IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1475/2018

DATE HEARD: 13/12/2018

DATE DELIVERED: 12/02/2019

In the matter between

VUYO ZAMBODLA	**APPLICANT**
and	
DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN	**RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The applicant has applied for a permanent stay of prosecution. The respondent opposed the application.

[2] The applicant was formerly employed by Buffalo City Municipality (BCM) as a Director: Executive Support Services with authority to approve contracts in a maximum amount of R200 000. In September 2011 he appeared in the East London Magistrate's Court on a charge of fraud. The matter was transferred to the Regional court for trial on 27 March 2012. The applicant and a co-accused, Ms Amanda Ncanywa, were charged with fraud and the applicant was additionally charged with two further counts: contravening s 173 (3) of the Local Government: Municipal Finance Management Act 56 of 2003, in that he intentionally or grossly negligently approved payments in excess of a threshold of R200 000; and contravening s 118 (A) of Act 56 of 2003 in that he

intentionally or grossly negligently interfered with the supply chain management system of BCM, alternatively contravening s 115 (2) of Act 56 of 2003 in that he intentionally or grossly negligently impeded BCM's accounting officer in fulfilling his responsibilities.

[3] The gist of the alleged background to the charges was the use of a front close corporation, Incango CC (Incango) to whom a tender was awarded for the provision of big screen television viewing and events organising for the Confederations Cup 2009. The applicant submitted a deviation report in which he falsely indicated that the contract for these services would be awarded to Incango, an accredited service provider. The deviation was approved in a sum not exceeding R200 000. The applicant and Ncanywa, a friend of the applicant, acting with a common purpose to defraud BCM, arranged that Ncanywa would actually provide the services and Incango would in return receive 10% of the profits from the contract. Ncanywa employed sub-contractors to provide the services and was unable to pay all of them. She submitted further invoices in the total sum of R230 410 and the applicant approved payment of these invoices, thus exceeding the authorised contract sum of R200 000.

[4] The applicant and Ncanywa pleaded not guilty to the charges on 26 November 2012. The trial ran on and off until 7 March 2014 when the presiding magistrate recused himself. By this stage the State had called several witnesses and closed its case and the applicant had testified and been cross-examined by the prosecutor. Ncanywa had not yet testified. At times the trial was postponed owing to the non-availability of the applicant's counsel and Ncanywa's attorney. At the time of the recusal, both accused were represented by the same counsel.

[5] On 11 January 2017 the applicant received a summons to appear in court on 9 February 2017. The charges were as before. This led to the present application.

[6] The record of the trial was part of the papers in this application. On 5 March 2014, during the cross-examination of the applicant, the possible recusal of the magistrate was raised. Following a complaint by the prosecutor that the applicant's counsel had whispered a four letter expletive the magistrate said the following:

> "I do not think that under the circumstances with this sort of attitude and problems emanating between the prosecution and the defence, these accused are getting a fair trial in this court. And I think what I should do is recuse myself for another presiding officer to preside in this matter with perhaps other parties involved, because of a fair trial procedure in this case there can be no question. "

He said that he was "fed up" with the bickering between the prosecution and the defence and that the moment it happened again and he felt that the accused were not getting a fair trial, he would recuse himself. The cross-examination of the applicant continued.

[7] On 6 March 2014, after the completion of cross-examination of the applicant, his counsel told the court that he was troubled about something. He referred to a number of instances where the prosecutor had put to the applicant factual statements which were not in line with the evidence led on behalf of the State. He said that the problem was the question of a fair trial, although he acknowledged that the magistrate had on a number of occasions intervened and corrected the prosecutor. However the number of times it had occurred might amount to the applicant and Ncanywa not having a fair trial. Counsel referred to the refusal by the magistrate of an application by the applicant for his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 and said that

he understood why it had been refused, but said that it was “no big deal at this point in time”. Counsel also said that he was a little perturbed that the magistrate was “a bit harsh” with the applicant when questioning him but that he was not raising that point. He said he had no doubt that the magistrate would give the two accused a fair trial. He had no re-examination of the applicant and said that he was considering his position in the trial. He was concerned that Ncanywa would endure similar cross-examination. He asked for time to consult with his clients.

[8] The trial resumed on 7 March 2014. The magistrate referred to the number of times the trial had been postponed because of the absence or unavailability of the legal representatives and how the trial had been delayed. He said that this delay would have a negative impact on the fairness of the trial because it could not be expected of the two accused to remember two years later what evidence had been led. He also referred to the animosity between the prosecutor and counsel and described their conduct during the trial as unbecoming. He referred to the prosecutor’s cross-examination when he misrepresented the evidence of witnesses and the fact that the prosecutor had declined to accept the correctness of the transcript when it was available to him to check what the witnesses had actually said. He concluded that the prosecutor’s cross-examination of the applicant was irregular and did not know how such cross-examination impacted on the demeanour of the applicant, thus making it impossible for him to evaluate him as a witness objectively. It was impossible for him to give a fair decision in the matter and the only option open to him was to recuse himself.

[9] The applicant's counsel said he had discussed the matter with his clients and that the magistrate had to recuse himself. The prosecutor said he could not be of assistance concerning whether or not the magistrate should recuse himself.

[10] In his founding affidavit the applicant expressed the view that it was the conduct of the prosecutor during the trial which led to the magistrate concluding that he would not have a fair trial.

[11] After the recusal the applicant learned that a transcript of the proceedings would be sent to the Head of the Commercial Crimes Unit for decision. In June 2015 he learned that Advocate Goosen of this unit had sent the documents to Ms Deneshree Naicker, a deputy director of public prosecutions based at the East London office. In November 2015 his attorney wrote to Naicker asking whether a decision had been made. She replied advising that she would shortly revert. She thereafter sent an email to the applicant's attorney saying that she wanted to re-enrol the matter and to discuss dates. The applicant's attorney suggested 14 December 2015. Naicker advised that summons would be issued in early January 2016.

[12] No further correspondence was received from Naicker until May 2016 when she advised that she was not able to attend to the matter because of other work commitments. In January 2017 the summons was served on the applicant. Thereafter efforts were made by his attorney to obtain copies of the original charge sheet, exhibits and the police docket. Copies were provided during October 2017. This application was launched on 21 May 2018.

[13] The applicant maintained that he had suffered financial and personal prejudice. He had to pay large amounts to his legal representatives for their services in the trial and it will be difficult to raise funds for a second trial. The Assets Forfeiture Unit seized some of his property and a provisional restraint order granted in terms of s 26 of the Prevention of Organised Crime Act 1998 was confirmed. Since his arrest in 2011 he has been unable to find permanent employment because every time he attends an interview he is questioned about the case. Since 2015 he has found temporary employment at various institutions, earning 50% less than previously. He is now 58 years old and the prospect of obtaining permanent employment is slim. It is stressful for him to appear in court and he has experienced the stigma associated with a criminal trial.

[14] The applicant further maintained that he will not have a fair trial because the offences were allegedly committed during the period June 2009 to June 2010. He will have to rely on his memory of events and is unable to recall details of the allegations against him. He will be subjected to cross-examination for a second time.

[15] Naicker deposed to the answering affidavit. She was appointed as head of the Specialised Commercial Crimes Unit at East London during September 2014. This is a satellite office of the regional office in Port Elizabeth. At the time of her appointment there were five prosecutors who reported to her. The office has a very heavy workload and deals with all complex fraud and corruption matters emanating from State departments and municipalities in the area. The prosecutors appear in a number of Regional Courts in the province which means that they are often away from the office and she is restricted in delegating matters. Since her appointment two prosecutors

have resigned and owing to prevailing economic circumstances, their posts have not been filled. The heavy workload means that Naicker and other prosecutors have to prioritise and re-prioritise and at times important matters do not receive the timely attention they require. After she was appointed in East London, Naicker still had to complete part-heard matters in KwaZulu-Natal. She did so during November 2014, and April, June, July and October 2015.

[16] After Naicker assumed her duties, Goosen provided her with a memorandum from the prosecutor who prosecuted the applicant, the transcript of the trial and the office file, and requested her to provide her opinion on whether or not the magistrate's decision to recuse himself should be taken on review. She worked on these documents sporadically while she was completing matters in KwaZulu-Natal, and attending to her other duties in East London. During March 2015 she informed a Colonel Mashwabane of her decision to prosecute the case de novo and requested the police docket from the investigating officer. At this stage she had decided not to pursue a review of the magistrate's decision to recuse himself. She received the docket on 24 April 2015. Some witness statements were missing because they had been handed in as exhibits at the trial.

[17] At the end of April 2015 the office administrator resigned, leaving Naicker to perform administrative duties. A further administrator was appointed but left within a short time. The administrative duties included opening files, answering calls, taking messages for prosecutors, dealing with the office fleet, processing leave applications, submitting statistics, submitting monthly managerial reports and attending meetings.

She had to peruse new cases and make decisions, and attend to representations made to her office.

[18] During May 2015 one of the prosecutors resigned. She carried a very heavy workload which included complex and voluminous matters. These cases were divided between Naicker and the remaining prosecutors. An urgent request for assistance was made to the national office and a prosecutor was appointed to deal with two cases. Assistance was also provided from the Port Elizabeth office.

[19] In early 2015 the applicant's attorney enquired about the matter and indicated that the applicant was going to bring an application for a permanent stay of prosecution. From May to November 2015 Naicker studied the docket and evaluated the charges. She did not have a continuous period of time to attend to this case alone. During November 2015 she wrote to the attorney advising that she intended to re-enrol the matter. She requested suitable dates from the attorney. She informed him that she would enrol the matter for January 2016.

[20] Later in January 2016 she became ill, and suffered a miscarriage in February 2016. She was booked off for most of February and when she resumed duty the work had accumulated in her absence and had to be given preference to the extent that she was not able to prosecute the applicant's matter at that stage. During April and May 2016 certain management matters required urgent attention. She informed the applicant's attorney that because of work commitments she was having difficulty finding a date when she could appear in court for the matter. At the end of May 2016 Naicker fell ill again and was hospitalised for most of June 2016. She informed the applicant's

attorney of the position. She tried to allocate the applicant's matter to another prosecutor, without success. She continued to suffer from pregnancy related ill-health. At the end of July 2016 she requested assistance from Goosen. Goosen was not able to assign the case immediately to another prosecutor, and in October 2016 it was agreed that Naicker should enrol the matter for January 2017.

[21] During October 2016 she fell ill again and was eventually booked off work from November 2016 to April 2017. By this time she had drafted the summons and allocated a date in February 2017 for the applicant's and Ncanywa's first appearance. Goosen allocated the case to another prosecutor and the applicant and Ncanywa appeared in court in East London on 9 February 2017. During May 2017 the applicant's attorney was assisted by the prosecutor in obtaining a copy of the police docket and exhibits, for the purpose of launching the present application. The case was postponed from time to time until the applicant served the present application on the respondent on 21 May 2018.

[22] Naicker expressed the view that the facts of the case against the applicant and Ncanywa are relatively simple. The State witnesses had all made statements and should memories have faded, including that of the applicant, the transcript of the trial was available.

The Law

[23] In *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 at paragraphs [9] – [14] Maya AJA (as she then was) summarised the legal position as follows:

> "[9] Section 38 of the Constitution grants the relevant party a right to approach a competent court on the ground that a right in the Bill of Rights has been infringed or threatened, and, depending on the circumstances of each particular case, the court may grant appropriate relief, including a declaration of rights. (See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) paras [18] - [19].) One of the broad range of remedies which the Court may grant where the right to a fair trial is under threat is a permanent stay of the criminal prosecution.
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> [10] This is, however, a drastic remedy which is granted sparingly and only for very compelling reasons. Describing the remedy in *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675) para [38], where the Court was dealing with an accused's right to a speedy trial under s 25(3)*(a)* of the interim Constitution, the precursor to s 35(3)*(d)* of the Constitution (which, although worded differently, has the same object), Kriegler J said:
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> > '[T]he relief . . . 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 seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by s 7(4)*(a)* of the interim Constitution',
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> [the similarly worded precursor to s 38 of the Constitution.]
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> The learned Judge continued at para [39]:
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> > 'A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.'
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> The remedy may be granted in the absence of trial-related prejudice, where 'there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate'. (See *Wild and Another v Hoffert NO and Others* 1998 (2) SACR 1 (CC) (1998 (3) SA 695; 1998 (6) BCLR 656) para [27]; see also *McCarthy v Additional Magistrate, Johannesburg, and Others* 2000 (2) SACR 542 (SCA) ([2000] 4 All SA 561).)
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> [11] Section 35(3)*(d)* entrenches an accused's right to a speedy trial and provides:
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> > 'Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.'

> The object of this provision is to protect an accused's liberty, personal security and trial-related interests (see *Sanderson* para [20]; *Wild* para [5]).

[12] The protection of these three rights is described in a judgment of the Supreme Court of Canada, *R v Morin* (1992) 8 CRR (2d) 193 at 202, quoted with approval in *Sanderson* para [20], as follows:

> 'The right to security of the person is protected . . . by seeking to minimise the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.'

(See also *Barker v Wingo, Warden* 407 US 514 (1972) at 532.)

> Trial-related prejudice refers to prejudice suffered by an accused mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his or her trial. (See *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC) (2000 (4) SA 1078; 2000 (11) BCLR 1252) para [51].)

[13] Counsel were agreed that the delay in the prosecution of the case had to be calculated as from August 1993, when the appellant was first charged (ie served with an indictment or summons) with the offence. This may well not be correct and it could be argued that it would be inappropriate to set a time-bar in circumstances where, for example, the prosecuting authority decides not to prosecute because it is unable or does not believe, for any number of valid reasons, that a case can be prosecuted successfully against an accused, as may have been the case in the present matter. As the Court pointed out in *Sanderson* para [30], 'the test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained . . . [t]he Courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us'. Be that as it may, the issue was not debated before us and it is not necessary, in my view, to consider it in the light of counsel's agreement. I shall, therefore, assume in favour of the appellant, but without deciding, that for the purpose of evaluating the lapse of time in conjunction with other relevant factors, the delay in question commenced on the date accepted by counsel.

[14] That there was a lengthy lapse of time between August 1993 (when the first decision to indict the appellant was given effect to) and April 2004 (when he was indicted for the second time) is beyond doubt. The time period is, of course, central to the enquiry whether there has been an unreasonable delay. Nevertheless, the fact of a long delay cannot *per se* be regarded as an infringement of the right to a fair trial. Whether there was 'unreasonable delay' must be determined in the context of the particular circumstances of each case, taking into account factors such as the length of the delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason thereof and the accused's assertion of his right to a speedy trial. The last-mentioned right

> is not restricted to those who seek to enforce it (see *Sanderson* paras [25] - [26], [32]).”

[24] In *Sanderson* (supra) at paragraph [25] Kriegler J stated:

> “Having determined that the section protects three kinds of interests, 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* 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 reason the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and prejudice to the accused. Other jurisdictions have likewise adopted the flexible 'balancing' test of *Barker*. South African Courts, too, have used the *Barker v Wingo* balancing test in interpreting and applying s 25(3)*(a)*, as well as considerations set out by the Canadian Supreme Court.”

[25] In *Bothma v Els* 2010 (1) BCLR 1 (CC) at para [38] Sachs J said that a further factor to be placed in the scales when conducting the balancing exercise was the nature of the offence.

Evaluation

[26] The circumstances in this matter are quite unusual in the sense that the applicant has already been through a trial which lasted until a late stage – the completion of the applicant’s cross-examination. Up to that stage the delay between the first appearance in court in September 2011 and the recusal of the magistrate on 7 March 2014 was largely attributable to the non-availability of the legal representatives for the applicant and his co-accused. Each time they were not available, the trial was postponed to a date months ahead. The trial commenced within a reasonable time after arrest, given the circumstances.

[27] The magistrate's recusal caused me some surprise. His decision is not the subject of a review but I would have thought that it is for a judicial officer to ensure that an accused has a fair trial. If the prosecutor was remiss in misrepresenting evidence when cross-examining the applicant, it was for the magistrate to intervene and for the applicant's counsel to object. They did so on numerous occasions. In evaluating the applicant's demeanour the magistrate would have been able to take into account the fact that misrepresentations were made by the prosecutor. Any prejudice caused by the lapse of time between the evidence of the State witnesses and the cross-examination of the applicant would be a factor to be taken into account and could have been cured by the applicant reading the transcribed record, which was available. I also do not think that it was the conduct of the prosecutor alone which caused the magistrate to recuse himself. He referred to other factors besides the prosecutor's irregular cross-examination, namely the delay caused by the number of postponements and the animosity between the prosecutor and the applicant's counsel.

[28] Interestingly, despite his intimation on 5 March 2014 of a possible recusal, the magistrate did not raise recusal again during the remainder of the applicant's cross-examination, despite further objections by the applicant's counsel to the prosecutor's questions. After the completion of the applicant's cross-examination the magistrate said he wanted to clarify some aspects with the applicant, before counsel's re-examination of the applicant. This indicates that he expected the trial to continue in the normal course. It was the applicant's counsel who raised the fairness of the trial after the completion of cross-examination of the applicant. Counsel also mentioned the refusal of the s 174 application and the magistrate's alleged harsh questioning of the applicant. Why

counsel mentioned these two factors is puzzling. He immediately backtracked by saying that he was not relying on them at that stage. The impression I gained was that these factors were mentioned to fortify the magistrate's warning of a recusal. The applicant's counsel did discuss the recusal with the applicant and Ncanywa and told the magistrate that he should recuse himself. One must accept that this was an instruction from his clients.

[29] The whole saga leading up to the recusal is in my view most unfortunate. However, I am not prepared to find that it was the conduct of the State alone which led to the recusal. There were other causes and the applicant, through his counsel, supported a recusal. Frankly, and with respect to the magistrate, who conducted the trial with fairness and admirable patience, I think that the trial could have been completed, however unpleasant the atmosphere and however many objections by counsel and interventions by the magistrate might have been necessary to ensure a fair trial.

[30] Given that the trial commenced within a reasonable time, the causes of the postponements, and the recusal of the magistrate, which ended the trial, one cannot really say that there was a delay in beginning and concluding the trial, as envisaged in s 35 (3) (d) of the Constitution.

[31] I now consider the delay between the recusal and the service of the summons on the applicant, a period of 35 months. This is a long period, especially considering that the new charges are identical to the old ones. In addition the prosecuting authority was

aware that the applicant had already been through a long trial. In such circumstances it would have been fair to give the applicant's matter priority and no reason was given for giving other matters priority. There appears to be no explanation for the delay between the recusal and Naicker receiving the various documents from Goosen after she assumed duties in September 2014. It is also strange that Naicker made the decision to prosecute the case de novo during March 2015 prior to receiving the police docket. When she received the docket some witness statements were missing because they had been handed in as exhibits at the trial. Generally there were gaps in the explanation for the delay and the explanation was somewhat sweeping. However there is no reason to reject Naicker's account of the heavy workload in her office, her own heavy workload, and the staff shortages. This account paints a worrying picture of the effectiveness and capacity of the criminal justice system in relation to Naicker's office and the number of serious matters with which she and her staff have to deal. It might be that the applicant's case could have taken priority over others and a summons could have been prepared and served much earlier than it was. However I am unable to conclude on the available evidence that Naicker and her fellow prosecutors were not working hard in difficult circumstances or that the delay was attributable to laxity or lack of interest. I accept that Naicker's illness played a fairly significant part in the delay.

[32] With regard to the applicant's assertion of his right to have his trial begin and conclude without unreasonable delay, I refer to what was said by Kriegler J in *Sanderson* at paras [32] and [33]:

> "[32] An important issue related to prejudice should be clarified. It is the relevance of the accused's desire that the trial be expedited. In some American cases, such as *Barker*, the extent to which the accused actually

> wants to go to trial looms very large. I respectfully disagree. Even if accused would rather avoid their contest with the State, they remain capable of suffering prejudice related to incarceration or the stringency of bail conditions or the exposure to a public charge. An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, provided that he can establish any of the three kinds of prejudice protected by the right. Of course, an accused that has constantly consented to postponements could find it difficult to establish that he has suffered actionable social prejudice from resulting delays. But the question is not whether he *wants* to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.
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> [33] On a related issue, I would suggest that if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under s 25(3)*(a)*. The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal. There is, however, no need for the accused to assert his right or actively compel the State to accelerate the preparation of its case. Provided that he has genuinely suffered prejudice as a result of the State's delay, he cannot be responsible for the State's tardiness."

[33] I now consider the prejudice to the applicant. His liberty has not been restricted. After his arrest he was released on bail and remained on bail throughout the trial. He has been brought to court by way of summons for the second trial and will not be in custody. If the trial proceeds, he will have to pay for legal representation for the second time. This is a considerable burden considering that the first trial was lengthy and his costs concomitantly high. The costs of a new trial will be significant. It is not clear how his employment with BCM ended but there is no reason to reject his evidence that he has since been unable to find permanent employment and temporary employment has not been as lucrative. While he stated that it will be difficult to raise funds for a second trial, he did not state that it will be impossible and it appears that since the recusal of the magistrate, he has been represented by an attorney in relation to a second trial.

[34] The applicant mentioned that some of his assets had been seized by the Assets Forfeiture Unit but he did not specify their value, nor did he say what assets he possesses which were not seized. This factor therefore does not carry much weight.

[35] The social stigma of a criminal trial is inevitable but the applicant did not state that his trial was extensively publicly reported or that his further appearance in court in 2017 attracted publicity. He did not say that his family and personal relationships have been adversely affected by the trial or the prospect of a second trial.

[36] The applicant maintains that he will suffer trial prejudice because he will have to rely on his memory of events which occurred during 2009 and 2010. I do not think that the applicant established trial prejudice. The three charges do not flow from a complex alleged factual background. After he pleaded not guilty to the charges, he submitted a detailed plea statement in terms of s 115 of the Criminal Procedure Act in which he inter alia agreed that the tender had been awarded to Incango but denied that he had conspired with Ncanywa. He said he was aware that Ncanywa was going to work in partnership with Incango but that such agreement was between them. He agreed that the approved contract amount of R200 000.00 was exceeded but said that that he had always considered that this amount was merely an estimate and was too low, and had warned the authorities accordingly. The applicant's plea statement and the entire transcript of the trial are available to him.

[37] In addition, there were a number of documents which were handed in as exhibits and which are available. These documents include Incango's quotation dated 5 June 2009; the letter of appointment of Incango dated 6 June 2009 signed by the applicant;

the deviation order recommended by the applicant on 10 June 2009 and approved by the acting municipal manager on 11 June 2009; cheque requisitions for payment to Incango authorised by the applicant; and a memorandum signed by the applicant in which he requested that the amounts exceeding the limit of R200 000.00 be paid.

[38] It is unfortunate that the applicant will have to endure a second trial and be cross-examined again. However with all the information he has at hand there is no reason why his trial should not be fair.

[39] The charges against the applicant are serious, particularly the charge of fraud. Fraud in the circumstances alleged is rife and a betrayal of the public's trust that public officials will carry out their public duties honestly and in the interests of the people they serve.

Conclusion

[40] Balancing all the factors as I should, I am not persuaded that the applicant should succeed in his application. The State's conduct, while there are shortcomings, is not such as to outweigh the absence of significant prejudice to the applicant, both trial related and otherwise. The offences are serious and, as was said in *Sanderson*, a permanent stay of prosecution "prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct". Nor do I think that there are extraordinary circumstances rendering the relief claimed appropriate. As I

said, this is an unusual case because there has already been a lengthy trial, but I do not consider that factor to amount to an extraordinary circumstance.

Costs

[41] In *Sanderson*, while the appellant was unsuccessful, the costs order made against the appellant by the High Court was reversed. Kriegler J stated at para [44]:

> "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. However slow a court of appeal should be to interfere with a costs order in a court of first instance, this is clearly a case where intervention is necessary. Although the appeal must fail on the merits, the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay the costs and should not have to bear the costs in this Court."

It follows that there will be no costs order in this matter.

[42] The following order will issue:

[42.1] The application is dismissed.

[42.2] There is no order as to costs.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv C Meiring, instructed by Netteltons Attorneys, Grahamstown

For the Respondent: Adv H Bakker, instructed by Whitesides Attorneys, Grahamstown