IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO 534/2012
DATE HEARD: 28/02/2013
DATE DELIVERED: 27/03/2013

In the matter between

NEO MOERANE MAMASE	**APPLICANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS, BHISHO	**2ND RESPONDENT**
THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN	**3RD RESPONDENT**
MAXWELL MAMASE	**4TH RESPONDENT**
QUICKVEST 54(PTY) LTD	**5TH RESPONDENT**
THE ASSET FORFEITURE UNIT	**6TH RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] This is an application for a permanent stay of prosecution. In the event of such an order being granted, the applicant also seeks an order against the sixth respondent that certain monies currently subject to a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA), be released to her.

The application was opposed by the first, second, third and sixth respondents (the respondents).

[2] The applicant and her former husband Maxwell Mamase (Mamase), both former members of the executive council of the Eastern Cape provincial government, were indicted in the High Court for five offences under the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Act), allegedly committed during 2003 and 2004. They were also charged with one count of fraud, together with a third accused, a company Quickvest 54 (Pty) Ltd (Quickvest), of which the applicant and Mamase were directors. They first appeared in court during March 2005 and the charges were provisionally withdrawn in the High Court on 16 October 2009, with an indication from the State that they might be charged again in the future. When this application was launched, on 13 February 2012, no further indictment had been served on the applicant, Mamase or Quickvest. A new indictment was signed by the Deputy Director of Public Prosecutions, Bhisho, on 20 August 2012, but still has to be served.

[3] The applicant annexed a portion of the first indictment to her affidavit. There were three other accused at this stage. The portion annexed contained five counts of contraventions of s 7 (1) (a) (i) (aa) of the Act, and the count of fraud. S 7 of the Act creates the offence of corrupt activities on the part of members of legislative authorities.

[4] Without going into great detail, the substance of the charges under the Act was as follows: Mamase, on behalf of the Eastern Cape government, entered into an agreement of sale with one or more of the other three accused, in terms of which the government purchased 49% of the share capital in a certain company which owned farms. Mamase was officially informed of certain shortcomings in the agreement. Mamase issued unauthorised instructions that two payments of R7,84 million each be made in terms of the agreement, when he knew that the required authorisation for payment had not been given. In return, the applicant and Mamase accepted gratifications from one or more of the other accused in the form of the payment of R270 000.00, being transfer duty on the purchase of an immovable property in the name of Quickvest, payment of instalments in the total sum of R45 000.00 on Quickvest's mortgage loan account, and payment of a further R45 000.00. It was alleged that the applicant and Mamase acted at all times with a common purpose.

[5] The allegations in the fraud charge were to the effect that the three accused, as a result of certain misrepresentations, had induced the Eastern Cape government to accept that the farms purchased were to be bequeathed to previously disadvantaged persons, that the government was getting value for money by the acquisition of the farms and that the applicant and Mamase would not unlawfully benefit from the transaction.

[6] The new indictment, in which the accused are the applicant, Mamase and Quickvest, contains four charges:

1. Corruption in contravention of s 12 (1) (a) of the Act, with alternative charges under the Act and under the Corruption Act 94 of 1992 (against all three accused). S 12 of the Act creates offences in respect of corrupt activities relating to contracts.
2. A contravention of s 86 (3) of the Public Finance Management Act 1 of 1999 (against Mamase only).
3. Fraud (against Mamase only).
4. Money laundering in contravention of s 4 of POCA, alternatively fraud (against all three accused).

[7] The allegations in the corruption charge involve acceptance of the same gratifications referred to in the first indictment, in order for Mamase improperly to influence the procurement of a contract with a public body. The money laundering charge concerns the payments which were made into Quickvest's mortgage loan account, it being alleged that these payments were the proceeds of unlawful activities, and that they were disguised as rental payments in terms of a fictitious lease of the immovable property entered into between Quickvest as lessor and a shelf company as lessee. The lease was allegedly signed by the applicant on behalf of Quickvest. The gist of the alternative charge of fraud was that following questions being asked in the press about the immovable property, the accused, by way of the fictitious lease, misrepresented the true position

regarding the various payments into Quickvest's mortgage loan account. As a result of the misrepresentation, the State, the South African Police Service (the SAPS) and the press, were induced to believe, to their prejudice, that the payments were lawful.

HISTORY

[8] There is a long and detailed history of the prosecution and the pending prosecution to recount, some of which is common cause and the rest is largely not in dispute. The applicant, Mamase and Quickvest were initially charged together with four other accused, who over time fell out of the picture. Before a High Court trial date could be arranged, negotiations took place between the attorneys for two of the other accused and the prosecutor dealing with the case at the time, Advocate Johan Roothman. One of these accused, Emiliya Peneva (she was not one of the six accused in the first indictment), agreed to testify for the State. A statement was taken from her and the charges were withdrawn against her during June 2005. It was contended on behalf of the other accused, Norman Benjamin, that he was in poor health and would not be able to stand trial or make a proper defence. The respective parties obtained medical reports concerning Benjamin's condition.

[9] The case was eventually set down for hearing in the Bhisho High Court on 11 September 2006. The case against Benjamin was struck from the roll, and the charges against the other two accused were withdrawn, leaving the applicant,

Mamase and Quickvest as the accused. They gave notice that they intended to enter a plea in terms of s 106 (1) (f) of the Criminal Procedure Act 51 of 1977, namely that the court did not have jurisdiction to try those offences which had allegedly been committed outside the jurisdiction of the Bhisho High Court. The State sought to cure the problem by the issue of a directive by the National Director of Public Prosecutions (the NDPP) in terms of s 22 (3) of the National Prosecuting Authority Act 32 of 1998, that the proceedings should be commenced in the area of jurisdiction of the Director of Public Prosecutions, Bhisho. The accused persisted in their objection to the jurisdiction.

[10] On 19 September 2006 Miller J ruled that the directive was "valid and of effect", but granted leave to appeal against his order to the Full Bench of the Bhisho High Court. Subsequently however the applicant and her co-accused petitioned the Supreme Court of Appeal (the SCA) and on 18 March 2008 the SCA granted leave to appeal Miller J's order. On 25 September 2009 the SCA set aside Miller J's order, concluding *inter alia* that the NDPP's directive did not have the effect of conferring jurisdiction on the Bhisho High Court, issued as it was after the commencement of proceedings.[1]

[11] By the time the judgment of the SCA was delivered, Roothman had taken up a new position outside the province. A new prosecutor, Advocate Jacques Cilliers, was assigned to the case and it was he who attended to the withdrawal of the charges on 16 October 2009. By this time it had been decided not to

[1] The judgment is reported as *S v Mamase and Others* 2010 (1) SACR 121 (SCA)

prosecute Benjamin owing to his ill health, and a plea and sentence agreement had been entered into between the State and another former accused. Cilliers discovered prior to the decision of the SCA that Peneva, a Bulgarian national, had left South Africa.

[12] Cilliers had to familiarise himself with the whole case before the accused could be indicted again. The papers were voluminous, contained in forty files, and Cilliers already had a heavy case load. The original investigator had also taken up a post outside the province and a new investigator, Colonel Nopasika Mashwabane was appointed. She too needed to acquaint herself with the case. As the new prosecutor, Cilliers had to re-assess the evidence, especially when it had been decided that Benjamin would not be prosecuted again. This decision resulted in a need to consult with the more important State witnesses.

[13] These developments occurred during the restructuring of the National Prosecuting Authority (the NPA) following the disbandment of the Directorate of Special Operations (the DSO) during July 2009. The DSO had borne sole responsibility for the case since March 2006. There was uncertainty about the future deployment of prosecutors from the DSO, one of whom was Cilliers, as well as about which of the existing structures of the NPA would take responsibility for the case.

[14] Cilliers was deployed to the Organised Crime Unit in the office of the Director of Public Prosecutions (the DPP). This case did not fall into the organised crime category and there therefore followed a period of uncertainty as to whether or not Cilliers would remain the prosecutor in the case. He did however provide a new draft indictment to the DPP.

[15] Cilliers was eventually transferred, at his request, to the Specialised Commercial Crime Unit of the NPA (the SCCU) and the case became the responsibility of the SCCU on 1 April 2010, when Cilliers was officially appointed to that unit. At this time he was already dealing with a number of other complex cases which had originated from the DSO, some of which were part-heard. Advocate Antoinette de Jager was assigned to the case to assist Cilliers, and she also had to acquaint herself with the case. She and Cilliers consulted with the more important witnesses during September 2010, in order to clarify certain allegations in the new indictment. Cilliers and De Jager concluded that the indictment could not be finalised without consulting with Peneva. Consultation with Peneva turned out to be difficult to achieve.

[16] Cilliers made contact with Peneva on 29 August 2010. She was in Australia and did not have valid travel documents in order to travel to South Africa. She had to travel to Bulgaria to obtain a passport and was unable to do so before mid-2011. On 1 April 2011 Peneva informed Cilliers that she had obtained an Australian passport. She was on leave at the time but told Cilliers

that on her return to work she would find out when she was able to travel to South Africa.

[17] Steps were then taken to arrange for Peneva to travel to South Africa. The SAPS was responsible for the travel expenses and required a letter from her employer containing proof of her income and confirmation that she would not be paid during her visit to South Africa. The employer's letter was received on 24 May 2011 and was forwarded to Mashwabane, who in turn informed Cilliers that she was obtaining quotations for the travel expenses. Mashwabane informed Cilliers that the head of the Commercial Branch of the SAPS required additional motivation. This was prepared by Cilliers and De Jager and forwarded to Mashwabane the same day. They were informed on 4 July 2011 that authorisation for Peneva's journey had been obtained and that Mashwabane could proceed to make the arrangements. Consultations with Peneva were planned for the period 26 to 30 September 2011.

[18] Unfortunately, owing to work commitments, Peneva was unable to travel to South Africa in September 2011 and De Jager attempted to arrange for consultations in October 2011. At this stage Peneva announced that she would have to be accompanied by her young daughter as she did not have anyone to look after her in her absence. Peneva also insisted that consultations take place in Cape Town because that was the only place where she had relatives who could care for her daughter.

[19] A further motivation for travel authorisation was sent to the SAPS but the request was refused, resulting in negotiations between the NPA and the SAPS. Eventually Peneva said that if the consultations could take place in Cape Town she would pay for her daughter's fare. However, again owing to work commitments, Peneva could now only come to South Africa in December 2011.

[20] Cilliers, De Jager and Mashwabane eventually consulted with Peneva, who indicated she was prepared to travel to South Africa to testify at the trial. As a result of the consultations certain aspects of the State case had to be followed up. Mashwabane was instructed to attend to these aspects.

[21] Cilliers, De Jager, and Mashwabane took their annual leave during the 2011/2012 festive season. Cilliers had a busy trial roll during the first term of the High Court and De Jager had to prepare for a complicated corruption trial.

[22] Advocate Theunis Goosen, of the SCCU, who deposed to the answering affidavit on 14 May 2012, stated in the affidavit that the new indictment would be finalised within approximately one month from that date. In his supplementary affidavit, deposed to on 6 December 2012, Goosen said that De Jager had edited the first draft of the new indictment on 28 May 2012, and forwarded it to him. De Jager discussed the indictment with Cilliers at the beginning of July 2012. In the meantime Mashwabane and the DPP of the Western Cape were approached for

their views on the centralisation of the charges in the Bhisho High Court. They responded on 29 June and 16 July 2012 respectively.

[23] The attorneys for the applicant, Mamase and Quickvest were also approached and requested to agree to the charges being brought in the Bhisho High Court. The attorneys for the applicant and Quickvest indicated their agreement but there was no response from Mamase's attorneys.

[24] As already mentioned the new indictment was signed on 20 August 2012 and the directive for centralisation was signed by the NDPP on 6 September 2012. Goosen said that the trial is ready to proceed, but the first, second and third respondents' legal advisors advised that the matter should not be re-enrolled until the present application is finalised.

APPLICANT'S COMPLAINT

[25] After the indictment was served, the applicant appeared regularly in court. While the appeal to the SCA was pending, she appeared less frequently. She was on bail prior to the withdrawal of the charges, and the bail money has not been refunded. On 16 February 2011 her attorneys wrote to the first respondent, alleging that the applicant had been severely prejudiced by the delays in the case and that her right to a "speedy trial" had been violated. They requested confirmation that no further prosecution would take place and indicated that the

applicant intended at some stage to apply for a permanent stay of prosecution. The first respondent replied on 4 April 2011, disputing the applicant's allegations of prejudice and breach of her fair trial rights. The letter concluded as follows:

> "You are informed that the matter is currently under reconsideration and the State will summons the accused to court should a decision be taken to proceed with the prosecution."

[26] The applicant maintained that she has been socially and professionally compromised. Her family life has fallen apart and the stress of the case caused the breakdown of her marriage to Mamase. They married in 2003 but by the time the charges were withdrawn were divorced. At the time the charges were withdrawn, she was in her third term as a member of the provincial legislature. She had thus gained experience in this position and had prospects of election to higher positions in the provincial parliament. In May 2010 she was elected as Deputy Speaker but was obliged to resign that position in June 2010 because of the negative publicity and the ill treatment she suffered at the hands of fellow parliamentarians. She was regarded as someone who was "still subject to possible criminal proceedings." At the time she was elected as Deputy Speaker, there was a public debate by the African National Congress (the ANC) caucus concerning her suitability for the position, as a result of the State's indication that she could be charged again. She was advised that this was also the reason why she could not represent the Eastern Cape legislature as Speaker. While Deputy Speaker she had differences of opinion with the Speaker and was instructed by the provincial executive of the ANC to resign as Deputy Speaker. She maintains

she is unable to engage in public debate with her former "vociferousness" because of the ever present slur on her integrity.

[27] The applicant mentioned several factors which she averred caused her trial prejudice. Further particulars requested on 14 September 2006 have not yet been furnished. She has been unable to prepare for trial, to collect documentation and to establish which witnesses are necessary to enable her to conduct a defence. After her divorce from Mamase she moved home, and documentation which "may have been relevant" has now been lost or destroyed. No list of state witnesses has ever been disclosed to her and she has no knowledge of which witnesses will testify for the state, other than Peneva. Generally, the lapse of time since the alleged criminal conduct has rendered it impossible for her to have a fair trial. In specific response to a new indictment, which at the time of deposing to her replying affidavit she had not seen, she said that it would be impossible for her to investigate new allegations in a new indictment after the lapse of nine years (the replying affidavit was deposed to on 6 August 2012). At the time she and Mamase separated there was no reason to retain documentation as there was no suggestion that there would be new charges, and the documentation has been disposed of.

THE LAW

S 35 (3) (d) of the Constitution provides:

> "Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay."

[28] The judgment in *Sanderson v Attorney-General Eastern Cape*[2] concerned the equivalent provision in the interim Constitution (s 25 (3) (a) of that Constitution). Kriegler J found that the provision protected three kinds of interests: liberty, security, and trial-related interests.[3] With regard to the question of when the provision had been violated, he said the following:[4]

> "Having determined that the section protects three kinds of interest, we are better situated to determine when the provision has been violated. The critical question is how we determine whether a particular lapse of time is reasonable. The seminal answer in *Barker v Wingo*[5] is that there is a "balancing test" 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 his right to a speedy trial; and the prejudice to the accused."

[29] In *Bothma v Els*[6] Sachs J said that the nature of the offence should be added as a further factor.[7]

[30] With regard to the nature of the remedy of a permanent stay of prosecution, in *Sanderson* Kriegler J said the following[8]:

> " …… the relief the applicant seeks is 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. That will

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[2] 1997 (12) BCLR 1675 (CC)
[3] At para [22]
[4] At para [25]
[5] 407 US 514, 532 (1972)
[6] 2010 (1) BCLR 1 (CC)
[7] At para [38]
[8] At para [38]

> seldom be warranted in the absence of significant prejudice to the accused."

[31] Further on this aspect, in *Wild and Another v Hoffert NO and Others*[9], Kriegler J said:[10]

> "The appellants do not allege, nor is there any suggestion of, trial prejudice here. Consequently their claim for a stay of prosecution must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate."

CONCLUSIONS

[32] In the applicant's affidavit and in submissions on her behalf, there was repeated reference to the total period which has elapsed since 2003 to the present time, a period of almost ten years. In *McCarthy v Additional Magistrate, Johannesburg and Others*[11] Farlam AJA (as he then was) was of the view that in order to decide whether there had been a unreasonable delay, it was necessary to divide up the whole period in order to see what caused the delay.[12] This approach is particularly apposite in the present case.

[33] According to both indictments, the last alleged payment of a gratification was during December 2004. The applicant was arrested and first appeared in court in March 2005. I do not understand the applicant to complain about the

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[9] 1998 (3) SA 695 (CC)
[10] At para [27]
[11] [2000] 4 All SA 561 (A)
[12] At para [31]

period between that date and 11 September 2006, the first trial date in the High Court. In any event, given the complex nature of the charges, I do not think that that time lapse was unreasonable or unusual.

[34] The next time period was the one between Miller J's ruling on 19 September 2006 and the judgment of the SCA on 25 September 2009. That time lapse is attributable to the appeal procedure. While the applicant was entitled to take the point of jurisdiction and to appeal Miller J's order, it was she who set that process in motion. It seems the petition to the SCA was only launched in 2008 (the case number of the order granting leave to appeal to the SCA was 038/2008).

[35] Reference was made on behalf of the applicant to the following remarks of Snyders JA in *S v Mamase* (*supra*)[13]:

> "What is alarming about this case is that considerable delay and costs could have been avoided if a simple and practical solution to the problem was adopted: the charges could have been withdrawn, another directive issued and the appellants served with a fresh indictment. There was no apparent reason why such a course could not be followed and completed in a matter of hours. Counsel on behalf of the respondent could not offer any reason why such a course was not open to it."

[36] It was submitted that the delay since September 2006 was attributable to the failure of the State to adopt the course mentioned by Snyders JA. It may well be that if the State had adopted that course that the trial would now be over.

[13] At para [17]

However I do not think that there was any improper or vexatious conduct on the part of the State by not adopting that course. It was entitled to argue the appeal and have the issue decided. The State clearly wanted to proceed with the trial in September 2006: the issue of the directive demonstrated as much. I am therefore of the view that the three year period between September 2006 and September 2009 cannot be attributed to fault on the part of the State.

[37] The subsequent three year delay was wholly attributable to problems encountered by the State and events which took place within the NPA. I am of the view that, in broad outline, the cause of the delay was systemic. During this time the prosecuting authority did not sit back and do nothing and steps towards a new prosecution were constantly taken, although the time lapses between some of the steps appear to be longer than would be expected, and were not fully explained.

[38] It is unfortunate that the original prosecutor and investigator were no longer in the province at the time of the SCA decision, but it is not unusual for prosecutors and police officers to take up new posts elsewhere in the country, especially considering the three year lapse between Miller J's ruling and the SCA decision. It is not unusual for an individual prosecutor to have a heavy case load and Cilliers' further task in acquainting himself with this case would have taken some time. The same applies to Mashwabane and De Jager. In particular, in the light of the fact that Benjamin could not be prosecuted with the other

accused, it is understandable that Cilliers had to re-assess the evidence and consult with the more important State witnesses. With regard to Cilliers' movement from one unit to another, it was inevitable that the disbandment of the DSO, which was effected by an Act of Parliament, necessitated redeployment and restructuring in the NPA.

[39] There was merit in the applicant's question in her replying affidavit, asking what Cilliers and De Jager were doing between April and September 2010. This period was not clearly explained. Nor was the reason why contact with Peneva was only made in August 2010 explained. As a former accused turned State witness, consultation with her was extremely important. Cilliers already knew before the SCA decision that she had left South Africa. On the other hand the NPA could not prevent Peneva from leaving the country and had to rely on her co-operation. Travelling from one country to another at State expense for the purpose of consultation is not a simple matter. It involves the necessary authority and paperwork, and arrangements have to accord to some extent with the personal circumstances of the person who has to travel. The applicant questioned why NPA officials had not travelled to Australia to consult with Peneva, or used diplomatic channels to ensure her presence in South Africa, or communicated with her by video conference. One or more of these measures might have expedited consultations with her, but it cannot be said with certainty that they would have. Once the first contact was made with Peneva, efforts to consult with her were consistently made. It is not surprising or unusual that

following consultations with Peneva, certain aspects of the case required clarification. It is important to remember that her present involvement in the case is as a State witness, whereas she was previously an accused.

[40] Following these consultations, the delay in finalising the new indictment was partly explained by heavy case loads on the part of Cilliers and De Jager. The fact that they took their annual leave was criticised by the applicant, but it would not have been a lengthy period, perhaps three to four weeks. I do think that once consultations with Peneva had taken place, given the lapse of time since the withdrawal of the charges, as well as the overall age of the matter, the new indictment could have been expedited, and it is not altogether clear why it was not. Although I accept that Cilliers and De Jager had other cases to prosecute, no reasons were provided for those cases receiving priority over the applicant's case. As at 14 May 2012 the indictment was not ready and the first draft was only ready on 28 May 2012. No reason was given for why it was only discussed between Cilliers and De Jager in July 2012, although it does appear that during this time arrangements were being made for centralisation of the charges. However I cannot go so far as to say that there was dereliction of duty on the part of Cillers or De Jager. As I said earlier, steps were constantly being taken towards a new prosecution, and the case was not ignored.

[41] Despite the complexity of the matter and the systemic problems encountered by the NPA, three years is a long time, especially when the new

indictment is substantially based on the same factual allegations, and there were two prosecutors working on the case. In *Sanderson*, with reference to systemic delays, Kriegler J said the following[14]:

> "Even if one does accept that systemic factors justify delay, as one must at the present, they can only do so for a certain period of time. ……. In principle, however, [courts] should not allow claims of systemic delay to render the right nugatory."

[42] I do not think that such a stage has been reached. The new indictment is at last ready to be served and the necessary directive has been issued by the NDPP.

[43] With regard to an accused's assertion of the right to be tried without unreasonable delay, in *Sanderson* Kriegler J said the following:[15]

> "An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, benefit from the right, provided that he can establish any of the three kinds of prejudice protected by the right."

[44] This brings me to the prejudice the applicant says she has suffered and continues to suffer. She is not in custody and her liberty and security have therefore not been affected. She could apply for the bail money to be refunded. Apart from her divorce she gave no further details of how her family life has been affected or what her family's attitude is to her as a result of the pending prosecution. I accept that there has been and still is some social prejudice, and

[14] At para [35]
[15] At para [32]

that it will have endured in varying degrees at least since her first appearance in court in 2005. The fact that there was a party debate about her suitability to be Deputy Speaker reflects the views of at least some of her colleagues. She was advised by the ANC to resign as Deputy Speaker, and her position in public office was therefore adversely affected. On the other hand she is still a member of the provincial legislature, a position which carries considerable responsibility and power, as well as a salary. Overall I do not consider the social and professional prejudice to be significant.

[45] As far as trial prejudice is concerned, I am of the view that the applicant's complaints are not persuasive. A comparison of the old and new indictments reveals more or less the same factual foundation. Even though further particulars to the first indictment were not furnished (Goosen said that this was by agreement pending the SCA decision) she will be entitled to request further particulars to the new indictment, and to be provided with the usual contents of the police docket. A list of State witnesses is attached to the new indictment. The alleged facts behind the money laundering, alternatively fraud, charge were not mentioned in the first indictment, nor was there a related charge. However the alleged fictitious lease relates directly to the immovable property in relation to which gratifications were allegedly paid, and these gratifications have always been part of the factual foundation behind the charges.

[46] The applicant's reference to documentation which "may have been relevant" is vague and one is unable to assess trial prejudice from such an assertion. In any event, with the knowledge that charges could again be brought, it was strange conduct not to retain important documents and instead to destroy them.

[47] I am therefore not satisfied that the applicant has demonstrated significant trial prejudice.

[48] The offences with which the applicant is charged in the new indictment are serious, particularly in view of her important and responsible position in public office. The preamble to the Act tellingly explains why corruption and related activities are so serious. It states, *inter alia*:

> "that corruption and related corrupt activities undermine [all the rights as enshrined in the Bill of Rights], endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime."

[49] Applying the "balancing test" to all the above factors, and particularly having regard to the applicant's failure to show significant trial prejudice, or the existence of extraordinary circumstances, I am of the view that the applicant has not established her claim to a permanent stay of prosecution.

COSTS

[50] In *Sanderson*, with regard to the question of costs, Kriegler J said:[16]

> "Ordinarily 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 costs orders are not competent; and the cause of action is that the State allegedly breached an accused's constitutional right to a fair trial. Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order."

[51] I believe that the same considerations apply in the present case. The applicant failed to establish her claim but in my view her complaint was genuine. She waited just over two years after withdrawal of the charges before she brought this application, which was foreshadowed by her attorneys' letter of 16 February 2011. Despite Goosen's assertion that the new indictment would be finalised within a month of 14 May 2012, it was only signed on 20 August 2012, after the delivery of the applicant's replying affidavit. I think there is merit in the submission made on the applicant's behalf that the application itself provoked activity on the part of the State to finalise the new indictment.

[52] It was submitted on behalf of the sixth respondent that its citation was a misjoinder and the correct party was the curator who had been appointed in terms of the restraint order. The applicant indicated in her replying affidavit that steps would be taken to join the curator but he was not joined. It was submitted that a costs order should be made against the applicant in respect of the sixth respondent. I do not believe that such a costs order is warranted. The sixth

[16] At para [44]

respondent, although not a legal *persona*, is a unit of the NPA and the issue of misjoinder was an insignificant feature of the whole case. In addition the relief claimed against the sixth respondent was contingent upon the granting of a permanent stay of prosecution.

ORDER

[53] The following order will issue:

[53.1] The application is dismissed.

[53.2] There is no order as to costs.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv S Cole, instructed by Neville Borman & Botha Attorneys, Grahamstown

For the Defendant: Adv H van der Linde SC with Adv M Nobatana, instructed by NN Dullabh & Co, Grahamstown