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

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

Case No.: 3843/2020

In the matter between: -

SINGEYELWE DLADLA	1st Applicant
REARETSE LEKHOOE	2nd Applicant
DIMAKATSO MALEFANE	3rd Applicant
MOFIHLI MAKHELE	4th Applicant
TSHIDISO KHASANE	5th Applicant
MALERATO KELE	6th Applicant
PHUTHI KELE	7th Applicant

and

MR. K MSIMANGA (Regional Court Magistrate, Phuthaditjhaba)	1st Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS FS	2nd Respondent

CORUM:	C. J. MUSI, JP *et* C. REINDERS, J
JUDGMENT BY:	C. J. MUSI, JP
HEARD ON:	01 MARCH 2021
DELIVERED ON:	09 MARCH 2021

Summary: **Section 342A of the Criminal Procedure Act 51 of 1977 requires that an investigation be done and that a finding regarding the delay** be

made. A plea in terms of section 106(1)(i) is a dilatory plea and does not entitle an accused person to demand to be convicted or acquitted.

[1] This is a review in terms of Rule 53 of the Uniform Court Rules. The applicants sought the following order:

> '1. That the ruling to deny a 106(1)(i) application by the defence and the order that the trial may proceed by the Hon. Regional Court Magistrate Msimanga, in Case No. PRC 140/19 be reviewed and set aside.
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> 2. That the proceedings under Case No. PRC 140/19, which resulted in the continuation of the trial proceedings be declared invalid and set aside;
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> 3. Further and/or alternatively relief.'

[2] The first to fourth applicants were arrested and charged with murder on 8 August 2018. It was alleged that they murdered Wesele Ntema, on 8 August 2018 at Ha-Nchobeng, Qwa Qwa. They appeared in the Magistrate's Court Tseki under Case No. A546/18, on 10 August 2018. Their case was postponed to 14 August 2018. The fifth to seventh applicants were arrested on 13 August 2018, on the same charge. They were added as accused and the matter against them was also postponed until 14 August 2018.

[3] On 14 August 2018 they were each granted bail of R500.00, and the matter was postponed to 12 September 2018 for further investigation. All of them paid the bail. It is unknown what happened between 12 September 2018 and 18 January 2019.[1]

[4] On 18 January 2019 the following was recorded:

> 'All 7 acc [accused] bf [before] crt [court] app [appeared] O/B [on bail] legally repre [represented] by the respective attorneys. State informs court that R/C [Regional Court]

[1] The record of 12 September 2018 and thereafter is irretrievably lost. Mr. Matee, on behalf of the applicants, informed us that he went to the Magistrate's Court after he noticed that the record is incomplete but the clerk of the court could not find the lost record.

> Prosecutor could not make a decision as A7 (witness) refused to consult with him as a result there is no R/C [Regional Court] decision and request matter to be removed from the roll. Matter is hereby struck off roll pending R/C [Regional Court] decision (sic).'

[5] The applicants were subsequently summoned to appear on 9 October 2019 at the Regional Court, Phuthaditjhaba. On 17 August 2020 the charge was put to them and they all pleaded not guilty. In addition, they pleaded that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(c) of the Criminal Procedure Act (Act)[2].

[6] The applicants argued that Case No. A546/19 was struck off the District Court roll pursuant to the provisions of section 342A(3)(c) and that the prosecution may not be resumed or instituted *de novo* without the written instruction of the attorney-general (Director of Public Prosecutions, Free State (DPP))[3].

[7] The Regional Magistrate found that the District Magistrate did not order that the prosecution may not be resumed or instituted without the written instruction of the DPP and rejected the second plea.

[8] In this Court, Mr. Matee repeated the argument advanced before the Regional Magistrate. He contended that the Magistrate's Court, as a creature of statute, is confined to make orders which are expressly mentioned in and sanctioned by the Act. He asserted that the Act only empowers a Magistrate to strike a case off the roll in section 342A(3)(c) and nowhere else. Therefore, so he argued, the Magistrate struck the matter off the roll in terms of that section.

[9] The issues to be determined are:

1. May a Magistrate strike a matter off the roll outside the parameters of section 3042A(3)(c)?
2. Did the Magistrate utilize section 342A(3)(c) in this case?

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[2] Act 51 of 1977.

[3] See Naidoo and Others v Director of Public Prosecutions and Others (062/2004) [2005] ZASCA 23 (29 March 2005) at para 38.

[10] The starting point is the Constitution.[4] Section 35(d) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay. Section 342A is geared at advancing and protecting the right in section 35(d).

[11] Section 342A of the Act, reads as follows:

> '(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 or her legal adviser, the State or a witness.
>
> (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
> *(a)* The duration of the delay;
> *(b)* the reasons advanced for the delay;
> *(c)* whether any person can be blamed for the delay;
> *(d)* the effect of the delay on the personal circumstances of the accused and witnesses;
> *(e)* the seriousness, extent or complexity of the charge or charges;
> *(f)* actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
> *(g)* the effect of the delay on the administration of justice;
> *(h)* the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
> *(i)* any other factor which in the opinion of the court ought to be taken into account.
>
> (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-
> *(a)* refusing further postponement of the proceedings;
> *(b)* granting a postponement subject to any such conditions as the court may determine;

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

(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 adviser, 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 adviser, as the case may be; or

[Date of commencement of para. (e): to be proclaimed.]

(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.

(4) *(a)* An order contemplated in subsection (3) *(a)*, where the accused has pleaded to the charge, and an order contemplated in subsection (3) *(d)*, shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order...'

[12] Section 106 of the Act reads as follows:

'(1) When an accused pleads to a charge he may plead-

(a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or

(b) that he is not guilty; or

(c) that he has already been convicted of the offence with which he is charged; or

(d) that he has already been acquitted of the offence with which he is charged; or

(e) that he has received a free pardon under section 327 (6) from the State President for the offence charged; or

(f) that the court has no jurisdiction to try the offence; or

(g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or

(h) that the prosecutor has no title to prosecute; or

(i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A (3) *(c)*.

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

[13] Mr. Matee contended that a Magistrate may not strike a matter off the roll, except when the Magistrate acts in terms of section 342A(3)(c) of the Act. According to him, a Magistrate could not strike a matter off the roll before the enactment of section 342A because the Act does not make provision for a Magistrate to strike a matter of the roll. Therefore, so he argued, when a Magistrate strikes a matter of the roll she or he may only do so in terms of section 342A(3)(c). I disagree.

[14] Although the Act does not specifically provide for a Magistrate to strike a matter off the roll, in practice Magistrates always strike matters off the roll, in the interests of justice or for pragmatic reasons. It happens daily in the Magistrate's Courts that accused are summoned to appear in court. The matter is placed on the court roll even when the summons is defective. When the accused is not at court and the Magistrate ascertains that the summons is defective, the matter would be struck from the roll because it is irregularly on the court's roll.

[15] Section 168 of the Act, which predates section 342A, reads as follows:

> 'A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.'

[16] Courts, including Magistrates' Courts, used section 168 of the Act and its predecessors[5] to refuse postponements if the court was of the view that to postpone a case would not be necessary or expedient.[6] In cases where the postponement was refused, before the accused has pleaded, the state would in most cases withdraw the charge or charges. Where, however, the state was not eager or refused to withdraw the charge the court would strike the matter of the roll, in the interests of justice, in order to break the deadlock. Having determined that Magistrates could, before the enactment of section 342A, strike a case off the roll, I turn to consider whether the Magistrate applied section 342A, in this case.

[17] Section 342A (1) is couched in peremptory terms. The Court shall investigate any delay in the completion of proceedings before it, if the delay appears to the Court to be unreasonable and the delay could cause substantial prejudice to the prosecution, the accused or his or her legal representative, the state or a witness.

[18] The Court is enjoined to hold an investigation. The section does not require a formal investigation. An informal enquiry is sufficient.[7]

[19] When investigating the delay, the Court must consider the factors mentioned in section 342A(2). Those factors are not an exhaustive list, they are a guide which the Court must consider.[8] The factors mentioned in section 342A(2) are by and large a codification of the factors mentioned in **Acheson**.[9]

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[5] See for example section 160 of Act 56 of 1955 which read as follows:
'subject to the provisions of section 150, in a court before which a trial is pending may, if it is necessary or expedient, on the trial until such time, and to such place, and upon such terms, as to such court may seem proper, and further postponement may, if necessary or expedient, be made from time to time.'

[6] S v Geritis 1966 (1) SA 753.

[7] S v Van Huysteen 2004 (2) SACR 478 (C) at para 8.

[8] Ibid at para 8.

[9] S v Acheson 1991 (2) SA 805 (Nm HC) at 812 C – G.

[20] After considering the factors in 342A(2), the Court must make a finding. If it finds that the delay in the completion of the proceedings is unreasonable it may make an order to prevent or eliminate the unreasonable delay and any prejudice arising from the unreasonable delay.

[21] In **Van Huysteen** it was said that section 342A does not require a formal finding.[10] If this means that an implicit finding after due consideration of the facts of a case is sufficient, then I agree. It is clear that in **Van Huysteen** the Magistrate gave the assurance that she considered all the factors mentioned in section 342A before she decided to refuse the postponement.[11] It is, in my view, advisable that an express finding to the effect that the completion of the proceedings is being delayed unreasonably should be made.

[22] The finding that the proceedings are being delayed unreasonably is important because it unlocks the applicable remedies. Without a finding of an unreasonable delay the remedies suggested in section 342A(3) would not be applicable. I say this because if the Court finds that the delay is reasonable it may postpone the case in accordance with section 168, on the proper terms and conditions.

[23] Assuming there was a delay in this matter, the Magistrate neither held an enquiry nor did he make any finding with regard thereto. He did what the prosecutor requested him to do. The Magistrate irregularly allowed the Prosecutor to usurp his judicial function by deciding that a matter that was properly on the roll should be removed. The Magistrate acceded to the Prosecutor's request without question or reflection. He did so without giving the applicants' legal representatives an opportunity to address him before striking the case off the roll.

[24] The Prosecutor had no authority to ask the Magistrate to strike a properly enrolled matter off the roll, without holding an enquiry. The holding of an

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[10] Ibid at para 8.
[11] Ibid at para 12.

investigation in terms of section 342A and ultimately applying the suggested remedies, if the delay is found to be unreasonable or the grant or refusal of a postponement in terms of sections 168, falls squarely within the remit of the Court. If the Prosecutor was of the view that the matter should not be postponed any further he should have withdrawn the charge.

[25] It can also not be said that the Magistrate, by implication, refused a postponement, for the simple reason that there was no application for a postponement. The matter was properly on the roll. Striking it off the roll, solely based on the Prosecutor's request, was irregular.

[26] The upshot of the above discussion is that the Magistrate did not apply section 342A(3)(c) when he struck the matter off the roll. The applicants' argument that the proceedings could not be instituted in the Regional Court without a written instruction by the DPP must be rejected.

[27] The case was therefore properly instituted in the Regional Court.

[28] There is another issue that was debated before the Regional Magistrate which was not resolved. The issue relates to the question whether a plea in terms of section 106(1)(i), that the prosecution may not be resumed or instituted owing to an order by a court under section 342A (3)(c), may be pleaded with a plea of not guilty? Mr. Matee, argued in the Regional Court, that since the applicants pleaded not guilty and that the proceedings may not be commenced or instituted *de novo* the applicants had a right to demand to be convicted or acquitted.

[29] A plea of not guilty normally signifies that the accused puts in issue some or all of the allegations in the charge sheet or indictment. She or he then enters into a legal battle with the State to prove all the allegations or the contested allegations against him or her.

[30] With a plea in terms of section 106(1)(i) the accused indicates that the State is not yet ready to even put the charge to him or her because it does not have

the necessary wherewithal, to do so. It is an important dilatory plea, because, first, it ensures that the decision to resume or institute the proceedings *de novo* is taken at a high level and, second, that the decision maker applies his or her mind properly before taking it. In Naidoo[12]it was said that:

> 'It is clear that, having regard to the Constitution, particularly the rights of accused persons to a fair trial – including the right (in terms of s 35(1)(d)) to have their trial begin and conclude without unreasonable delay – that a decision to resume or institute *de novo* a prosecution in circumstances where a court has already determined that there has been unreasonable delay in the completion of proceedings is not one to be taken lightly. The interests of the accused, the State and witnesses are all to be taken into account. I agree with the submission on behalf of the appellants that it is a decision meant to be taken at a higher level of authority.'

[31] A plea in terms of section 106(1)(i) has nothing to do with the guilt or innocence of the accused but everything to do with respect for the Rule of Law. Everyone, including the prosecuting authority, is subject to the law and court orders should be obeyed.[13]

[32] In my judgment, a plea in terms of section 106(1)(i) only bars the prosecution from commencing or instituting the proceedings *de novo* without written authorization. It does not entitle the accused to demand to be convicted or acquitted. If it is properly taken and accepted by the Court, the case must be dealt with in accordance with the law, including the withdrawal of the charge, striking the matter of the roll or even postponing the matter.

[33] In my view, it is best that a plea in terms of section 106(1)(i) be adjudicated before the accused pleads on the merits.

[34] In this matter the applicants' pleas in terms of section 106(1)(i) were properly rejected. Their pleas of not guilty is still extant. The matter should proceed

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[12] Infra fn 3 at para 38.

[13] Section 1 of the Constitution provides:
'The Republic is one, sovereign, democratic state founded on the following values:
(a) ...
(c) Supremacy of the constitution and the rule of law.'

on that basis. The applicants have not yet given plea explanations in terms of section 115 of the Act. The Regional Magistrate should give them an opportunity to do so.

[35] I accordingly make the following order:

[a] The application is dismissed with no order as to costs.

[b] The matter is remitted to the Regional Court for the Regional Magistrate or another Regional Magistrate to deal with in accordance with this judgment and the law.

C.J. MUSI, JP

I concur.

C. REINDERS,

Appearances:

For the Applicants: Mr K. Matee
Instructed by Matee Attorneys
Bloemfontein

For the Respondents: Adv. S. Giorgi
Instructed by National Director Prosecutions
Bloemfontein