IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: GRAHAMSTOWN]

CASE NO. 1281/2019

In the matter between:

MARYKE VAN DER WALT **1st Applicant**

SAREL VAN DER WALT **2nd Applicant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **1st Respondent**

THE REGIONAL MAGISTRATE, EASTERN CAPE
REGIONAL SPECIALISED CRIMES COURT
PORT ELIZABETH **2nd Respondent**

JUDGMENT

JOLWANA J

Introduction

[1] The applicants applied to this Court for the review and the setting aside of the Commercial Crimes Court's decision sitting in Port Elizabeth pertaining to their prosecution for a multitude of charges all prosecuted under case number CCC1/88/2013. The Regional Commercial Crimes Court, Port Elizabeth (the court *a quo*) dismissed their application in that court in which the applicants had applied for an order, *inter alia,* for the permanent stay of prosecution of all cases for which they had been charged under the above mentioned case number. There were also

alternative prayers sought, if the main relief was refused, for the transfer of the criminal proceedings in that case to another Commercial Crimes Court in South Africa, the payment of their travelling and accommodation expenses until the trial is finalised and the barring of the current prosecutor, advocate De Klerk from further prosecuting the matter.

[2] On the papers properly considered the review application does not seem to be based on any gross irregularity, which allegedly occurred in those proceedings. It appears to be a purely jurisdictional challenge. The first respondent opposes the review application in its entirety but also raises the fact that the applicants had not raised the issue of the lack of jurisdiction in the court *a quo* and had in fact asserted it when they made their application in that court. However, once jurisdiction is challenged this Court is enjoined to look into it. It becomes irrelevant what the respective parties' position was initially. If the court *a quo* lacked jurisdiction to deal with an application for a permanent stay of prosecution, this Court must review those proceedings and set them aside. That this is so is clear from the provisions of section 22 of the Superior Courts Act 10 of 2013 which need no elaboration suffice it to point out that lack of jurisdiction is one of the grounds for review listed therein.

Does the magistrates' court have jurisdiction?

[3] The question of whether or not the regional magistrates' court does have jurisdiction to entertain an application for a permanent stay of prosecution has been considered by various courts in different divisions in this country, which regrettably came to different conclusions. This has resulted in the legal position being somewhat uncertain due to those conflicting decisions. The position is so confusing

that both the applicants and the first respondent rely on the case of S v *Naidoo*[1] in contending for and against the jurisdiction of the magistrates' court to deal with and determine an application for a permanent stay of prosecution in respect of either, extra-curial delays, intra-curial delays or both.

[4] In *Naidoo supra*[2] the court analyzed a number of decisions of that court and other decisions of other courts and concluded as follows:

> "[A]n accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(*d*) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal proceedings (in other words, in circumstances not provided for in s 342*A* of the CPA) must bring the application before the high court having jurisdiction. By contrast, what we have termed 'intracurial delay' – delay occurring after the commencement of criminal proceedings– is a matter falling to be dealt with exclusively by the court seized with the criminal proceedings."

[5] This conclusion of the court in *Naidoo* amounts to this: If the alleged delay in prosecution occurred before the accused appeared in the lower court, the accused can approach the High Court having jurisdiction for an order for a permanent stay of prosecution. However, if the order for a permanent stay of prosecution is sought on the basis of intra-curial delays then in that event an accused person may seek an order for a permanent stay of prosecution in the lower court in which the accused is appearing. Logically on this reasoning, it must follow that if the order is sought on the basis of both extra-curial delays and intra-curial delays the accused can only approach a High Court having jurisdiction as the lower court would not be able to adjudicate on extra-curial delays whereas the High Court would be able to deal with both types of delays.

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[1] 2012 (2) SACR (WCC) 126.
[2] at para 18.

[6] The basis for the court's decision in *Naidoo* appears to be its interpretation of section 342*A* of the Criminal Procedure Act[3] (the CPA). This section reads in part:

> "(1) A court before which criminal proceedings are pending shall investigate any delay 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 legal adviser, the State or a witness.
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> (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
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> (a) The duration of the delay;
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> (b) the reason advanced for the delay;
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> (c) whether any person can be blamed for the delay;
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> (d) the effect of the delay on the personal circumstances of the accused and
>
> witnesses;
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> (e) the seriousness, extent or complexity of the charge or charges;
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> (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 costs;
>
> (g) the effect of the delay on the administration of justice;
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> (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.
>
> (3) 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, including an order–
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> (a) refusing further postponement of the proceedings;

[3] The Criminal Procedure Act 51 of 1977.

(b) granting a postponement subject to any such conditions as the court may determine;

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;

(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;

(e) that-

(i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;

(ii) the accused or his or her legal advisor, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal advisor, as the case may be; or

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

…"

[7] Subsection (1) empowers a court before which criminal proceedings are pending, even *mero motu*, to investigate any delay in the completion of such proceedings. However, first, it must appear to the court that such delay is unreasonable and second, that it could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness. These are the jurisdictional factors for a section 342*A* enquiry. Subsection (2) lists factors, which the court shall consider in determining whether the delay is unreasonable. This list is specifically not an exhaustive list, which is why subsection (2) (i) empowers the court to consider any other factor which in the court's opinion, ought to be taken into account.

Subsection (2) contains detailed guidelines of what the court could take into account but also any other factors, which may not be on that list but which, in the court's opinion, ought to be taken into account. This particular provision is very important if regard is had to the fact that each case must be determined on its own facts and circumstances.

[8] If the court goes through the above exercise and comes to the conclusion that the completion of the proceedings is being unreasonably delayed subsection (3) provides a list of possible remedies. Those remedies are quite detailed, all of them being intended to achieve one purpose, which is the elimination of the delay and the prejudice arising therefrom. It is apposite to point out immediately that an order for a permanent stay of prosecution does not eliminate a delay in pending criminal proceedings, it brings such proceedings, to an abrupt end. It will be observed that the catch all provision in subsection (2)(i) is not provided for in subsection (3). In other words there is no provision for a court to grant any order it deems fit save for purposes of eliminating the delay. In my view, the list in subsection (3) is exhaustive all of it being aimed at the elimination of any delay in pending criminal proceedings providing for no other outcome of the enquiry, certainly not a permanent stay of prosecution.

[9] If it is accepted that the whole purposes of the section 342*A* enquiry is to eliminate a delay in criminal proceedings before a court it cannot be correct, in my view, that an order for a permanent stay of prosecution eliminates a delay on any possible interpretation of the word, "eliminate". It clearly doesn't. As the court pointed out in *Naidoo*[4] such an order is in effect a prohibitory interdict which, if granted means that the National Director of Public Prosecutions can never prosecute

[4] Note 1 supra para 15

that person in any court. Such a relief is so far-reaching in its width that it cannot be incidental to any other power, which a lower court may exercise. If it was the intention of the legislature that the power to grant an order for a permanent stay of prosecution be exercised by any court before which criminal proceedings are pending including a lower court, the legislature would have made such a provision in section 342*A* of the CPA. It would not have been crafted such as to be read as being part of a provision to eliminate a delay in criminal proceedings when in effect, it does not eliminate a delay but terminates the proceedings themselves.

[10] In fact the court in *Naidoo*[5] rejected the argument of the magistrates' court having the power to grant a permanent stay order on the basis of s 170 of the Constitution. I respectfully agree with such rejection *inter alia* for the reasons stated therein. However, I must respectfully but strongly disagree with the court's conclusion that in respect of "intra-curial" delays, that is delays occurring after the commencement of criminal proceedings – "is a matter falling to be dealt with exclusively by the court seized with the criminal proceedings." If such a court is a magistrates' court, then the same limitation applies namely, that a magistrates' court only has jurisdiction to deal with matters, which are assigned to it by an act of parliament. If these courts were intended to also grant a permanent stay order the legislature would have included such a relief amongst the orders that are listed in section 342*A* (3) of the CPA. Therefore, in the absence of a specific provision in section 342*A* or any other provision of the CPA the magistrates' court lacks jurisdiction to entertain an application for a permanent stay of prosecution. It follows that the Commercial Crimes Court, Port Elizabeth, which dealt with the applicants'

[5] Note 1 supra at paras 11-13.

application for such an order did not have jurisdiction to do so and as such those proceedings are liable to be set aside.

[11] This brings me to the applicants' prayers foreshadowed in the notice of motion for this Court to grant them an order for a permanent stay of prosecution once the proceedings in the court *a quo* are set aside. This is in respect of all case dockets forming part of the Commercial Crimes Court case number CCC1/88/2013. The applicants further seek a prohibitory interdict against the first respondent interdicting it from prosecuting the applicants, now and in the future in all cases and dockets which form part of case no. CCC1/88/2013, if they succeed in their application for a permanent stay order. However, before I deal with the application for a permanent stay order, there are a number of issues raised by the applicants which are foreshadowed in their application and are part of the total factual matrix. I first deal with these issues below.

The alleged persecution of the applicants.

[12] The applicants are husband and wife who ran highly successful businesses of estate agencies under various franchises and entities. The second applicant was the sole member of many of those agencies under different entities with a substantial annual turnover. Their business model included townhouse developments. The second applicant was also appointed as the regional manager of ABSA Data Brokers, which also became very successful. It appears that even though the first applicant was involved in the running of the businesses to some degree she did not become a member of any of the entities.

[13] In 2003, the applicants became acquainted with both Mr and Mrs De Villiers (the De Villierses). At that time, Mr De Villiers was already a State prosecutor and most

importantly he was working as one of the prosecutors under the Special Commercial Crimes Unit in Port Elizabeth. In December 2003, the second applicant and Mrs De Villiers registered and became members of a close corporation, which they named SANREL CC which also became one of the estate agency franchises. It appears that this was the only entity in which Mrs De Villiers also became operationally involved in 2004. It is common cause that Mrs De Villiers was also appointed as an ABSA Bank Data Broker.

[14] It is alleged that the otherwise cordial relations between the applicants and the De Villierses became seriously strained because of allegations of impropriety involving accusations that agents' commissions were deducted in the close corporations' bank accounts but which were not reflecting on the relevant agents' bank accounts. This must be with reference to SANREL CC in which Mrs De Villiers was also operationally involved. There is no evidence that she ever became a member of any other close corporation or was authorized to operate the accounts of any of the other close corporations. It is further alleged that following an internal investigation it was established that an amount of between R40 000.00 and R50 000.00 was misappropriated and that Mrs De Villiers was responsible for it. It is alleged that that internal investigation resulted in Adv De Villiers undertaking to repay the misappropriated money and to take remedial action to ensure that the misappropriation did not recur. Based on these undertakings a decision was taken not to lay criminal charges with the police against Mrs De Villiers. However, ABSA Bank apparently became aware of a possible past criminal record of Mrs De Villiers and terminated her data broker contract. It is alleged that this enraged Adv De Villiers as he blamed the second applicant for the termination of Mrs De Villiers' data broker licence.

[15] This was followed by seriously defamatory allegations allegedly made by Mrs De Villiers regarding the second applicant's business ethics. This resulted in an ABSA senior manager confronting the second applicant concerning the said allegations, which he vehemently denied. Thereafter there was a verbal altercation between the second applicant and Adv De Villiers culminating in Adv De Villiers verbally threatening the second applicant. This is the background to what is alleged to be the causes of the allegedly acrimonious relationship between the applicants and the De Villierses gleaned from the founding affidavit of the applicants. It is important to point out that these allegations are, for obvious reasons, one sided to the extent that they concern the De Villierses who are not parties to these proceedings. The applicants' central contention in this regard is that the bad relations between them and the De Villierses were the motive or the driving force behind the charges preferred against them by the first respondent. Adv Goosen who is the head of the Special Commercial Crimes Unit in Port Elizabeth and who deposed to the answering affidavit on behalf of the first respondent denies that those allegations or the alleged bad relations between the applicants and the De Villiers had anything to do with the charges.

[16] The applicants also allege that they are unfairly and even unconstitutionally being singled out for prosecution while Mrs De Villiers is not being prosecuted while she, like the second applicant, played a role in the business and in some instances taking more responsibility in the running of the business. For some reason the applicants are not specific as to which business they are referring to in respect of which Mrs De Villiers took more responsibility than the second applicant.

[17] I give a very brief summary of all the charges as contained in the charge sheet hereunder:

1. Counts 1–2

1.1 Sarel van der Walt Properties CC

1.2 Beywalt Properties CC trading as Sky Properties. These charges relate to allegations of cheque fraud against ABSA Bank and Standard Bank in September 2006 and January 2007.

2. Counts 3-173

2.1 Sarel van der Walt Properties CC;

2.2 Sarel van der Walt Properties 102 CC;

2.3 All Good Things 128 CC;

2.4 Beywalt Properties CC;

2.5 Turkstra General Traders CC

2.7 Sanrel CC

These charges relate to the failure by the applicants to deliver employees' tax certificates in terms of the Income Tax Act to several estate agents employed by the close corporations, failure to pay to SARS' employee taxes deducted from employees, failure to submit tax returns and other violations of the Income Tax Act.

3. Count 174

This count relates to an allegedly false EFT proof of payment used by the second applicant to purchase two Samsung television sets, which were allegedly collected by his son, Jonvert van der Walt from a furniture store in Jeffreys Bay in 2012.

4. Count 175

This count relates to an allegedly false EFT payment to a tyre business in Greenacres, Port Elizabeth allegedly sent by the first applicant to that business on the basis of which tyres were collected on first applicant's alleged instructions in 2011.

5. Counts 176-177

These charges relate to an allegedly false EFT proof of payment to a paint shop. The second charge relates another allegedly false EFT proof of payment also made to a paint shop. Both false proof of payments were allegedly made by the

first applicant. The transactions are alleged to have been done in November 2011 and in May 2012 respectively.

6. Counts 178-179

These charges relate to a dishonoured cheque and an allegedly false EFT proof of payment made on 25 October 2012.

7. Counts 180-182

These charges relate to a fraudulent deposit slip allegedly emailed by the second applicant to purchase electronic equipment at a Cell C shop in Greenacres, Port Elizabeth between October and November 2012.

8. Count 183

This charge relates to a false proof of payment allegedly made by the first applicant to a butchery business in North End, Port Elizabeth to purchase meat in November 2012.

9. Count 184

This count relates to a false proof of payment allegedly made by the first applicant to purchase mag wheels and tyres at a tyre shop in Port Elizabeth.

10. Counts 185-187

These counts relate to an allegedly false EFT proof of payment for a six day stay at Pine Lodge Hotel in Port Elizabeth in February 2013.

11. Counts 188-189

These counts relate to a false EFT proof of payment made at Willows Resort in Port Elizabeth for accommodation in February or March 2013.

12. Count 190

This count relates to an allegedly false proof of payment made for accommodation at La Mere guest house in Port Elizabeth in April 2013.

[18] It is in relation to all these charges that the applicants contend that their section 35(3)(*d*) constitutional rights will be infringed in that they will not receive a fair trial. The genesis of the applicants' application seems to be standing on three legs. The first leg is that in the first place, they are being maliciously prosecuted as a result of

persecution by the De Villierses. Second, that the documents seized from them during search and seizure operations, which they need for their defence were never returned. Further that there has been both extra and intra-curial delays in their prosecution. To demonstrate the allegedly unfair prosecution the applicants mention the fact that even though the first applicant was not a member of any of the close corporations through which the second applicant conducted various businesses, she is maliciously being prosecuted together with the second applicant while Mrs De Villiers has not been charged. It is alleged, first, that at the time relevant to the charges Mrs De Villiers was a member of the second applicants' businesses. Second, Mrs De Villiers has a criminal record. Third, Mrs De Villiers was responsible for the business administration of the businesses over that period.

Mrs De Villiers' involvement in second applicants' businesses.

[19] The applicants have been rather terse about Mrs De Villiers' involvement in the business administration of the second applicants' businesses. They simply baldly alleged that she was involved with no indication of what position she occupied and what her responsibilities were in those businesses. Furthermore, the applicants are content to allege that Mrs De Villiers was a member of the second applicants' businesses. It is not indicated which of these businesses or close corporations she was a member of. However, elsewhere in their founding affidavit the applicants list all the close corporations through which the second applicant's businesses were run. Contradictorily, it appears therein that the second applicant was a sole member of at least four of them. One of the other three, Beywalt Properties CC had the second applicant and one AD Beyers as its members. The second one, Turkstra General Traders CC had as its members, the second applicant, Andries Turkstra and Sussana Turkstra. The last one being SANREL CC had two members being the

second applicant and Mrs De Villiers. In the circumstances, it is unclear what case the applicants are making with the bald allegation that Mrs De Villiers was responsible for the business administration of the second applicant's businesses and was a member of the second applicant's businesses, the emphasis being on the reference to businesses in plural as against only SANREL CC. The importance of this lies in the fact that it is not in dispute that Mrs De Villiers was member of only one close corporation which is SANREL CC in which she was a co-member with the second applicant.

Why was Mrs De Villiers not prosecuted?

[20] The first respondent's answering affidavit goes to quite some detail in explaining why a decision was taken not to charge Mrs De Villiers even in respect of his involvement with and membership of SANREL CC. Briefly, the explanation is that Mrs De Villiers was a member of SANREL CC until April 2005 at which stage she sold her membership to the second applicant. When the docket involving SANREL CC was received at the first respondent's offices, it already also contained a witness statement taken by the South African Revenue Service (SARS) from Mrs De Villiers. In that statement she gave an explanation on how pay as you earn (PAYE) got to be withheld according to what the first applicant told her, at the instruction of the second applicant. There was a sale agreement in respect of the sale of her member's interest in SANREL CC to the second applicant. That agreement made a provision in terms of which monies owed by SANREL CC were to be paid by the second applicant including outstanding agents' commissions as well as PAYE. On the basis of the information at their disposal after the docket was received, the first respondent decided not to prosecute Mrs De Villiers.

[21] I pause now to point out that this application is not a review of the first respondent's decision not to prosecute Mrs De Villiers. Therefore, that decision remains extant. It does appear though that there was a rational decision which informed the decision not to prefer any charges against Mrs De Villiers even for Income Tax Act contraventions which happened at SANREL CC up to the point of her selling her member's interest to the second applicant. This is far removed from the unsubstantiated allegation of the applicants being unfairly and selectively prosecuted while Mrs De Villiers is not. Beyond a bare denial in their replying affidavit, the applicants do not deal cogently with the first respondent's reasons for not prosecuting Mrs De Villiers.

Did Adv De Villiers influence the prosecution of the applicants?

[22] The applicants allege that at a certain point after Mrs De Villiers went into business with the second applicant and became a member of SANREL CC there was a fall out between the De Villierses and the applicants. This culminated in Mrs De Villiers selling her member's interest in SANREL CC to the second applicant. According to the applicants' papers, this is when they started being targeted by the De Villierses in various ways including serious defamatory allegations being made by Mrs De Villiers questioning the second applicant's business ethics. It is alleged that at some stage there was a telephonic verbal altercation between the second applicant and Adv De Villiers in which the latter uttered threatening words to the second applicant. The applicants allege that this was followed by false allegations, which resulted in numerous investigations into the second applicant's businesses. These resulted in the loss of goodwill of the businesses, the decline in business, staff losses and ultimately the collapse of the businesses.

[23] Incidentally SARS also conducted their own investigations into the business operations of the second applicant relating to compliance requirements with the Income Tax Act. The investigations culminated in a raid by the police on all the second applicant's businesses and private homes. Documents were seized during the raids in January 2007 including the entire contents of the second applicants' business files. These events and raids were followed by negative media publications. It became impossible for the applicants to run their businesses resulting in their estate agents and brokers leaving their employ. Financial institutions would not do business with their companies resulting in the businesses being either deregistered or liquidated.

[24] At some stage the second applicant, his attorneys and their accountant went to SARS where they were assured that SARS played no role in the raid on second applicant's businesses. I must mention that for some reason the applicants have not filed confirmatory affidavits by either the attorney or someone from his firm or the accountant nor has any explanation been given for this omission. It appears elsewhere in the applicants' papers that the said attorney has since passed on. There was another raid by the police on 15 October 2008 on the second applicant's offices and businesses during which further documents were seized.

[25] The applicants allege that SARS did not initiate the criminal charges against them and yet SARS are supposedly the complainants in charges, which they did not initiate. They therefore allege that the charges against them are a malicious vendetta against them because of their fall out with the De Villierses. They have annexed to their founding affidavit a transcript of a telephone conversation between the second applicant and a SARS official in which it appears that that official was oblivious of any criminal investigations and in fact, from her information their case

was closed. They also allege that prior to the raids on their offices they were informed by a third party that Mrs De Villiers had publicly spoken about the raids before they happened. These raids were conducted almost two years apart from each other. It is unclear whether the information from the third party concerning Mrs De Villiers' prior knowledge of the raids related to the first, the second or both raids. The applicants also allege that long before the final charges were brought against them they telephonically contacted Adv De Villiers seeking advice from him. They say in doing so they gave information or evidence, which he misconstrued and used against them on behalf of the first respondent. At that time, he appeared to be acting in their best interests and appeared to believe in their innocence.

[26] Once more the applicants are rather cagey about the information they say they gave to Adv De Villiers which they say he misconstrued and used against them. There is no indication of when they gave this information to him in relation to any of the significant events relating to this matter. Was it before or after the first raid in January 2007? Was it before or after the second raid in October 2008? Or was it before or after they had been charged in November 2013. It is also unclear what it is that he is alleged to have done about the said information. Even if one accepts that the conversation did take place, without it being disclosed by the applicant what its nature was, it is difficult to understand what its relevance to the charges is. It is not difficult to imagine that the conversation might have taken place. After all, it is common cause that the applicants and the De Villierses knew each other very well.

[27] It appears to be the applicants' case that the fall out with the De Villierses would have happened some time in 2005. The first raid by the police happened in 2007 and the second one in 2008. At that stage, the relations and the vendetta alleged by the applicants would have been at its highest. It would ultimately result in the

applicants being arrested and appearing in court for the first time on the 8 November 2013. There is no suggestion by the applicants that the relations ever improved between them. This again begs the question, when did they go to Adv De Villiers for advice and what conversations took place. This is far from clear. There was even an exchange of emails or email communication on 15 April 2013 between the first applicant and Adv De Villiers. According to the first respondent, this email communication did not suggest mistrust or even bad blood between the applicants and Adv De Villiers. These are just some of the aspects of the applicants' case that are difficult to understand as they seem to be largely speculative. As a result it is difficult to make anything or sense of relevance out of the related allegations. This brings me to the issue of how the applicants got to be charged with all these charges in light of the applicants' allegations that these charges were all part of a vendetta by the De Villierses in their persecution of the applicants as a result of the fall out between the two families. The head of the Specialized Commercial Crimes Unit of the National Prosecuting Authority, Adv Goosen has given an explanation in the answering affidavit of how all the charges against the applicants were laid. I turn now to deal with that issue hereunder in some more detail.

Bank related charges.

[28] Counts 1 and 2 related to the conduct of the second applicant in his capacity as a customer of Standard Bank and ABSA Bank. In the charge sheet, the conduct the second applicant is accused of is described as "kiting". According to the charge sheet, kiting is explained as a conduct in which customers of one or more banks draw cheques in favour of one another on different bank or branches of the same bank. Cheques are then drawn against the deposits before the proceeds of the cheques have been collected. In this way, the bank pays out against the deposited

cheques in the expectation of the cheque being honoured. In respect of these charges it is difficult to see and the applicants do not explain how Adv De Villiers or anybody with an axe to grind against them could have influenced their own conduct in such a way that they conduct themselves in their relationships with their banks in a manner which, according to the first respondent is fraud or is otherwise a criminal offence.

SARS related charges.

[29] Counts 3 to 173 were initiated by a report made by SARS to the South African Police Service. Mr Carel Nicolas Smit describes himself in his affidavit annexed to the answering affidavit as being employed by SARS as Operations Manager for Criminal Investigations in the Eastern Cape. It appears that in this capacity he was tasked by his line manager on 11 September 2006 to investigate offences in respect of PAYE entities under which the applicants conducted their businesses. These offences are alleged contraventions of the Income Tax Act. It appears that to the extent that the applicants or their entities might have been cleared of their civil liabilities by SARS in the sense of the debt having been extinguished either because the entities were liquidated or for whatever reason, that is totally unrelated to criminal liability from which the prosecution arose. Criminal investigations are not affected by any debt having been written off by the SARS Estate Debt Management Division. Mr Smit laid criminal charges with the police on behalf of SARS against the applicants and such cases were assigned to warrant officer Jacqueline Fourie for investigation. That is how the offences related to SARS came to be, according to the first respondent.

[30] There is just no evidence or suggestion of any conduct by any of the De Villierses that could have influenced either Mr Smit's line manager to instruct Mr Smit to investigate the applicants' conduct in respect of PAYE in respect of their entities. Whether or not the alleged conduct of the applicants, which was investigated by Mr Smit resulting in him laying criminal charges with the police, is a crime as alleged is a matter for the criminal court to determine. There is no evidence of any conduct by Adv De Villiers influencing the SARS' officials to initiate their investigations in the execution of their statutory mandate. The search and seizure operations which led to the seizure of the applicants' business records or documents were conducted after the police applied for and were granted search and seizure warrants as part of the SARS related criminal investigations. The first respondent contends that if the applicants have issues with the admissibility of the evidence obtained by the police during the search and seizure operations, that is a matter to be dealt with during the criminal trial. There can be no doubt that this Court has no authority to usurp or second guess anything that must, as a matter of both law and logic, be determined at criminal trial.

[31] It is worth mentioning that SARS, which initiated the Income Tax Act related investigations, is independent of the SAPS and both are independent of the first respondent. All of them have constitutional and statutory obligations to carry out their functions and where necessary to cooperate with one another as each one of them has got separate statutory powers in the law enforcement landscape. I find it difficult to understand how investigations by SARS and the police must somehow be delegitimized by allegations of sour relations between a member of the first respondent, Adv De Villiers and the applicants. In any event, some of the people who give information to law enforcement agencies are not always necessarily driven

by their aversion to crime or their sense of duty as law abiding citizens. They are sometimes driven by personal interests or indeed hidden vendetta. There is a suggestion by the applicants that Mrs De Villiers should have been charged and the fact that she was not charged is somehow on its own, sinister. Besides the fact that these allegations are clearly unfounded in light of Adv Goosen's explanation of how it came to be that she was not charged; and further besides the fact that the decision to prosecute or not is that of the first respondent and not that of any other body, not even the court; and furthermore, besides the fact that these proceedings are not a review of the first respondent's decision not to prosecute Mrs De Villiers, the suggestion of impropriety in the fact that she was not charged ignores the legal framework in this country.

[32] There are various statutory provisions within the legislative framework, which underscore co-operation between a clearly guilty criminal, even a self-confessed one on the one hand and the police and the prosecuting authority on the other. One example that comes to mind is section 204 of the CPA. This piece of legislation provides for a self-confessed criminal giving evidence to the court at a criminal trial against his co-perpetrators of crime in exchange for indemnity from prosecution. Therefore, and to the extent that there might have been co-operation between the police, the prosecuting authority and Mrs De Villiers or any other person – that is something that can be done within the prism of one or the other piece of legislation and there is nothing necessarily sinister about it. I make this point especially because the applicants have also made allegations of a previous conviction and even some criminal conduct on the part of Mrs De Villiers.

[33] I have already indicated hereinbefore that the applicants have made allegations of persecution by Adv De Villiers following what they allege was a serious fall out

between themselves and the De Villierses. I do not think that this Court should be concerned with whether or not there was such a fall out between the applicants and the De Villierses. In my view that fall out, even if it occurred, is irrelevant. The real question is whether the applicants have provided any evidence of impropriety in the conduct of or even involvement of Adv De Villiers as it related to the investigation by SARS, the police and the prosecution of the applicants by the first respondent. Unfortunately, the applicants have only made bare allegations, embarked on wild and unrestrained speculation to create a cloud of suspicion on why and how they were charged in the first place with no factual basis. This is despite the fact that even a cursory glance at the charge sheet suggests otherwise.

Charges unrelated to SARS.

[34] Counts 1 and 2 relate to allegations of fraudulent conduct by the second applicant himself in his relationship with his banks. Counts 174 to 190 are charges of fraud, alternatively forgery, or alternatively theft in respect of offences which according to the charge sheet, were committed by the applicants in defrauding certain merchants in the purchasing of goods and/or services through allegedly fictitious proof of payments. In respect of counts 1 and 2 and 174 to 190, it might be that amongst others the first respondent would have to come up with witnesses from the banks and from those merchants that were allegedly defrauded. I fail to see how any bad blood between the De Villierses and the applicants would have any role to play in creating a nexus between the alleged fraud or theft and the alleged conduct by the applicants themselves. There is also no evidence that any of the prosecutors of the first respondent did anything which led to any of the charges being laid by those businesses. There is similarly no evidence of any of the prosecutors including

Adv De Villiers conducting themselves improperly or unlawfully whose conduct led to the decision to prosecute. There is, on the contrary, evidence of all the prosecutors, excluding Adv De Villiers who was not involved in those matters applying themselves to the evidence in the docket and making their own independent decisions at various stages. These included Adv Naiker who was not only not from Port Elizabeth but also never worked in Port Elizabeth save for her involvement in prosecuting the applicants. Against the backdrop of all the above issues raised by the applicants, I turn now to deal with the application for a permanent stay of prosecution.

The application for permanent stay of prosecution.

[35] The applicants' case in respect of their application for a permanent stay of prosecution finds its genesis in section 35(3)(*d*) of the Constitution[6]. It reads:

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

[36] A case is sought to be made in the applicants' founding affidavit and other documents, which form part of the applicants' application papers including the record of proceedings in the court *a quo* filed in terms of rule 53 of the Uniform Rules of Court. These papers reveal a number of reasons on the basis of which the applicants contend that they will suffer trial related and other prejudice during trial. Some of the related factual allegations have already been alluded to above. Having said that, repeating some of them may become necessary in some instances for the sake of clarity. They mostly originate from the alleged deterioration and breakdown of their relationship with the De Villierses and the role allegedly played by Adv De Villiers in their prosecution which they claim, is part of the first respondent being used in their persecution by the De Villierses. They also include the obliteration of

[6] Constitution of the Republic of South Africa, 1996.

their numerous businesses which resulted ultimately, in their impoverishment. This, they allege, has resulted in them not only being publicly humiliated but also having no place to live and having to live with a relative in East London, a significant distance of about 300km from the Port Elizabeth Commercial Crimes Court. This has also made it financially unaffordable for them to commute between East London and Port Elizabeth to attend the trial. All of the issues they raise, they contend, make it very prejudicial for the trial to continue in Port Elizabeth. However, their main issue is what they contend, is trial related prejudice, for which they cite many reasons and on which they seek an order for a permanent stay of prosecution. The alleged trial related prejudice is also based on allegations that their documents, which were seized during the 2007 and 2008 police raids were allegedly not returned. The length of the period since as far back as 2003 when some of the evidential material and witnesses date is said to be part of the whole factual matrix referred to as evidencing trial related prejudice.

[37] I consider it necessary to quote verbatim, some of the averments the applicants have made in their founding affidavit articulating the case that is sought to be made on the main issue of the permanent stay of prosecution. This is how the applicants have expressed themselves:

> "66. Applicants fear that their right to a fair trial shall be prejudiced through the length of time that has passed in that some of our witnesses have since died, *inter alia* our erstwhile attorney who had intimate knowledge of the matter, alternatively, have been negatively affected by applicants' economic downfall and are unwilling to give evidence.
>
> 67. Applicants fear this will severely prejudice our ability to defend ourselves against the charges brought and relating to 2005 and/or 2008, given the length of time, the fact that oral evidence would have been strongly relied on, more so as the first respondent initially misplaced all applicants' documents and evidence.

68. Further, logically our recollection of these events (and that of all potential witnesses) are not as clear as it was five years ago and this in turn further prejudices our defence to the charges brought. Our personal recollection is imperative to our defence and even if we recorded same now, our recollection might not be accurate.

69. Submitted that first respondent avers that all documents seized in the raids have been provided back to us and yet this is strongly contested. There were numerous documents removed from different branches and our home and none of these documents have been returned to us and no explanation has been forthcoming why the documents were initially seized and why they have not been returned to us.

70. I am advised that this Honourable Court can order a permanent stay of the prosecution against the applicants on the basis that the prejudice suffered has been suffered prior to the trial commencing.

71. Submitted that the delay in prosecuting the applicants has resulted not only in trial related prejudice in that the applicants are unable to properly defend themselves but in prejudice suffered by the Applicants, their families, employees, clients and creditors and debtors.

72. Submitted that admittedly, the Applicants may have been the cause for some of the cause for some of the postponements but ultimately, First Respondent is responsible for ensuring a complete docket and charge sheet are available so that the applicants are aware of the case they have to meet. This not to mention the seized documentation, which applicants required to prepare for their defence.

73. During the times that applicants were the cause of postponements the Respondents were in any event not ready to proceed.

74. After numerous requests a complete copy of the docket was only received from the state on 14 February 2017."

[38] These are some of the main averments on the basis of which the applicants claim that their rights to a fair trial have been negated and infringed. There are other contentions raised elsewhere in the founding affidavit and annexures as well as the other documents which served before the court *a quo* and which have been filed in this case. I do not intend to deal with each and everyone of them even though I

have considered all of their contentions in their articulation of their case within the prism of the whole factual matrix.

The delay in prosecution.

[39] The facts in this matter, in brief reflect that in November 2006 SARS decided to investigate the second applicants' businesses' suspected Income Tax Act contraventions. These investigations resulted in some witness statements being obtained and criminal charges being laid with the police against the applicants. The police raided the applicants' businesses, offices and their home in 2007 and in 2008. The applicants were arrested, charged and appeared in court for the first time on 08 November 2013. A period of about seven years or so elapsed during which the SARS related charges were investigated by SARS in 2006 and 2007 during which the matter was investigated by the police. These included the raiding of the applicants' business premises and home before the applicants appeared in court for the first time in November 2013. This is obviously a long period of time and the applicants have explained in some detail the suffering they experienced including the liquidation, deregistration of their businesses with consequential huge financial losses, losing assets and in the case of the second applicant, even his health has become badly affected and weakened. He also cites his health condition as part of the reasons why the criminal prosecution should be stayed. This is because the sickness he is suffering from has, he alleges, affected his recollection of events through memory loss which he says would have prejudicial effects on the fairness of his trial and his ability to defend himself.

[40] The fact that there was a delay in the finalization of the investigation is acknowledged by the first respondent. However, the first respondent denies that the

applicants' fair trial rights have in the process been infringed. The first respondent explains the delay as follows:

> "53. The allegations in paragraph 51 of the founding affidavit are without substance. The first search and seizure operation happened in 2007. That was at the early stages of the investigations, less than two months after the first case dockets were received.
>
> 54. The suggestion that nothing was found is untrue and is denied.
>
> 55. The allegation that the applicants' fair trial rights had already been infringed is denied. It is, with respect, without substantiation. It is so that the investigation took long to finalize, but that is typical of a case of this nature. The investigation did not cover only the SARS offences contained in the current charge sheet. Various other angles relating to possible theft of estate agents' commission, discounting and double discounting of estate agents' commissions, reckless trading, stopping of cheque payments etcetera were also investigated. The many estate agencies and large volume of documentation to examine, was a time-consuming exercise. At one stage it was considered necessary to appoint an outside forensic auditor (Price Waterhouse Coopers) and that meant that the police had to go through a lengthy tender process. The final forensic report was received only after the first court appearance by the applicants.
>
> 56. One of the dockets received during October 2008 resulted in the prosecution of the applicants separately in respect of Mount Road CAS871/10/2008. That case was finalized in February 2013. That also contributed to the delay in bringing the applicants before Court in this matter.
>
> 57. The reasons for the delays after the applicants were arraigned before court are on record and clear for all to see. Suffice to say that a number of trial dates were arranged since 2016 and the case could have been finalized long ago if it was not for the delays caused by the applicants. The Regional Court had, previously, on more than one occasion ruled that the applicants are unreasonably delaying the trial. I annex hereto a copy of the relevant portions of the court record marked as 'TCG4'.
>
> 58. The launching of the application for permanent stay before the Regional Court as well as before this Honourable Court by the applicants also delayed the finalization of this matter."

[41] It appears from this explanation that in addition to the 190 counts now under consideration, there were other possible charges that were considered and decisions were taken not to prosecute the applicants in respect thereof. There can be no debate, in my view, that each count has to be thoroughly investigated before it is added to the charge sheet. The importance of this has many layers including the very fundamental right to dignity and fairness in respect of each person, which are enshrined in the Constitution. Chapter 2 of the Constitution, which codifies the Bill of Rights, opens with section 7 by making an overarching provision that applies to all and affects all the rights contained therein as follows:

> "7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
>
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

[42] One of the rights contained in the Bill of Rights, is human dignity provided for in section 10 as follows:

> "10. Everyone has inherent dignity and the right to have their dignity respected and protected."

[43] I just do not see how the dignity of the applicants could have been respected, protected and promoted by quick but shoddy investigations. Our courts are inundated with situations in which a person is arrested on very serious charges, which sometimes because of the profile of the individual concerned attract not only public attention but also media attention, only for those charges to be later withdrawn due to lack of evidence. The withdrawal of charges would happen after the accused person would have suffered public humiliation and at times, the person might never

recover from the stain of having faced serious criminal charges. In such cases, a person is therefore charged and convicted in what in everyday parlance is called the court of public opinion. Clearly nobody should be subjected to such humiliation and having their dignity imperiled because of shoddy investigations. Thorough investigations of especially complex cases are obviously a time consuming exercise.

[44] I simply do not think that in the circumstances of this case the length of time the first respondent took to investigate the case was unreasonable especially if regard is had not only to the complexity of the charges but also the substantial documentation that needed to be properly analysed. Add to this the fact that the first respondent considered it necessary to involve an auditing firm which necessitated a tedious public tendering process. This, it is alleged, also took enormous amounts of time. The explanation given by the first respondent for the delay and the amount of time it took to investigate and ultimately charge the applicants is not out of the ordinary especially for a case of such magnitude. There are also a number of charges that were laid against the applicants long after SARS laid the initial charges. Those are charges that have nothing to do with SARS and pertain to alleged fraudulent activities of the applicants affecting various merchants where fraudulent proof of payments were used to purchase certain goods or to receive services on the strength of those proof of payments. Some of these activities occurred between 2011, 2012 and 2013 and the applicants were charged for all the offences including those that had been under investigation since 2006.

[45] In any event, the mere length of time it takes to bring an accused person before court is not, without more, a basis for a challenge to fair trial rights. This is the case despite the obvious fact that the accused person's fair trial rights would be greater enhanced by a speedy prosecution as required by section 35(3)(d) of the

Constitution. I am also emboldened in this view by the provisions of section 18 of the CPA, which reads:

"18. The right to institute a prosecution for any offence, other than –

(a) murder;

(*b*) treason committed when the Republic is in a state of war;

(*c*) robbery, if aggravating circumstances were present;

(d) kidnapping;

(*e*) child-stealing;

(eA) the -

(i) common law offence of bribery;
(ii) offence referred n section 1 of the Corruption Act, 1994 (Act 92 of 1994); or
(iii) offences referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004);

(*f*) any sexual offence in terms of the common law or statute;

(*g*) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

(*h*) any contravention of section 4,5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013);

(i) …

(j) torture as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013),

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed."

[46] In terms of section 18 the right of the prosecuting authority to initiate prosecution expires after 20 years for some offences as the maximum period. In respect of the offences listed in section 18 it simply never expires regardless of the time that would have expired since the date of the alleged commission of the offence. It seems to me that the length of time it takes to investigate the case or it takes to charge a person is not a bar to a prosecution as a general principle. Clearly, the questions of memory lapses, the death or disappearance of witnesses will always be a factor that compromises to a lesser or greater extent the ability of the accused to mount an effective defence against the charges preferred against him. It obviously also affects the recollection of events by State witnesses, death and/or disappearances in some cases.

[47] Despite what may very well be not an ideal situation for an accused person where there had been a long delay, section 18 remains in our statute books. In fact, if anything, the constitutional validity of section 18 was recently affirmed in *Frankel*[7] by the Constitutional Court in which, writing a unanimous decision of the court, Zondi AJ said:

> "The High Court, relying on *Bothma*, held that an accused's right to a fair trial would be no more prejudiced in a prosecution after 20 years for sexual offences, than his rights in a prosecution after 20 years for rape or compelled rape. This conclusion was predicated on a finding that rights to a fair trial, coupled with the state's discretion on whether to prosecute, based on the cogency and reliability of the evidence at its disposal, would serve to reduce any prejudice an accused person might have experienced as a result of a delay in prosecution beyond 20 years.
>
> I agree with the High Court's conclusion. On the facts presented by the applicants, Mr Frankel could have been prosecuted for the common law offence of indecent assault as that was the crime at the time it was committed. The declaration of

[7] *NL v Estate Late Frankel* 2018 (2) SACR 283 at 304 para 64-66

> invalidity of s 18 does not therefore give rise to a new act, which was not unlawful at the time it was committed.
>
> It remains to consider an appropriate remedy. The constitutional invalidity of s 18 arises from that portion which bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in s 18(*f*), (*h*) and (*i*), after the lapse of a period of 20 years from the time when the offence was committed. In terms of s 172(1) of the Constitution, a declaration to that effect must be made, including any order that is just and equitable. The offending portion of s 18 must be struck down. ... ”

[48] Lest I be misunderstood, I am not even remotely suggesting that on the basis either of section 18 or what the Constitutional Court said in *Frankel*, the rights of an accused person to a speedy prosecution provided for in section 35(3)(*d*) should be rendered nugatory. They are in the Constitution to be asserted and for the courts to ensure that they are not negated by the conduct of the prosecuting authorities. What I am saying is that prosecution cannot be barred merely on the mathematical calculation of the length of time it has taken for the prosecuting authority to charge the accused person outside of a statutory provision. The rights enshrined in section 35(3)(*d*) can be asserted even in periods less than the time it took to prosecute the applicants in this matter. For instance where the prosecuting authority inexplicably unreasonably delayed in prosecuting an accused person by acting in an underhanded and irresponsible manner in handling a particular case, is but one example. A prosecution may very well be stayed permanently where it is not the circumstances of the case that caused the delay, which may visit some prejudice to the accused, but an unacceptable or irresponsible conduct by the prosecutor concerned.

[49] In Van *Heerden*[8] the Supreme Court of Appeal emphasized the nature of the enquiry involved and its fact specific nature. In that case, Navsa ADP said:

> "I return to an aspect foreshadowed above, namely, the conduct of the prosecutor and a senior in the *DPP's* office, in giving the undertaking to the court to proceed on the restricted basis of theft to forestall the matter being struck off from the roll. Ms *Booysen*, who was one of the counsel representing the NDPP before us and who has been a prosecutor for almost four decades, commendably, as an officer of the court, agreed that such behavior was unacceptable. She described this as a ruse and/or stratagem to avoid the matter being struck from the roll. When it was put to her that it was dishonest, she conceded that it was not the way in which she would have conducted herself. To her credit, she conceded that in the event that it was held to be a significant factor in deciding the matter in favour of the appellants, the NDPP could not justifiably be dissatisfied.
>
> Having regard to the applicable factors on which *Sanderson* is instructive, and considering the totality of the circumstances set out above, in my view, the passage of time in this case, relative to its facts, was unreasonable. Importantly, the dishonest and unacceptable conduct of the state in *facie curiae* cannot go unnoticed and must be taken into account in favour of the appellants and against the NDPP, as rightly conceded by counsel. I have taken into account that the relief sought is an extraordinary remedy. In my view and for all the stated reasons, the conclusion is ineluctable that the appellants' right to a trial to begin and conclude without unreasonable delay has been infringed and that the appropriate relief in terms of s 38 of the Constitution is the principal relief sought by them. That conclusion makes it unnecessary to deal with any of the other questions raised on behalf of the appellants and the necessary result is that the assets under restraint are released therefrom.
>
> I cannot stress enough that decisions in matters of this kind are fact-specific. It follows that this judgment should not be resorted to as a ready guide in determining the reasonableness or otherwise of delays in the finalization of trials. Whether a breach of a right to an expeditious trial has occurred and relief is justified, are to be determined by a court after having been apprised of all of the facts on a case-by-by-case basis."

[8] *Van Heerden v NDPP* 2017 (2) SACR 696 (SCA) at 717 paras 68-70.

[50] The delay of the trial after the applicants' first appearance in the court *a quo* on the 8 November 2013, the so called intra-curial delay can be disposed of with ease. The facts relevant to that period and the causes of the delay are largely common cause as can be gleaned from the court record in the court *a quo*. They can best be described as nothing out of the ordinary in any criminal trial. They include a number of instances in which postponements were necessitated by the applicants changing legal representatives for one reason or the other a few times. Sometimes the applicants would ask for postponements to give them time to make one application or the other or to make representations to the prosecuting authorities. For the better part of 2015 into 2016 the second applicant was indisposed or very sick. Some of the postponements were occasioned by the first respondent changing prosecutors a few times or needing to finalize the charge sheet and provide the applicants with complete dockets.

[51] All postponements since the applicants' first appearance in November 2013 whether by the applicants themselves or by the State some of which were by agreement are not such as to found a basis for an application for a permanent stay of prosecution. The applicants cannot be blamed for having delayed the trial by making the applications for postponements, which the court granted as they were all within their right and were part of preparation for trial. The second applicant can also not be blamed for having taken ill during which time a period of over a year was lost as that was beyond his control. The related postponements appear to have been part of procedural justice and any attempt to use the delay for the period after the applicants' first court appearance as a basis for the stay of prosecution application is, on the facts of this matter, ill-advised. The bottom line is that parties before court cannot be denied applications for postponement where a postponement is

warranted. All avenues to seek and exhaust statutory remedies through relevant applications as the applicants did are part of access to justice, which should not be lightly refused. The net effect of procedural justice is that until that procedural aspect of the case is dealt with the trial cannot go ahead. All of this should not raise any eyebrows. In a proper case, a court would be well placed to determine if its procedures are being abused to delay the trial. It is the responsibility of the court before which a criminal trial is pending, to ensure that the trial is not unduly delayed and where undue delays occur, to take remedial action as provided for in section 342*A* of the CPA.

The transfer of the trial to another court in South Africa.

[52] The applicants seek, among other relief, an order for their criminal trial to be transferred from Port Elizabeth to any other Commercial Crimes Court in South Africa. However, there are no allegations against the second respondent at all. There is not even a remote suggestion of improper conduct or an averment that before him the applicants will not receive a fair trial. This is besides the fact that even if there were to be any basis for him to be removed from hearing this trial there are many other magistrates in that court who could handle the criminal trial. In any event, the record shows that in conducting the proceedings before him the second respondent showed commendable judicial temperament. He postponed the case on numerous occasions and at various times and accommodated the applicants whenever they needed time to make any of the many applications that they made. At no stage did he show inappropriate impatience and a deep-seated desire to conduct the trial regardless of any considerations of fairness to the applicants. At

various times the applicants changed their legal representatives. The second respondent never showed signs of being impatient and seeking to force the applicants to conduct the trial without legal representation. He basically allowed them to change their legal representatives whenever they wanted to. The application to remove the matter from Port Elizabeth to any other court in South Africa is without basis, ill-advised and unprecedented to my knowledge.

The barring of Adv De Klerk from prosecuting the applicants.

[53] This brings me to the issue of the removal or barring of the current prosecutor, Adv De Klerk from prosecuting the criminal trial. In the notice of motion there is a specific prayer for the barring of Adv De Klerk from prosecuting the applicants. However, in the founding affidavit she is mentioned only once. In the paragraph in which she is mentioned it is with reference to the fact that she is a colleague of Adv De Villiers and she together with Adv Van Zyl who was previously appointed to prosecute this matter work in close proximity with Adv De Villiers. There is not a single cogent reference to any conduct on her part that the applicants allege indicates a prosecutor who will not deal with the matter fairly. There is not a single substantiated allegation that she had, at any stage during her involvement in prosecuting the matter and during the many applications that the applicants made in the court *a quo,* behaved inappropriately or unethically. She made a few arrangements for the hearing of the matter by agreement with some of the applicants' legal representatives and there are no factual averments that she behaved improperly and in breach of her prosecutorial mandate at any stage. There is no suggestion that other than being a colleague of Adv De Villiers she allowed herself improperly to be influenced by Adv De Villiers who is alleged to have a sinister motive of persecuting the applicants.

[54] Adv Goosen explains that he had initially intended to allocate the applicants' criminal trial to Adv De Villiers. The latter immediately disclosed the fact that his wife was, at some stage, a business partner of the applicants and therefore declined to be involved in the matter. Adv Goosen then decided to allocate it to Adv Van Zyl as the first prosecutor to handle the matter. He disclosed to Adv Van Zyl that he had initially intended to allocate the case to Adv De Villiers. He further advised Adv Van Zyl to discuss the matter with Adv De Villiers who could have information relevant to the investigation of the case. The applicants suggest that the mere fact that Adv De Villiers could have given some information to Adv Van Zyl is somehow and without more, sinister. It is unclear how whatever information might have been obtained by Adv Van Zyl from Adv De Villiers as part of the investigation could, on the facts of this matter and in particular, the nature of the offences, have had a result of prejudicing the applicants. The charges do not appear to have anything do with what Adv De Villiers said or did not say. When the applicants raised the issue of their discomfort with Adv Van Zyl, Adv Goosen decided to accommodate the concerns the applicants expressed and appointed Adv Naiker from East London who was not only from outside but also at the time, was not very busy.

[55] All the charges appear to be crimes allegedly committed by applicants and sometimes with different entities as indicated elsewhere in this judgment and as clearly reflected in the charge sheet. Some of those charges appear to have been committed long after the raids by the police at the applicants' premises. Some of them were allegedly committed not long before the applicants appeared in court in November 2013. All of the charges appear to relate to the applicants' business dealings with third parties and certain alleged contraventions of the Income Tax Act, which related to their business operations. It is difficult to imagine how another

person even one with all an ulterior motive could have led to the third parties with whom the applicants had business dealings or could have caused the applicants to commit the alleged compliance infractions in the case of SARS, resulting in the laying of criminal charges against them.

[56] Elsewhere in the record of proceedings in the court *a quo*, there are allegations about certain ex-employees of the applicants who are alleged to have axes to grind against the applicants. It appears that to the extent that they either assisted the investigations or could be State witnesses they are part of the persecution conspiracy for their own reasons. It does need to be said even at the risk of being repetitive, that law enforcement authorities get information from all sorts of people including well-known or even self-confessed criminals in their crime prevention and crime fighting strategies. The real issue is whether or not there is evidence of wrong doing by an accused person. It is for the court to apply the relevant cautionary rules when it weighs the evidence in light of the source thereof. All of this is designed to ensure that an accused person receives a fair trial at all stages of a criminal trial and the conclusions arrived at by the court do take into account not only the nature of the evidence but, most importantly, its source. If Mrs De Villiers is called by the State as a witness, surely the trial court will be alive to her relationship with the applicants and the possibility of her wanting to settle some scores. Our criminal justice jurisprudence is alive to the possibility of a witness who might even have unknown bad motive or a score to settle against an accused person. For this reason, an accused person is never expected to give an explanation of why a witness would want to falsely implicate him or her. It is accepted that an accused person may not know the witness' motives for implicating him.

[57] Prosecutors live and work in the same communities or societies in which both those charged with crime and the witnesses live. The real question is whether a prosecutor who is both a professional and an officer of the court has applied an independent mind to the facts before him in prosecuting a case. This is totally unrelated to the source of his information or the motives of the witnesses about which he or she may not necessarily know. The point I am making is that it might very well be that Adv De Villiers had an axe to grind although there is no cogent evidence of that or of him unlawfully influencing any of the prosecutors or even attempting to do so. There are other people mentioned in the applicants' papers some of whom were applicants' employees who are said to be also having axes to grind. That is all irrelevant to whether the prosecutor assigned to prosecute the case did or did not do his job properly and professionally or will or will not do so. Unsavoury characters do give information to law enforcement authorities. However, it is for the prosecutor to be mindful of the source of his information as he makes his or her own decision on whether he or she has enough evidence to prosecute or whether more investigation is necessary for purposes of bringing before court what she or he considers to be credible evidence that meets the minimum threshold. In any event, a prosecutor does not decide on the credit worthiness and credibility of his or her witnesses. All the evidence must be brought before court, which will also be mindful of the sources of the evidence that is before it in its evaluation processes. I therefore conclude that there is no basis for the removal of Adv De Klerk from prosecuting this case and in fact, the fact that she, like all her colleagues works in the same office as Adv De Villiers is irrelevant. It surely cannot be that simply because of the allegedly sour relations between Adv De Villiers and the applicants,

all the prosecutors who work with him must be debarred from doing their work as professionals and officers of the court.

The payment of travelling and accommodation expenses.

[58] The applicants have also asked this Court to grant them an order for the payment of travelling and accommodation costs until the finalization of the criminal trial. This seems to be based on the applicants' precarious financial position. As I understand it the applicants' case in this regard is that they cannot afford the travel and accommodation expenses as they stay in East London and not in Port Elizabeth. This also seems to be related to their prayer that the trial be moved to any other Commercial Crimes Court in South Africa. In my view, what the applicants want this Court to do is to take a policy-laden decision. South Africa is not a small country. There are huge distances between some places where people live and where courts are located. If an accused person were to require paid up expenses for travel and accommodation based purely on the distance between his place of residence and the court, that would surely have huge financial implications for the fiscus. For that reason, it is a matter not for the courts but for the other arms of the State to deal with. I can do no better than refer to the case of *Land Access Movement*[9] in explaining this principle in which the Constitutional Court said:

> "This Court has held that its powers under section 172(1)(*b*) are restrained to the extent that they do not allow this Court to traverse into the terrain of the other arms of government. Thus the broad extent of the powers under section 172(1)(*b*) must be balanced with the separation of powers principle. A just and equitable order under paragraph 7 of the Order must not enter the realm of legislating. The order, if granted, will remain intact and will not be changed once Parliament enacts a new Amendment Act. In *ITAC*, this court said:

[9] *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* 2019 (6) SA 568 (CC) at 592 para 57.

> 'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'"

[59] The question of the payment of travelling and accommodation expenses for accused persons who are released on bail or warning, which is what in essence, is raised by the applicants, is, in my view, a clearly policy-laden one. This is especially so if regard is had to the geographical make up of where a lot of people actually live and where the courts are situated. In a lot of instances, the courts are situated in vast distances to where the people live and this affects all the public utilities. There is massive poverty and unemployment in this country affecting especially the rural poor who are located even farther than those in urban areas. If an accused person having been released on bail or warning must be funded for travel and accommodation expenses as a norm, it is the State that would have to do that and the decision maker is certainly not the courts but those with constitutional authority to make policy decisions and legislate those policy decisions. Any other challenges that an accused person may face with regard to court attendance has to be for the decision of the court, which is dealing with that matter in light of the specific circumstances of a particular matter.

[60] It might very well be that in another case and based on its specific facts a particular court would be deemed unsuitable to hear a particular matter. It is in those specific circumstances that a court could, if asked, have to pronounce on an issue like that, if it grants an order to move that specific case to another court. It clearly

cannot be that an accused person could, as a personal preference, leave the area in which he is charged and expect the State to bear the related expenses of court attendance. In any event, it happens quite often that an offence is committed in an area of jurisdiction of another court which is different or even far from where a person lives and the accused is charged thereat. It cannot be that that accused would, on being released on bail or warning be entitled to State funded travel and accommodation expenses outside of a carefully crafted legal framework, something that under the current legislation is constitutionally beyond the power of the courts.

The missing documents.

[61] The applicants have also raised the question of documents which were seized in execution of the search and seizure warrants, which they say are vital to their defence and were allegedly not returned by the first respondent or the police. The applicants contend that the failure by the first respondent to return those documents is prejudicial to their defence and as such, they stand to be prejudiced during trial as they will not be able to properly defend themselves without those documents. The first respondent disputes that all the documents were not returned contending that the applicants were provided with either the original documents or copies thereof in cases where the originals had to be retained as trial exhibits. In its papers the first respondent has attached annexure JF2 which is a 9 paged spreadsheet containing a long list of documents returned by the first respondent and signed for as having been received by the applicants.

[62] It is not entirely clear which documents will be relevant during the trial and which ones of those neither the applicants nor the first respondent have because they are missing or may have been lost. Some of the documents appear to be documents

that would have originated from SARS like tax directives or information that could be available from the relevant banking institutions like proof of payments or even bank statements. It seems to me that to the extent that such documents could still be available from SARS or the banks or whosever else might still be in possession of relevant documents it is the trial court that would be well placed to deal with those issues. It might be that such documents could be subpoenaed from the relevant institution or person and made available to the trial court. It might be that some of them might be relevant and not capable of being subpoenaed for whatever reasons. It is the trial court that, in my view, would be best positioned to deal with facts relevant to a specific charge and a specific document.

[63] It is simply incorrect to try and embark on huge speculation at this stage about any of the documents that are alleged to be needed by the applicants to enable them to mount a proper defence to the relevant count or counts. What is clear is that a lot of the documents are still available. It is simply incorrect that all the documents were not returned. In addition to this, it is the responsibility of the first respondent to prove the guilt of each applicant on each count beyond reasonable doubt. Most importantly it is the duty of the trial court to ensure that as far as possible each accused person is placed in as best position as possible to defend themselves and for it to be satisfied that the guilt of the accused has been established in respect of each count beyond reasonable doubt. All of these issues are issues for the trial court to traverse guided by the overall interests of justice with all the relevant facts having been placed before it.

[64] It would not only be constitutionally inappropriate at best but also counterintuitive to simply grant an order for a permanent stay of prosecution and thus prevent the first respondent from executing its constitutional mandate. The applicants face 190

counts, which the first respondent maintains, it needs to be afforded an opportunity to present before the trial court, the relevant evidence in its possession. It might be unsuccessful in establishing the guilt of the applicants beyond reasonable doubt in respect of all the counts. This will become clear as part of the evolution of the criminal trial and the determinations which only the trial court can make. The applicants want a permanent stay of prosecution in respect of all the counts also on the basis of some conspiracy theory involving Adv De Villiers and his wife and the alleged trial related prejudice of one form or another. Even if there was some merit to that conspiracy theory, and on the facts before me, it seems to be entirely far-fetched, such merit as it relates to the alleged role of Adv De Villiers, would not necessarily result in the applicants being entitled to an order for a permanent stay of prosecution.

Conclusion.

[65] As I have said before the question whether or not an order for permanent stay of prosecution is warranted in a specific case is dependent on the facts of each case. It would be incorrect to consider the possibility of granting an order such as the one sought by the applicants on the mere mention of a possibility of some form of trial related prejudice that might be suffered if trial is allowed to continue. It is worth emphasizing that the applicants are not seeking protection from some well-founded apprehension of trial related prejudice which ought to be eliminated. Their case is factually bankrupt and based on conjecture at best. It is not founded on some inappropriate behaviour of any of the prosecutors who were assigned to handle their

case. There is simply no substance to any allegations levelled against any prosecutor, including Adv De Klerk having conducted themselves inappropriately in a manner that annihilates any possibility of the applicants being afforded a fair trial.

[66] The submission that because there were serious difficulties in the relationship between the applicants and one prosecutor, Adv De Villiers, all his colleagues would have somehow abandoned their professional obligations and violated their oath of office by doing his bidding in pushing whatever agenda he might have misconstrues the environment in which prosecutors execute their duties. Where such allegations are made, they need to be supported by concrete evidence of inappropriate conduct that is inimical to their oath office. It cannot be correct that a mere allegation of bias or inappropriate conduct must result in a prosecutor's objectivity being questioned.

[67] In *Yengeni*[10] Bertelsmann and Preller JJ expressed the following sentiments with which I am in respectful agreement:

> "The national legislation envisaged by the Constitution is the National Prosecuting Authority Act 32 of 1998. It reiterates the provisions of s 179 of the Constitution both in its preamble and in several sections of the Act. Of particular importance is s 32 of Act 32 of 1998. It reads in part:
>
> '32 **Impartiality of, and oath or affirmation by the members of prosecuting authority**
>
> (1)(*a*) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.'
>
> Every member of the authority is obliged to undertake an oath or affirmation prior to the commencement of their service to uphold this provision. The Constitution guarantees the professional independence of the National Director of Public Prosecutions and every professional member of his staff, with the obvious aim of

[10] *S v Yengeni* 2006 (1) SACR 405 TPD at 425 paras 50-52.

ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence.

The untrammelled exercise of their powers in a spirit of professional independence is vital to the functioning of the legal system. The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the National Director of Public Prosecutions. Undermining this freedom from outside influence would lead to the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth."

[68] The evidence before this Court shows very clearly that the prosecutors who handled the case of the applicants each took independent decisions. The current prosecutor Adv De Klerk is no different and there is nothing to suggest that she was not operating and taking decisions independently or professionally. There is no evidence that she was at any stage subject to or had any inappropriate influence from anybody including Adv De Villiers.

[69] The philosophical underpinnings of our jurisprudence on the consideration of a permanent stay of prosecution were laid quite firmly by the Constitutional Court in *Sanderson*[11] in which Kriegler J said:

"Although this case is concerned with the rights of the accused under s 25(3)(a) of the interim Constitution, the point should not be overlooked that it is by no means only the accused who has a legitimate interest in a criminal trial commencing and concluding reasonably expeditiously. Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality. And, of course, quite apart from the general public, there are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interests of witnesses, especially complainants, in bringing a case to finality. Ordinarily the interests of all concerned are best served by getting on and getting done with the case as quickly as reasonably possible, but it may happen that the interests of the

[11] Sanderson v Attorney-General Eastern Cape 1998 (1) SACR 227 at 244 paras 37-39.

accused conflict with those of others. Though the interests of others should not be ignored in deciding what is reasonable, the demands of s 25(3)(a) require the accused's right to a fair trial to be given precedence. It is the duty of presiding officers to assume primary responsibility for ensuring that this constitutional right is protected in the day-to-day functioning of their courts.

It is appropriate at this juncture to make some brief observations about the remedy sought by the appellant. Even if the evidence he had placed before the Court had been more damning, the relief the appellant 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 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. In interpreting that provision in *Fose v Minister of Safety and Security* we adopted a flexible approach that is certainly inconsistent with the availability of a single remedy in North American jurisdictions. In our interpretation of s 7(4)(*a*) we understood 'appropriateness' to require 'suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.

Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of 'appropriate' remedies less radical than barring the prosecution. These would include a *mandamus* requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. 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."

[70] In my view no case has been made at all, that the applicants have suffered or will suffer trial related prejudice caused by the length of time it took the police and the first respondent to investigate the case and only bring the applicants before court in November 2013. As I said before the delay after that date appears from the record itself to have been significantly contributed to by the applicants themselves. Therefore, the applicants' application for a permanent stay of prosecution must fail.

So should the alternative relief sought by the applicants as explained elsewhere in this judgment. On the facts of this case in which the allegations are entirely without substance and at times, clearly hyperbolic, there is no reason why the costs should not follow the results.

[71] In the result the following order shall issue:

1. The application for the review and setting aside of the whole of the judgment of the Regional Commercial Crimes Court, Port Elizabeth dismissing the application for a permanent stay of prosecution is granted.

2. The applicants' application for an order for a permanent stay of prosecution in respect of all case dockets forming part of the case under Regional Commercial Crimes Court case number CCC1/88/2013 against the applicants is dismissed.

3. All the other alternative prayers sought by the applicants are dismissed.

4. The applicants are ordered to pay costs of this application.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

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T. V. NORMAN

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Instructed by: ADVOCATE T. SHUMBA

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Counsel for the 1st Respondent: M. MNYANI

Instructed by: STATE ATTORNEYS c/o MGANGATHO ATTORNEYS

GRAHAMSTOWN

Head on: 30 April 2021

Delivered on: 13 July 2021