IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1417/2016

In the matter between:

JAN HEROLD BOTHA 1ST Applicant

FREDERIKA JOHANNA BOTHA 2ND Applicant

and

THE NATIONAL DIRECTOR: PUBLIC 1ST Respondent

PROSECUTION NO.

THE DIRECTOR: PUBLIC PROSECUTION 2ND Respondent

FREE STATE NO.

THE REGIONAL MAGISTRATE KROONSTAD NO. 3RD Respondent

HEARD ON: 18 August 2017

DELIVERED ON: 25 August 2017

MHLAMBI, J

[1] This is an application for have to appeal to the Supreme Court of Appeal alternatively the full bench of the Free State Division, Bloemfontein against my judgment on the following grounds:

1. That I erred in fact and in law:

1.1 In not find that due to the criminal investigation dragging its feet for approximately 7 (seven) years when the transactions took place, constituted an abuse of process and was pre-trial related and also due to the present unavailability of documentary evidence;

1.2 In finding that the above said delays were unnecessary/over-emphasised and exaggerated; and/or

1.3 In not finding that the Applicants suffered the *same fate and irreparable trial related prejudice as was referred to in* **Broome v Director of Public Prosecution, Western Cape 2008 (1) SACR 178** at par 66 to 68 and 77 to 78; and/or

1.4 In not finding that the compromise relied on in the Applicants' papers was not dealt with, which justified and

served as a basis for launching the present application and/or

1.5 In finding that Applicants can properly make use of 342A of Act 51 of 1977 in the Regional Court whilst that section did not relate to pre-trial related prejudice; and/ or

1.6 With reference to Naidoo v Director of Public Prosecutions (2003) 4 ALL SA 380 (C).

[2] The first four grounds were traversed in my judgment and I find it unnecessary to deal with them in this judgment. The wording of the fourth ground of appeal is confusing and attempts to criticise my rejection of the compromise as a ground for the stay of the prosecution in paragraph 11 of my judgment. I repeat the contents of the said paragraph for the sake of clarity: *"In argument, the applicants did not pursue the compromise relied on in their papers as a ground for the stay of execution (sic). I shall therefore not deal with this aspect thoroughly save to state that, even if they did, it would not have justified or served as basis for the launching of this application."* The fifth and sixth grounds seem intertwined especially in view of the contentions made on behalf of the applicants which I shall deal with hereunder.

[3] Mr Van Wyk, on behalf of the applicants, requested that the appeal to the Supreme Court of Appeal be granted to enable that court to decide and bring about uniformity to the conflicting decisions delivered in Kwazulu-Natal, the Western Cape and now the Free State in respect of whether the magistrate's court is vested with

jurisdictional authority to entertain and determine an application for a permanent stay of prosecution on the basis of a delay in the institution of criminal proceedings. He submitted that there were two conflicting decisions viz, **Director of Public Persecutions Kwazulu Natal v Regional Magistrate, Durban and Another 2001 (2) SACR 463 (N)** in which it was held that the regional magistrates' court did have jurisdiction and **Naidoo v National Director of Public Prosecutions 2003 4 ALL SA 380 (C)** in which the opposite view was expressed. He opined that the Free State Division, through my judgment, had followed the Kwazulu- Natal decision in that the applicant had not made use of the provisions of section 342 A of the Criminal Procedure Act in the regional courts. He correctly pointed out that the authors, Du Toit et Alii were in favour of the decision in Naidoo in their book: Commentary on the Criminal Procedure Act Volume… on page...I agree with the submissions made that this judgment is well reasoned and especially the interpretation of section 170 of the Constitution and its application to the given facts. However, it does not assist or take the the applicants' case any further as shown below.

[4] In paragraph 12 of my judgment, I remarked that the applicants never at any stage made use of or employed some of the steps as set out in section 342 A 3(a)-(c) of Act 51 of 1977 in the regional court before filing this application to this court. The criminal case served before the lower courts since September 2014 until the filing of the application for the permanent stay of prosecution in the High Court on 9 March 2017. The thrust of the remark was an indication

that, during the various appearances in the lower courts, at no stage did the appellants bring it to the court's attention that the completion of the proceedings were being delayed unreasonably so that the court could eliminate the delay and any prejudice arising therefrom within the context of section 342 A (3)(a)-(c). The question whether the magistrate had the jurisdiction to deal with the application for the permanent stay of the prosecution at first instance was not considered.

[5] Paragraph 37 of the applicants' replying affidavit to the application to stay the prosecution reads as follows:

"The basis for my application is set out in my founding affidavit and is to (sic) fold, not only the compromise accepted but also the prejudice me and the other accused would suffer being compelled to defend ourselves eight years after the alleged offences without any sought documents to prepare and to hand in as exhibits to proof (sic) our innocence. Therefore the paragraph is denied." Paragraph 10.5 of the founding affidavit, as reflected in my judgment on page 3 stated the following:

"My moeder het eiendomme verhandel vir 'n bedrag van ongeveer R 1.8 milijoen (sic) ten einde die kompromis aanbod te befonds, en sou derhalwe nie voorgemelde godoen het, indien sy geweet het dat ek en die mede beskildigde strafregtelik aangekla sou word nie.'

[6] During the period 19 March 2015 and 26 October 2015 (as indicated by the correspondence addressed to the State prosecutor and State Advocate by the applicants' attorney of record and attached to the founding affidavit as annexures "H" and "I") representations and express requests were made that "*a party that had reached a compromise should not be allowed to invoke*

and abuse the criminal system and consequently become an extension of the creditor/complainant. The prosecutor should adhere to the terms of the compromise and the agreement reached by all the parties and wherewith all the parties were unconditionally satisfied." (translation). It was therefore clear in my mind that the applicants' stance was not that their prosecution was unnecessarily delayed nor their constitutional rights unnecessarily and unfairly prejudiced, but that they did not want to be prosecuted at all.

[7] Despite the grounds contained in the notice of application for leave to appeal, the main thrust of Mr Van Wyk's argument was focused on the matter of jurisdiction and the different approaches of the Divisions in this regard; hence his argument that the matter be referred to the Supreme Court of Appeal. In my mind this argument is misplaced as the ruling and the *ratio* of my decision was not based on jurisdiction but on the merits as more fully set out in paragraphs 8-12 of the judgment.

[8] I am therefore not persuaded by Mr Van Wyk's argument that this matter deserves either the attention of the Supreme Court of Appeal as suggested or the full bench of the Division as I am of the opinion that the appeal would not have a reasonable prospect of success. I therefore make the following order.

ORDER:

The application for leave to appeal is dismissed

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JJ MHLAMBI, J

Counsel for Applicant:	Adv. Van Wyk SC
Instructed by:	Symington and De Kok Attorneys BLOEMFONTEIN
Counsel for Respondents:	Adv BS Mene
Instructed by:	State Attorneys BLOEMFONTIEN