the Magistrate, namely that the trial court is actually the best court to decide on the reasonableness of the delay, is to be applied universally, Section 342A would effectively be rendered redundant as the provisions empowers a court to investigate the delays before or during proceedings to prevent the very prejudice that an inordinately delayed criminal trial might create.
- [27] I am finally of the view that the eventual finding of the Magistrate is not one that was properly considered and that it effectively boils down to an attempt to kick the can as far down the road as possible.
- [28] It is trite that when considering a matter on appeal, the powers of the court of appeal is generally limited and that the court of appeal would only be allowed to interfere with the exercise of a discretion by a lower court if it is satisfied that the discretion was not exercised ‘... judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’⁶
- [29] In *Florence v Government of the Republic of South Africa* it was held that a court sitting as court of appeal may only interfere in instances where the lower court exercised a discretion in the true sense if ‘it is clear that the choice the court has preferred is at odds with the law.’⁷
- [30] I am of the view that the answer to the question as to the scope of an appeal court’s powers when considering a decision taken by a lower court, is best summarised by the learned Majiedt J where he held as

⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015), paras 83 and 88; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17 (2 December 1999), para 11

⁷ [2014] ZACC 22 (26 August 2014), para 113

follows in ***Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others***:

‘When a lower court (or Tribunal) has exercised a true discretion, it is generally inappropriate for an appellate court to interfere unless –

- (a) the discretion was not judicially exercised;
- (b) the discretion was influenced by the wrong principles or by a misdirection on the facts; or
- (c) the lower court reached a decision which, in the result, could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’⁸

[31] In the end, each case must be considered on its own merits⁹ and it is against the above that this appeal is considered. This court primarily needs to consider whether the Magistrate misdirected himself by failing to consider the specific trial related prejudice and/or whether the Magistrate applied the incorrect legal standard. I am of the view that the decision of the Magistrate in the present matter does not cut the mustard for the reasons already alluded to herein above.

[32] It should always be borne in mind that a permanent stay of prosecution is widely regarded as a drastic remedy and has been described in ***Sanderson v Attorney-General; Eastern Cape*** as follows:

‘... radical, both philosophically and socio-politically. Barring the prosecution before the trial begins ... and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case ... is far reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. This

⁸ [2026] ZACC 4 (30 January 2026), para 68; ***Caledon River Properties (Pty) Ltd t/a Magwa Construction and Another v Special Investigating Unit and Another*** [2026] ZASCA 6 (16 January 2026), para 12

⁹ ***Bothma v Els and Others*** [2009] ZACC 27 (8 October 2009), para 75

will seldom be warranted in the absence of significant prejudice to the accused.’¹⁰

[33] It is therefore of great importance that any application for a permanent stay of prosecution be taken seriously and be given the attention that it deserves and that a lackadaisical approach to this topic should be strongly discouraged.

[34] I am of the view that, given all of the above, this is a matter where this court may and should interfere with the decision of the Magistrate, but I am also of the view that this court should not step into the shoes of the court *a quo* just because the Magistrate failed in his duties.

[35] I am well aware of the congested rolls in the Magistrates courts, but congestion does not absolve the court from managing its roll effectively and from giving proper attention to matters that serve before it. This is what the public expects.

[36] I am consequently of the view that this is a case where this court should exercise its powers as set out in Section 19(c) of the Superior Courts Act 10 of 2013, and remit the matter to the Regional Court for proper enquiry in terms of the provisions of Section 342A of the CPA.

ORDER:

[37] In view of the above, the following order is made:

1. The appeal is upheld.
2. The order of the Regional Magistrate, Mr. Smit, of 11 July 2022 to refuse an application brought on behalf of the appellants in

¹⁰ 1998 (2) SA 38 (CC), para 38; *Zanner v Director of Public Prosecutions, Johannesburg* 2006] ZASCA 56 (3 April 2006), para 10

terms of Section 342A of the Criminal Procedure Act 51 of 1977, for the permanent stay of prosecution is hereby set aside.

3. The matter is remitted to the Regional Magistrate to conduct an enquiry into the reasonableness of the alleged delays in the criminal prosecution of the first and second appellants as contemplated in Section 342A(1) read with Section 342A(2) of the Criminal Procedure Act 51 of 1977, and to make an order permitted by Section 342A(3) of said Criminal Procedure Act.



A.D. OLIVIER
ACTING JUDGE
NORTHERN CAPE DIVISION
KIMBERLEY

I CONCUR.



M.C. MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION
KIMBERLEY

APPEARANCES:

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For the Respondent:
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