**IN THE KWAZULU-NATAL HIGH COURT OF SOUTH AFRICA PIETERMARITZBURG**

**CASE NO. AR80/2010**

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS**
**KWAZULU-NATAL**

**APPLICANT**

and

**REGIONAL MAGISTRATE T.W. LEVITT** **RESPONDENT**

**AND**

**BALLISTICS PROTECTION AGENCIES CC**
**Represented by David William Smith** **INTERESTED PARTY**

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**REVIEW JUDGMENT** delivered on 07 April 2011

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**SWAIN J**

[1] The applicant, the Director of Public Prosecutions for KwaZulu-Natal, seeks an order reviewing and setting aside an order made by the respondent, a Mr. T. W. Levitt (a Regional Magistrate in Durban) in Case No. 23/16447/2008, refusing an application by the applicant for an adjournment of the matter. As a consequence the applicant

was forced to close its case. Thereafter an application for the discharge of the accused, Ballistic Protection Agencies cc, represented by David William Smith and cited in the present proceedings as the "interested party", in terms of Section 174 of the Criminal Procedure Act No. 51 of 1977 (the Act) was granted by the respondent. As a consequence the applicant also seeks a review of this decision.

[2] The respondent has filed a response to the application, in which he states that he stands by both of the decisions that he made, but will abide the decision of this Court.

[3] The interested party has filed an opposing affidavit in which a number of "matters *in limine*" are set out, in which the interested party complains of the failure by the applicant to comply with the provisions of Rule 53 (1) of the Rules of this Court, as well as a number of other technical defects in the application papers. In addition, it is alleged that the applicant has failed to bring the present review proceedings, within a reasonable period of time after the respondent's orders were granted.

[4] I propose dealing at the outset with the merits of the application and thereafter with such "matters *in limine*'.

[5] The Magistrate's power to adjourn the proceedings is found within the provisions of Section 168 of the Act in terms of which the Magistrate was entitled to adjourn the proceedings, "if the Court deems it necessary or expedient" to do so.

[6] The decision under the section is one within the discretion of the judicial officer presiding at the trial and should, therefore, not be interfered with except on the ground that he or she, has not exercised a judicial discretion. An appeal court should not substitute its discretion for his or hers and should therefore not interfere, merely on the ground that it would have come to a different conclusion.

***R v Zackey***
***1945 AD 505 (A) at 511***

In this case, by reference to the decision in

***Maxwell v Keun***
***1928 (1) KB 645***

it was pointed out that a court of appeal would be very slow to interfere with the discretion of the judicial officer in the Court *a quo,* on the question of the adjournment of a trial and it very seldom would do so.

[7] In exercising such a discretion two basic principles must be borne in mind.

"The one is that it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted to be tried".

***State v Geritis***

***1966 (1) SA 753 (W) at 754 D – F***

[8] Where the State seeks an adjournment, relevant factors are whether the persons sought to be called are material witnesses, that the State has been guilty of no neglect in omitting to procure their attendance and there is a reasonable expectation that their attendance will be secured at a future date. Although these factors are all of importance, it is not necessary that they all be satisfied before an adjournment may be granted. Although it is essential that the evidence sought to be led is material, even if there has been neglect in securing the attendance of a witness, an adjournment might be granted if the Court is satisfied that the witness will attend at a later date.

**Geritis *supra* at 754 (H) – 755 D**

It should be noted that in Geritis, the Court was not concerned with the approach to be adopted by an appeal court, dealing with a

challenge raised to a decision to refuse an adjournment taken by the Court *a quo*, but rather with the approach to be followed by a court sitting as a court of first instance, to a request for an adjournment.

[9] It is clear however that the decision must ultimately depend upon the material facts of the particular case.

[10] The material facts of the case are as follows:

[10.1] The respondent was charged with fraud, it being alleged that the respondent had unlawfully and with intention to defraud, falsely misrepresented to the Commissioner of the South African Revenue Services, that the contents of input invoices, for the purposes of the payment of Value Added Tax were correct, when the accused knew that the supplier of the goods never existed and all the information supplied was false. It was alleged that the accused as a result caused potential prejudice to S A R S in the amount of R691,767.98. In the alternative it was alleged that the accused contravened Sections 59 (1) and 59 (2) of the Valued Added Tax Act, by furnishing tax invoices knowing them to be false.

[10.2] The accused was summoned to appear at the Magistrates' Court in Durban on 12 November 2008, the matter was enrolled on two occasions and was then adjourned for trial on 07 April 2009.

[10.3] On 07 April 2009, the trial commenced and the evidence of Philip Mhlongo was heard and completed on that day.

[10.4] After his evidence was completed the Prosecutor, Mr. Manciya, who also argued the review before us, informed the Court that he did not have further witnesses as they were not available, but he wished to call them at a later date. When asked by the Court who these witnesses were he said he would be calling Mr. Haynes, the accountant of the accused as well as a Mr. Avis, whom he referred to as "the investigating officer in this case".

[10.5] On 27 August 2009 Mr. Haynes was called and when he had completed his evidence, Mr. Manciya said although it had been planned for the matter to run on 27 and 28 August 2009, he did not have Mr. Avis present and had not subpoenaed him to attend court. He explained the reason for this was that because the witness worked for S A R S he believed

"that he could simply be called in and from what I thought, he was going to come without serving a subpoena".

He accordingly applied for an adjournment of the matter, which was opposed by the legal representative of the accused.

[10.6] Later during argument on the adjournment, Mr. Manciya indicated that after the evidence of Mr. Avis he would be

"Calling these other people".

When the legal representative objected on the basis that an adjournment was now being sought to lead the evidence of several witnesses, the Magistrate asked Mr. Manciya, whether the last physical witness would be Mr. Avis. He replied this would be the case. When the Magistrate asked Mr. Manciya

"There are no other witnesses?" Mr. Manciya replied "No".

[10.7] The Magistrate thereafter refused the adjournment and asked Mr. Manciya

"Does it mean you close your case? You are forced to", to which Mr. Manciya replied

"I am forced to, against my convictions" to which the Magistrate replied

"I understand".

[10.8] The legal representative for the accused then requested the discharge of the accused in terms of Section 174 of the Act, whereafter Mr. Manciya sought an adjournment of the matter to the following day, to enable him to prepare argument.

[10.9] On the following day Mr. Manciya indicated he wished to take the decision of the Magistrate refusing an adjournment, on review. The Magistrate then asked Mr. Manciya who the witnesses were who he wished to call, and he replied

"Avis, Maria Barnes, van der Walt from S A R S and a person from Sitco".

When questioned further he said that an additional witness was "Buys".

[10.10] When the Magistrate asked Mr. Manciya why van der Walt was not at Court, he said she had not been subpoenaed, because he wanted to canvas the admission of her affidavit, which was in the docket, with the defence.

[10.11] The Magistrate, after further argument, then refused to stay the matter to enable the State to bring an application for a review of his decision refusing the adjournment. Thereafter the Magistrate heard further argument on the application for the discharge of the accused and granted the application.

[10.12] If the matter had been adjourned, the earliest date for continuation would have been during February or March 2010.

[11] Before us Mr. Manciya, fairly and properly conceded that it was due to his neglect, that the attendance of the necessary witnesses at the trial on 27 August 2009, was not secured. It is clear that his neglect was of a serious nature, as the State had four months to secure the attendance of all of these witnesses. In addition, it is clear that the object in adjourning the matter to 27 to 28 August 2009, was to complete the trial.

[12] When all of the above is considered, I am not persuaded that the Magistrate failed to exercise his discretion judicially. The Magistrate considered the evidence that had been led against the accused at that stage, with particular emphasis upon the vital issue of whether the supplier of the goods in question did not exist. The Magistrate also considered the nature of the evidence that the State wished to lead, as well as its materiality, in establishing the issue of whether the supplier of the goods existed.

[13] The Magistrate also considered the history of the matter, as well as the need for the previous adjournment of the matter, which were of relevance in assessing the possible prejudice to the accused, if the matter was adjourned again.

[14] The Magistrate was therefore alive to the two basic principles to be applied, in exercising his discretion, whether to grant an adjournment or not, namely that guilty men should be duly convicted and not escape by reason of any oversight or mistake, which can be remedied, as against the right of an accused person once indicted, to be tried with expedition.

[15] Bearing in mind the dictum in Zackey that an appeal court should not, in a case such as the present, substitute its discretion for that of the Magistrate, and should not interfere merely on the ground

that it would have come to a different conclusion, I am satisfied that the application for a review of the Magistrate's decision should be dismissed.

[16] A dismissal of the application to review the decision of the Magistrate refusing an adjournment, has as its inevitable consequence, the dismissal of the application to review the decision of the Magistrate, to discharge the accused in terms of Section 174 of the Act. This is because the basis for the challenge raised against this decision, was the refusal by the Magistrate to grant an adjournment, as no irregularity has been alleged on the part of the Magistrate, in granting the discharge of the accused.

[17] As regards the so-called "matters *in limine",* in the light of the conclusion I have reached on the merits of the application, I find it unnecessary to deal with them all, save and except for the allegation that the applicant failed to bring the present proceedings, within a reasonable time of the refusal by the respondent, of the application for an adjournment.

[18] The notice of motion was issued by the Registrar on 02 March 2010, more than six months after the refusal of an adjournment of the matter. No explanation has been advanced for such an inordinate delay, which is a further glaring example of the dilatory manner in

which the applicant has acted. It is also clear that the papers were only served upon the interested party, on 16 February 2011, some eighteen months after the orders made by the respondent. Again there was no satisfactory explanation by the applicant for this conduct.

[19] It is clear that review proceedings must be instituted within a reasonable time. Two of the principle reasons why a court should have the power to refuse to entertain a review, at the instance of an aggrieved party who has been guilty of unreasonable delay are that:

[19.1] Unreasonable delay may cause prejudice to other parties.

[19.2] It is both desirable and important that finality should be reached within a reasonable time, in respect of judicial and administrative decisions.

***Radebe v Government of the Republic of South Africa & Others 1995 (3) (SA) 787 (N) at 798 A – D***

[20] In deciding whether a reasonable time has elapsed, a court does not exercise a discretion. The enquiry is a factual one, that is, whether the period which has elapsed is, in the light of all the relevant circumstances, reasonable or unreasonable

**Radebe *supra* at 798 I**

[21] In my view the delay, in the absence of any explanation by the applicant, is unreasonable. The prejudice to the interested party of having to defend criminal proceedings some two years after the first date of hearing, is self evident. I would accordingly dismiss the application on this additional ground.

[22] The dilatory conduct of the applicant in the prosecution of the review proceedings before this Court, form the basis for the request by the interested party, that the applicant be ordered to pay the costs of this application on the attorney and client scale. The interested party also points to the conduct of the applicant in only serving a copy of the papers upon the interested party, on 16 February 2011, some eighteen months after the grant of the order complained of. In my view, the dilatory conduct of the applicant constitutes an abuse of the process of this Court, particularly as there is no explanation for this behaviour. I am satisfied that the disapproval of this Court, should find expression in a punitive award of costs on the attorney and client scale against the applicant.

I make the following order:

a) The application is dismissed.

b) The applicant is ordered to pay the interested party's costs, such costs to be taxed on the attorney and client scale.

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**K SWAIN J**

**I agree**

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**GCABA A J**

***Appearances /***

**Appearances:**

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| **For the Applicant** | **:** | Mr. P. Manciya |
| **Instructed by** Prosecutions | **:** | Director of Public<br>KwaZulu Natal |
| **For the Respondent/ Interested Party** | **:** | Mr. R. D. Sichel |
| **Instructed by** | **:** | Jacques Botha & Associates<br>Durban |
| **Date of hearing** | **:** | 31 March 2011 |
| **Date of Judgment** | **:** | 07 April 2011 |