IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 7122/19P

In the matter between:

NAEEM ESSOP	**APPLICANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTION (KWAZULU-NATAL)	**SECOND RESPONDENT**
THE SENIOR PUBLIC PROSECUTOR (VERULAM REGIONAL COURT)	**THIRD RESPONDENT**

Coram: Koen J

Heard: 14 August 2020

Delivered: 5 October 2020

ORDER

The application is dismissed.

JUDGMENT

Koen J

[1] The applicant claims the following relief in regard to a criminal prosecution that is pending against him (the second trial) in the Regional Court, Verulam:

(a) An order that the prosecution in respect of any and all charges that he faced in respect of a previous trial in the Verulam Regional Court under case number VCR 93/14 (the previous trial) be stayed permanently.

(b) Pursuant thereto an Order that the criminal proceedings presently pending against the applicant in the second trial be withdrawn forthwith in absentia, with no obligation on the part of the applicant to appear for purposes of such withdrawal.[1]

(c) An Order that those respondents[2] who oppose this application pay the costs, jointly and severally.

Background

[2] In the previous trial, which commenced on 10 December 2014, the applicant was charged with murder (count 1), assault with intent to do grievous bodily harm (count 2), and pointing a firearm (count 3). On 25 January 2016 he was acquitted on count 2, but

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[1] This court cannot direct that charges be withdrawn. It can only review decisions of the respondents, and where appropriate, set them aside, or interdict conduct. The applicant conceded during argument that the relief in this subparagraph was not competent, and did not persist with such relief. This judgment therefore deals with only the relief in sub-paragraphs (a) and (c).

[2] The first respondent is the National Director of Public Prosecutions, the second respondent is the Senior Public Prosecutor, and the Third Respondent is the Senior Public Prosecutor (Verulam Regional Court).

convicted on counts 1 and 3. On 1 April 2016 he was sentenced to periods of imprisonment of 15 years and 2 years respectively. An appeal to the High Court succeeded on 2 March 2018[3] on the technical ground that the trial court had not complied with the proviso to s 93*ter*(1)[4] of the Magistrates' Court Act,[5] in that the magistrate had failed to appoint two assessors to assist her, in circumstances where the applicant had not requested that the trial proceed without assessors. The convictions and sentences were accordingly set aside.

[3] The third respondent, as it is entitled to do in terms of s 324[6] of the Criminal Procedure Act[7] (the Act), thereafter decided to prosecute the applicant *de novo,* in respect of the count of murder. It is this decision that has resulted in the second trial.

[4] The applicant submitted representations to the second respondent requesting that the further prosecution in the second trial should not be proceeded with against him. When those representations were unsuccessful, he escalated his representations to the first respondent. The first respondent confirmed the view of the second respondent in regard to the applicant's representations. The applicant was summoned on 15 August

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[3] Per Ploos van Amstel J and Maharaj AJ.

[4] Section 93*ter* (1) provides:

'The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice —

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

[5] Magistrates Court Act 32 of 1944.

[6] Section 324 provides that:

'Whenever a conviction and sentence are set aside by the court of appeal on the ground —

(a) that the court which convicted the accused was not competent to do so; or

(b) that the indictment on which the accused was convicted was invalid or defective in any respect; or

(c) that there has been any other technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings.'

[7] Criminal Procedure Act 51 of 1977.

2019 to appear before the Verulam Regional Court in respect of the second trial on 26 September 2019. The present application was launched by the applicant on 19 September 2019. The proceedings in the second trial have subsequently been postponed to allow for the finalisation of this application.

The applicant's complaints

[5] The contentions of the applicant are as follows: the second trial will be fundamentally prejudicial to him (both in regard to trial prejudice and other prejudice); he had already been exposed to the entire process of a criminal charge and prosecution which exposed him to a lengthy trial in which he had to spend vast sums of money on legal representation and the subsequent appeal; he suffered unjustifiable incarceration prior to being granted leave to appeal, at the hands of the trial magistrate who was biased against him; his convictions and sentences were set aside due to the fault of the trial magistrate and through no fault of his own; the new prosecution has no reasonable prospects of success; the evidence he gave at the previous trial 'will be admissible'[8] against him in the second trial, thus denying him the right to remain silent, not to testify, and to test the strength of the State case without disclosing his evidence; he had already spent approximately R1 million on legal fees, his business has collapsed, he has been brought to his financial and emotional knees, and he does not have the financial or emotional wherewithal to defend himself effectively again; the trial has been unreasonably delayed through no fault of his; due to his worsened financial position his right to a legal representative of his choice has been denied; his right to silence in the face of the State case and not to testify has been denied on the basis that in the new trial the State in presenting its case already has his version in response thereto, which it can utilise in its preparation for, and presentation of the State case the second time around; a witness, Mr Rathanam Nair (originally a State witness) necessary to corroborate his defence relating to an attack upon him by the deceased who had a firearm, has since the conclusion of the previous trial died and is no longer available to assist the applicant; there is no evidence that the family of the deceased, or anyone else in society has any interest in the

[8] Any alleged legal basis for this contention was not explained by the applicant.

prosecution proceeding a second time; and the prospects of a successful prosecution in the second trial are poor.

[6] During argument the applicant categorised his complaints under the following headings, which I, for practical purposes, shall also adopt in this judgment when considering the applicant's contentions seriatim below: the second trial has been unreasonably delayed; the applicant has suffered non-trial prejudice because of irregular conduct on the part of the magistrate in the previous trial and the emotional, reputational, and financial prejudice the applicant has experienced; the applicant has suffered trial prejudice because his right to silence has been breached irreversibly and he will be unable to adduce the evidence of a witness who has died in the interim; the interests of the deceased and/or his family do not require a second trial; and finally, that the prospects of a successful prosecution during the second trial are poor.

The legal basis for the relief claimed

[7] The applicant relies, as the basis for the relief claimed, on what he says was the advice of his 'legal representatives together with his own understanding of his constitutional rights', namely the right to a fair trial provided for in s 35(3) of the Constitution. He maintains that the second trial will result in a gross violation of some[9] of these rights to his prejudice.

[8] As regards the right to a fair trial, it is universally accepted that '[t]he right of every man to a fair hearing before he is condemned lies at the root of the tree of justice.'[10] Most of the common law principles protecting fair trial rights have now been codified in s 35 of the Constitution. Section 35(3) provides that:

'Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

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[9] There is, for example, no complaint that the applicant was required to give self-incriminating evidence in breach of s 35(3)*(j)*; or that he is tried for an offence of which he had previously been either acquitted or convicted on the merits in breach of s 35(3)*(m)*; or that he was denied the right as an arrested person to remain silent, in breach of s 35(1)*(a)*.

[10] Per Griffiths CJ of the High Court of Australia in *Rowe v Australian United Steam Navigation Co. Ltd* (1909) 9 CLR 1.

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.'

[9] The rights enumerated in s 35(3) are prerequisites to a fair trial, but do not constitute a closed list of rights to be considered in deciding whether an accused has had a fair trial. In *S v Zuma and Others*[11] Kentridge AJ held:

'The right to a fair trial conferred by that provision [s 25 of the Interim Constitution, 1993] is broader than the list of specific rights set out in paras *(a)* to *(j)* of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.'

[11] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 16 at 651J – 652A.

In *Ramabele v S, Msimango v S*[12] the Constitutional Court quoted from *S v Zuma*,[13] held that:

'The right to a fair trial has been described by this Court as a "comprehensive and integrated right" and is "not to be equated with what might have passed muster in our criminal courts before the Constitution came into force".'

Fair trial rights may be limited 'only[14] in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…'[15]

[10] The applicant maintains that the previous trial, which was set aside on appeal, was a complete waste of time, and breached his 'right to have [his] trial begin and conclude without unreasonable delay,'[16] but that apart from that delay,[17] various other fundamental rights would be breached if the second trial proceeded.

[11] Whether a breach of a trial right will be actionable and give rise to any remedy, shall depend on whether the accused person has suffered significant prejudice,[18] or is irredeemably likely to suffer such prejudice. The onus to establish such prejudice will be on the applicant. Whether the alleged breaches of any constitutional rights will give rise to such prejudice shall be considered below in respect of the various categories of complaint alluded to earlier. Before doing so, it is necessary to refer briefly to the remedies available to an accused person whose fair trial rights are threatened, and to comment briefly on which courts have jurisdiction to entertain applications for such relief.

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[12] *Ramabele v S; Msimango v S* [2020] ZACC 22 para 32.
[13] *S v Zuma* above.
[14] Section 36(1) of the Constitution.
[15] Section 36(1)*(a)* to *(e)* of the Constitution.
[16] Section 35(3)*(d)* of the Constitution.
[17] The applicant does not complain of any delays during the various stages of the previous trial.
[18] That was the requirement set by Kriegler J in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) para 38 when he said that a permanent stay '. . .will seldom be warranted in the absence of significant prejudice to the accused'.

The remedies available for a breach of constitutional rights to a fair trial

[12] South African jurisprudence is rights based, that is, that if there is a breach of a right, the law will afford a remedy. This is particularly so in regard to constitutional rights, and the broad discretion entrusted to courts in crafting appropriate remedies that are 'just and equitable', in terms of s 172(1)*(b)* of the Constitution. There is only one system of law applied by all courts.[19]

[13] Section 342A of the Act gives some effect to the right in s 35(3)*(d)* of the Constitution. Although there was some debate whether s 342A, unlike s 35(3)*(d)*, extends also to pre-trial delays,[20] it goes wider than s 35(3)*(d)* in not only providing remedies to an accused person, but also to the prosecution, the State and witnesses. The portions of s 342A of the Act that are relevant to this judgment provide:

(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 nonavailability of

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[19] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 22.

[20] In *S v Naidoo* 2012 (2) SACR 126 (WCC), the delay was from 2004 until 2010 when the summons was issued and the criminal proceedings commenced. The application for a stay of prosecution was brought at the first hearing in the regional magistrate's court before the accused pleaded to the charges. The court did not have jurisdiction under s 342A.

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;

(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

(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….'

[14] As a general principle, where there is a violation of constitutional rights, an aggrieved party will be entitled to a just and equitable remedy.[21] This could, in the context of a trial, include a finding that there has been an undue delay, which may result in one or more of the remedies provided in s 342A of the Act (which effectively might bring the prosecution to an end), or a court may order a permanent stay of prosecution (whether in circumstances as contemplated by s 342A, or on grounds going beyond that section), or it may find that the accused has not had a fair trial and should be acquitted. However, a court would not necessarily be confined to these possible remedies – there might conceivably be others. Ultimately, the determination of what might constitute an appropriate remedy will depend on the particular circumstances prevailing in each case.

[15] Some controversy has however arisen in recent times, as to which courts may have the jurisdiction to grant varying remedies: a distinction being made as regards magistrates' courts, the high court and the Constitutional Court. In particular, in the context of this application, the issue arose tangentially during argument as to whether only the high court would have the jurisdiction to grant an order for a permanent stay of a prosecution, and whether such an order could also be granted by a regional court. This debate arose in regard to the wording of s 342A of the Act which requires that '[the] court before which criminal proceedings are pending shall investigate any delay . . . ', hence whether, to the extent that the applicant's application may be founded on s 342A, the regional court hearing the second trial, rather than this court, should not be the court to apply that section. It resulted in the applicant seeking to base his case rather on s 35(3) of the Constitution, than s 342A of the Act. In this context the applicant referred me, amongst others, to the decisions in *Naidoo v Director of Public Prosecutions and Others*,[22] *Naidoo v Regional Magistrate, Durban and Another*,[23] *S v Sayed and Others*,[24]

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[21] Section 172(1)*(b)* of the Constitution. Section 172 provides:
'When deciding a constitutional matter within its power, a court —
(a) . . .
(b) may make any order that is just and equitable …'
[22] *Naidoo v Director of Public Prosecutions and Others* [2020] ZAKZDHC 39.
[23] *Naidoo v Regional Magistrate, Durban and Another* 2017 (2) SACR 244 (KZP).
[24] *S v Sayed and Others* [2017] ZASCA 156, 2018 (1) SACR 185 (SCA).

Sanderson v Attorney-General. Eastern Cape,[25] and *S v Naidoo*[26] and authorities cited in those cases. The applicant however submitted that the relief sought should not be left for determination by the trial court/regional court, as the wording of s 342A provides, but that the relief claimed may appropriately be considered by this court (although it is not the court hearing the second trial). He placed reliance on the recent judgment of Steyn J (Nkosi J concurring and D Pillay J dissenting) in *Naidoo v DPP and Others,* where the majority concluded that it is only the high court that can grant such relief where the basis for the relief is that constitutional rights of an accused person are or will be breached (as opposed to the complaint being restricted to an undue delay).

[16] Whether the majority view in *Naidoo* was correct, might justifiably, in due course, require the attention of the Supreme Court of Appeal and/or the Constitutional Court. The opposing view that the magistrates' court would have such jurisdiction was argued persuasively by D Pillay J in her dissenting judgment in *Naidoo.* The reader of this judgment is referred to D Pillay J's judgment in that regard. Her judgment will not be summarised or dealt with further in this judgment. It however seems to me that the issues of an unreasonable delay and/or a breach of constitutional rights, may be so intertwined, not only at the level of principle, but also with regard to whether an accused person suffers significant prejudice, that they should more appropriately, as provided in s 342A of the Act, and as resulting from the application of one system of law, be investigated and considered in the context of the particular facts which might arise, and an appropriate remedy determined, by the court before which the criminal proceedings are pending. It does not appear that, in principle, anything should stand in the way of that court, patently being the more appropriate court to decide issues of prejudice, to grant an appropriate order. Such a determination would not be one relating to the 'constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President', which are issues reserved for determination by only 'the Supreme Court of Appeal, a High Court or a court of similar status', in terms of s 172(2)*(a)* of the Constitution.

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[25] *Sanderson v Attorney-General. Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) para 8.
[26] *S v Naidoo* 2012 (2) SACR 126 (WCC).

[17] Courts outside this province appear not to have had any problem with a magistrate's court exercising jurisdiction in matters of this nature. The SCA in *S v Sayed and others*[27] *c*onfirmed a decision of a magistrate's court dismissing an application for a permanent stay of prosecution, without questioning its jurisdiction. The Constitutional Court also held in *Masiya v Director of Public Prosecutions, Pretoria and another (Centre for Applied Legal Studies and Another, amici curiae)*[28] in regard to a magistrates' court's jurisdiction to apply fair trial rights that:

'The wording of s 110 shows that the magistrates' courts are under an attenuated duty in relation to the development of the common law. They are, however, bound to give effect to the constitutional rights as all other courts are bound to do in terms of s 8(1) of the Constitution. Magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused.'

[18] In my view a magistrate's court has the jurisdiction to determine, indeed it has the duty to ensure, at every stage of an accused person's trial, that he/she receives a constitutionally fair trial, and to issue appropriate directions as to the future course of the trial before it, to achieve that purpose. Section 35 of the Constitution and s 342A of the Act complement and reinforce each other to ensure criminal proceedings are fair. Where s 342A of the Act does not reach, the Constitution fills the gaps. Section 170 of the Constitution requires magistrates' courts to determine whether an accused's fair trial rights are being infringed, it only may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.[29] If a magistrates' court may make such a determination, then it must follow that it must also determine an appropriate remedy which, under s 172, must be just and equitable.[30]

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[27] *S v Sayed and others* [2017] ZASCA 156; 2018 (1) SACR 185 (SCA).
[28] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, amici curiae)* 2007 (5) SA 30 (CC) para 68.
[29] Section 170 provides that: 'All other courts [this would include the magistrates' courts] than those referred to in sections 167 [ie Constitutional Court], 168 [Supreme Court of Appeal] and 169 [high courts] may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'
[30] Section 172(1) of the Constitution provides that when deciding a constitutional matter within its power, a court may make any order that is just and equitable.

[19] There have been instances in which high courts have refused to hear applications to stay prosecutions in criminal proceedings pending in the magistrates' courts. In *Hartley v Presiding Magistrate D Court Krugersdorp Magistrates Court and Others*[31] Satchwell J held that she was 'loath to interfere in the proceedings of another court – notwithstanding that the relevant statute permits same and … very reluctant to make any order at all involving another court without a full investigation and corroborated facts being presented.'[32] If an accused brings alleged unreasonable delays to the attention of the presiding magistrate or if the magistrate becomes concerned about delays that could cause any prejudice, then 'that presiding magistrate would have had regard to the factors set out in s 342A(2) and, after consideration, ... [make] an appropriate intervention.'[33] Similarly, in *Madiba v Director: Public Prosecutions Northern Cape*[34] the full court affirmed:

'[A] court before which criminal proceedings are indeed already pending would in terms of section 342A(1) of the Act be enjoined to investigate a delay in the completion of those proceedings and that would therefore be competent to consider sanctions or remedies like refusing a further postponement or striking the case off the roll. An accused can therefore not, it seems to me, in a court before which the particular criminal proceedings against him or her are not in any way pending, apply for relief on the basis of the provisions of section 342A of the Act, and such an application would not then magically transform such a court into one before which the criminal proceedings are pending. In my view it is clear that the criminal proceedings should be pending before the court at the stage when the application is made to that particular court.' [35]

[20] The Constitutional Court approved of *Qozeleni* in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*.[36] Reinforcing similar sentiments as expressed in *Qozeleni*,[37] Kriegler J observed in *Ferreira v Levin NO and*

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[31] *Hartley v Presiding Magistrate D Court Krugersdorp Magistrates Court and others* [2015] ZAGPJHC 75.
[32] *Hartley v Presiding Magistrate D Court Krugersdorp Magistrates Court* para 5.
[33] *Hartley v Presiding Magistrate D Court Krugersdorp Magistrates Court* para 7.
[34] *Madiba v Director: Public Prosecutions Northern Cape* [2016] ZANCHC 30.
[35] *Madiba v Director: Public Prosecutions Northern Cape* para 14.
[36] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11 para 167.
[37] *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 634.

Others; Vryenhoek and Others v Powell and Others[38] that the constitutional injunction that an accused be given the right to a fair trial, is best given effect to by the trial judge because:

'fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'[39]

[21] I express the above tentative views regarding the jurisdiction of the various courts to grant appropriate remedies simply because the issue was touched on in argument before me. My comments are however obiter as it is unnecessary for the purpose of this judgment, in the light of the conclusion to which I have come, to express any definitive view regarding this jurisprudential debate. If, and when, the applicant in the future believes that circumstances have arisen which might justify relief, then the issue as to the correct forum in which to proceed, will have to be addressed.

[22] The wisdom of the legislature in providing s 342A of the Act that the 'court before which criminal proceedings are pending' must conduct the enquiry into any unreasonable delay, holds a logical appeal. Save for possible exceptional instances, a determination as to whether a breach of fair trial rights has or will result in irredeemable prejudice, is best left for determination by the trial court before which the proceedings are pending. I shall endeavour to demonstrate this more fully with reference to the categories of complaint which the applicant advanced under the headings identified earlier.

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[38] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell and Others* 1996 (1) SA 984 (CC) – see paras 187 – 207

[39] *Key v Attorney-General, Cape Provincial Division, and Another* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 para 13.

Undue delay

[23] The right to have a trial begin and conclude without unreasonable delay[40] is merely one component, albeit an important one, of the right to a constitutionally fair trial. It has been remarked that:

'[u]ndue delay in the administration of criminal justice poses serious threats to the freedom and well-being of the individual citizen. If criminal charges are long pending against an accused, he may suffer extreme anxiety and harassment and may be forced to undergo lengthy imprisonment prior to trial. Delay can also impair the ability of an accused to refute the charges brought against him-potential witnesses may no longer be available, or the memories of available witnesses may be blurred by the passage of time.'[41]

[24] In *Sanderson v Attorney-General, Eastern Cape*[42] the Constitutional Court in dealing with what the right to a trial 'within a reasonable time' entails, emphasised that '*time*' in the context of the right was not solely concerned with the actual passing of days, months, or years, but more with prejudice sustained by an accused person in the context of delays.

[25] Section 342A of the Act and s 35(3)*(d)* of the Constitution both give expression to the right to have a trial begin and conclude without unreasonable delay. Particularly s 342A requires a consideration of the kind of prejudice that may arise, at the time it arises, within the factual context of the trial, in this instance, the second trial.

[26] There are very cogent reasons why s 342A of the Act provides that the trial court should hear such application. The issue of any delay is best left for determination by the trial court, rather than it being dressed up as a civil suit and determined in a sterilised civil court environment far removed from the atmosphere of a criminal court. I am aware that applications for a permanent stay due to delay have been heard separately before courts

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[40] Section 35(3)*(d)* of the Constitution.
[41] AL Schneider The Right to a Fair Trial (1968) 20 *Stan LR* 476.
[42] *Sanderson v Attorney-General. Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC).

other than the trial court,[43] but those instances should, with respect, be confined to exceptional instances, and instances where there was yet no subsequent pending case.

[27] The applicant made it clear that it is not his contention that there were unreasonable delays at any of the stages of the previous trial, or that such stages and delays as have occurred to date in the second trial, have been unreasonable. That concession makes it unnecessary to set out an analysis of the timing of steps taken during the previous trial. I might just add that having considered the steps taken in the previous trial, the concession was correctly made. Such delays as might have occurred were not undue, and were systemic. The applicant's argument was simply that it was the magistrate's failure to have applied s 93*ter* of the Magistrates' Court Act, which resulted in the previous trial being set aside on appeal, which meant that the time spent on the previous trial up until the appeal, was wasted and hence 'delayed' the second trial. It is this delay, he argued, which will result in him not receiving a constitutionally fair trial as guaranteed by s 35(3) of the Constitution. He argued that it is the prejudice to him resulting from that delay which has to be assessed in principle, at the outset, and before the second trial commences.

[28] Whether constitutional rights will be breached and whether the applicant will be prejudiced should not be decided *in vacua* and on the basis of speculation. Every case must be decided on its own facts. Accepting that a high court may in appropriate circumstances grant an appropriate remedy where there has been an unreasonable delay, as contemplated in s 342A of the Act, even although it is not the trial court, and that a magistrates' court does not have the power to grant a permanent stay of prosecution, the circumstances establishing clear prejudice must first arise before such an application should be entertained. To make such a determination of prejudice on what is before this court at present, would be premature and speculative.

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[43] *Rodrigues v National Director of Public Prosecutions & others* 2019 (2) SACR 251 (GJ) and S v *Zuma and another and a Related Matter* [2019] ZAKZDHC 19; [2019] 4 All SA 845 (KZD); 2020 (2) BCLR 153 (KZD) (Mnguni, Steyn and Poyo-Dlwati JJ concurring), and *Director of Public Prosecutions, Northern Cape v Brooks and Others* [2020] ZASCA 80. It is not without significance, that in these matters the applications for a permanent stay were refused. Other applications have been successful, for example *DPP v Phillips* [2012] 4 All SA 513 (SCA). Each case will depend on its own facts.

[29] The second trial is the result of the omission by the magistrate in the previous trial to have applied s 93*ter* of the Magistrates' Court Act. The fact that a second trial has to be pursued will not have no consequences, but whether any of the applicant's constitutional rights will be infringed resulting in significant prejudice, and even if it might, whether the infringement of such rights might not be reasonable and justifiable, are issues inextricably tied up with the peculiar factual circumstances that might arise.

[30] If circumstances should arise during the second trial pointing to irredeemable significant prejudice to the applicant, then appropriate relief can be pursued, whether before the trial court, or, if required, in an application to the high court.

[31] Whether an accused has a fair trial is best left for determination when the actual unfairness manifests itself during the trial. That is not to say that there may never be instances where it might be clear before the commencement of a trial that it would be impossible for an accused to receive a constitutionally fair trial and that a permanent stay of prosecution should be ordered on that basis. The present case is not such an instance. Those instances, I would venture to suggest, are few and far between. But even where they do occur, the trial court (possible questions of jurisdiction apart) will generally, in the absence of exceptional circumstances, be the most appropriate court to make that determination.

[32] Further, unlike the normal s 342A of the Act situation, the cause of delay in this application is not attributed to the litigants i.e. the State (prosecution) or the defence (although they could have drawn the non-compliance with s 93*ter* of the Magistrates' Court Act to the magistrate's attention). The delay complained of is due to the failure of the magistrate to have constituted the previous trial court properly. The applicant accordingly submitted that the basis for his claim was a *sui generis* type of application based on a situation having arisen where, through no fault of his own (but also not the prosecution), he will not receive a constitutionally fair trial. In deciding the issue whether

he will receive a constitutionally fair trial it was contended that the factors listed in s 342A of the Act can nevertheless legitimately be incorporated and utilised for that purpose.

[33] In regard to the delay, the issue accordingly became mainly whether the delay until the second trial would commence, can be said to be so unreasonable as to justify a permanent stay of prosecution, if the delay ensued as a result of conduct of the presiding judicial officer.

[34] There might be no reason in principle why the conduct of a judicial officer cannot, in appropriate circumstances, result in an accused not having a fair trial. The mere fact that a prosecution has to commence *de novo* because of some irregularity by the presiding magistrate cannot however of its own be said to constitute an unreasonable delay *per se,* otherwise every instance where a previous trial is set aside on appeal due to an irregularity, will justify a permanent stay of any subsequent prosecution which may lawfully ensue. If the second prosecutions in those circumstances all require to be stayed permanently, then s 324 of the Act will be rendered ineffectual. The position is not much different from that where a judge or presiding magistrate dies, or has to recuse him/herself – it 'is not a free pass for a successful application for stay of prosecution, even in the event of a long criminal trial that needs to start *de novo*.'[44]

[35] In the final analysis any delay is simply another consideration, which together with other factors might result in an order for a permanent stay of the prosecution. No single factor is necessarily decisive on its own. A consideration of all the facts on a case-by-case basis, is required.[45] A balancing act must be performed by a court considering an extraordinary remedy, such as a permanent stay of prosecution. It will involve a consideration of firstly, the right to a fair trial within a reasonable time and the prejudice to the accused if it does not materialise; secondly, the nature of the case; and thirdly, so-

[44] *Director of Public Prosecutions, Northern Cape v Brooks and Others* [2020] ZASCA 80 para 47.
[45] *Van Heerden v National Director of Public Prosecutions and Others* 2017 (2) SACR 696 (SCA); [2017] 4 All SA 322 (SCA).

called systemic delays.[46] Barring the prosecution from before a trial begins is far reaching and prevents the prosecution from presenting society's complaint against an alleged transgressor. That will seldom be warranted in the absence of significant prejudice to the accused.[47]

Non-trial prejudice

[36] Non-trial prejudice is a relevant consideration although it may carry less weight. The applicant submits that the non-trial prejudice consists of:

(a) The prejudice sustained by him during the trial in the first prosecution consequent upon grossly irregular conduct of the magistrate who heard the previous trial;

(b) The prejudice already suffered by him emotionally, financially and reputationally.

The prejudice sustained by the applicant by the gross irregularities committed by the trial magistrate

[37] The entire record of the previous trial, was attached as an annexure to the application. I was advised that I need not read the trial record but that the applicant would refer to the specific portions on which any reliance would be placed. He submitted however that it is evident generally *ex-facie* the record that gross irregularities were committed against him by the trial magistrate. Indeed, the second respondent in a letter of 1 October 2018 conceded that: '…The conduct of the Magistrate during the trial does leave a lot to be desired…'

[38] The applicant alleges that the gross irregularities included biased conduct by the magistrate against him, the curtailment of his counsel's right to cross examine effectively, the magistrate ignoring relevant evidence and/or excluding such evidence, the prejudging of the sentences before argument was heard, the failure to allow certain mitigating evidence, and the magistrate assuming the role of a prosecutor. After the conviction and sentence the irregularities allegedly continued when the presiding magistrate did her best

[46] *Sanderson v Attorney-General. Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC).
[47] *Sanderson v Attorney-General, Eastern Cape* para 38.

to ‘unreasonably ensure’ that the applicant’s application for leave to appeal and bail pending such appeal, could not be heard immediately. By that time, the applicant had spent over a month in custody.

[39] The applicant submits that these gross irregularities by the trial magistrate during the previous trial are relevant as they constitute unjust and unfair prejudice to the applicant during the course of the previous trial, that he has already suffered significantly in that regard, and that it cannot be ignored and must be given due weight. In particular the applicant relies on the magistrate’s failure to comply with s 93*ter* of the Magistrates’ Court Act regarding her responsibilities in respect of assessors, which had the consequence that on that basis alone, the previous trial was vitiated on appeal, thus resulting in the second respondent now pursuing the applicant’s prosecution *de novo*.

[40] As much as non-trial potential prejudice is not necessarily irrelevant, the magistrate’s alleged misconduct in this matter is academic and moot. No court has declared the magistrate to have acted irregularly (save for her failure to apply s 93*ter* of the Magistrates’ Court Act). Further, counsel were agreed that I did not have to read the record in the previous trial, which would be a prerequisite to making a determination as to whether there was in fact any ‘misconduct’ as alleged. The proceedings in the previous trial have been set aside by the appeal court, albeit for technical reasons, and are no longer of any consequence. At worst, the applicant’s recollection of the magistrate’s misconduct might remain an offensive or emotionally disturbing historical experience. But he has the assurance that he will not have to be subjected to any dealings with the previous trial magistrate again. Apart from the previous trial, with the benefit of hindsight having been a waste of time and resources, any alleged prejudice as a result of misconduct on the part of the magistrate is of such legal insignificance as to not be a consideration favouring a stay of the second trial, unless there is other significant prejudice which might be established at the hearing of the second trial.

The prejudice suffered by the applicant emotionally, financially and reputationally

[41] The applicant alleges, and it was not disputed by the State, that he has spent some R1 million on his legal fees in connection with the previous trial and the appeal, and that he is now pecuniously embarrassed to the extent that he is unable to defend himself as he did in the previous trial. He had employed experienced senior counsel during the previous trial and for the appeal.

[42] Again, this is a prejudice which most accused persons will suffer where a trial is set aside due to a technical irregularity, and the State decides to prosecute *de novo*. It cannot, per se, constitute an absolute bar to the institution of fresh proceedings in every instance, although it is a relevant consideration to consider in conjunction with others, when assessing whether there is significant prejudice that might arise during the second trial. In many instances, if, together with other considerations, it does not outweigh compelling reasons to institute proceedings *de novo*, it will be an unfortunate consequence of the second trial. The remedy might lie elsewhere in some form of some action for compensation against the State, but that argument lies beyond the scope of this judgment. The same considerations shall apply to the applicant's contentions that he is emotionally and reputationally prejudiced.

Trial Prejudice

[43] The trial prejudice raised by the applicant includes mainly the following:

(a) That the applicant lost his right to silence irreversibly; and

(b) That the applicant will be unable to call a material witness who would support his version, a Mr Nair, as he has died in the interim.

The breach of the applicant's right to silence

[44] In terms of s 35(3) of the Constitution every accused person has the right to a fair trial, which includes the right…'to be presumed innocent, to remain silent, and not to

testify during the proceedings'[48] and 'not to be compelled to give self-incriminating evidence',[49] or to give any evidence (as the applicant contends).

[45] The applicant is charged in the second trial with the same murder as in the previous trial.[50] In the previous trial the magistrate refused a discharge application brought pursuant to s 174 of the CPA, whereafter the applicant elected to testify. The appellant accordingly alleges that he gave up his right to silence and right not to testify, albeit that it was his choice to do so (obviously informed by what he assessed the strength of the case against him to be), and that his evidence will be admissible against him in the second trial; that the State witnesses who testified could now testify in a way to rebut his evidence or supplement the State case having prior knowledge of what his evidence will be; or that further witnesses may be called. He accordingly submits that his constitutional right to silence in the circumstances has been irreversibly lost through no fault of his own and that the State, in the circumstances, has an advantage of having already heard his full version and of having cross examined him once, which it is in breach of his Constitutional rights.

[46] It is not sufficient for an accused person applying for a permanent stay to rely on hypothetical prejudice. It must be actual significant prejudice.[51] In the second trial the applicant will have the right to remain silent, as well as all the other rights an accused enjoys, such as the right to apply for his discharge at the end of the State case. His evidence in the previous trial will not be admissible against him, unless he testifies, and then only to the extent that his evidence in the second trial deviates from his evidence in the previous trial, to impeach his credibility. It is so that his version is now known and that witnesses may tailor their evidence to counter any parts of his evidence as part of the State case, thus possibly contributing to a case which might otherwise have not called for

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[48] Section 35(3)*(h)* of the Constitution.
[49] Section 35(3)*(j)* of the Constitution.
[50] He is not charged again in the second trial with assault with intent to do grievous bodily harm (the former count 2), or the pointing of a firearm (the former count 3).
[51] *Sanderson v Attorney-General. Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) para 38.

a reply from the applicant. But, the trial court can, and will, be aware of that danger. If the State witnesses were to deviate from their evidence in the previous trial, they too can be cross-examined on the basis of their previous inconsistent testimony.

[47] Whether the State witnesses might add to or deviate from their previous testimony, or whether additional witnesses will be called, to counter the applicant's version disclosed in the previous trial, is at this stage speculative. It might be that the witnesses will simply repeat their previous testimony, possibly with even less conviction because of events having faded in their memories with the passage of time, which although another disadvantage, is unfortunately a reality, but not necessarily, depending on the circumstances, prejudice which would entitle the applicant to a permanent stay of prosecution.

[48] What the actual position will be, will only be known once the witnesses, including the applicant, testify. Whether there will be trial prejudice which might result in the applicant not receiving a constitutionally fair trial, is best left to the magistrate in the second trial, or at least left for assessment when it arises, if it does arise. It is premature to make any such a finding at this stage. And it is an issue of major consequence because should I, based on what I might imagine might occur in the second trial, conclude that a stay should not be ordered, and a different factual situation of significant prejudice results, then the power of the magistrate in the second trial (or another competent court) should not be hamstrung or influenced by a finding already made on that issue by this court on facts that did not come to pass. This court should not speculate regarding any such possible prejudice at this stage. A breach of the right to silence should not, purely as a matter of principle, preclude a new prosecution unless there is clear, demonstrable and significant prejudice proved to be irredeemably likely.

The death of the witness, Mr Nair

[49] The applicant's defence in the previous trial was that he had acted justifiably and in self-defence. That defence was disclosed in the bail application, and in the section 115 statement made at the commencement of the trial, even before he testified.

[50] Mr Rathnam Nair deposed to a statement under oath on 8 October 2013, the day on which the shooting giving rise to the prosecution took place, as part of the police investigation. His statement was filed in the police docket. The State did not call Mr Nair as a witness, but a copy of his statement was obviously made available to the defence. The statement recorded, inter alia, that the applicant was arguing with the deceased in the passage or entrance to the flat, and that

'[w]hile they were arguing deceased pulled a fire arm and he was to point it to [the applicant], [the applicant] pulled his gun and fired shots to the deceased. There were two males behind the deceased with fire arms . . . I don't know what was the problem between [the applicant] and the deceased.'

[51] The applicant argues that it is of significance that the State's eye witnesses, who were not independent, had claimed that the applicant could not have been acting in self-defence because the deceased did not have a firearm and was not attacking the applicant. Mr Nair could therefore be a material witness. In the circumstances, the applicant submits that a witness that ought to be available to the applicant to support his version that the deceased had a firearm and pointed it at him is no longer available to be called and that this is highly prejudicial to his defence.

[52] Mr Nair died on 13 October 2015. The defence, after it called its last witness Mr Zahed, closed its case on 3 September 2015, where after the trial was adjourned for argument. Mr Nair was therefore still alive during the previous trial and at a time when the defence might have wanted to adduce his evidence. The judgment resulting in the applicant's conviction was delivered on 25 January 2016. It seems that the defence had elected not to call Mr Nair as a witness. There was some suggestion that his was because the magistrate displayed bias towards the applicant, but one would then, all the more, have expected Mr Nair to have been called, to have his evidence on the record for the purpose of any subsequent appeal. It however serves no purpose to speculate why Mr Nair was not called as a witness in the previous trial, because that trial has been set aside and has limited relevance. The second trial will commence *de novo*, and it is the potential

prejudice from not being able to call Mr Nair, as with any other witness who has died before his or her evidence could be adduced, in the second trial, but resulting, specifically on the facts on this case, from the delay due to the previous trial being set aside, which must be considered.

[53] Mr Pitmann argued that regardless of the reasons why Mr Nair was not called, he, or counsel who might appear for the applicant in the second trial, would want to adduce the evidence of Mr Nair.

[54] If the previous trial was not set aside due to the magistrate's failure to apply s 93*ter,* the position would not have arisen, and the applicant's fate on appeal would have been decided without any regard to Mr Nair's evidence. It is unfortunate that the trial has to resume afresh. It seems to me that the position must be assessed largely, as in any trial where a witness has died before being able to give evidence, save that the prejudice which would result from such inability, must be considered on the basis that, but for the delay, such evidence would have been available. A major consideration will be the materiality of the evidence. *Prima facie*, the quoted extract from the statement under oath made by Mr Nair, almost contemporaneously on the day when the shooting occurred, will be material to the applicant's defence of private defence. But whether that evidence will in fact be required will depend on the evidence adduced by the State, the possibility of a s 174 of the Act application succeeding, whether the evidence adduced by the State indeed calls for a reply, or had such cogency, as to require the evidence of Mr Nair (as it seemingly did not do in the previous trial), the alternative methods of placing Mr Nair's evidence before the second trial court, such as for example in terms of the exception to the hearsay rule created in s 3 of the Evidence Law Amendment Act,[52] and the probative value to be attached to that evidence. The possibility however exists that the State might in the second trial accept what Mr Nair says in his statement, but rely on other evidence, in which case the evidence which Mr Nair might have been able to give, might become largely insignificant. There are simply too many variables which this court would have to speculate about at this stage, whereas the second trial court will be able to assess any

[52] Law of Evidence Amendment Act 45 of 1988.

potential trial prejudice on the actual circumstances which will prevail at various stages of the second trial. It would be premature to speculate on these possible circumstances when there are very strong competing interests for the prosecution proceeding. These must all be weighed overall, when they manifest themselves clearly, in deciding whether the grant of an order for a permanent stay of the prosecution is justified.

The interest of the deceased and/or his family

[55] The answering affidavit of the second respondent records that the family members of the deceased have a substantial interest in the outcome of the case, that they have been prejudiced by the decision to set aside the original trial, and will 'suffer negative consequences . . . when the trial recommences'. The applicant complains that these statements by the second respondent are generalised and made without any supporting facts and that there is nothing to suggest that the deceased's family in fact have maintained an interest in the matter being tried again, or that they want the matter to proceed to trial again, or that the public interest requires that the matter be heard again.

[56] The State has a clear interest in the death of any human being within its territory. It has an interest in the death of the deceased, which it is entitled to have resolved through a prosecution process. It retains that right to commence a prosecution, even if the family of the deceased might be disinterested. There is no evidence that the prosecution has not exercised an objective and rational discretion in deciding to commence the prosecution afresh, or that it has acted maliciously or capriciously in doing so. This argument is accordingly without merit.

The prospects of a successful prosecution

[57] In rejecting the applicant's representations, the second respondent provided at least two responses in writing. The first is the letter of 1 October 2018, in which the poor conduct of the magistrate was conceded. The reasons provided for proceeding with the second prosecution included the following:

(a) the evidence available, and adduced previously, was not of such a poor quality that a retrial 'would be an exercise in futility';

(b) ‘While there is not an overwhelming certainty that the accused will be convicted in a retrial, the evidence led at the original trial did lend itself to a finding of guilty…’, notwithstanding the criticisms of the magistrate’s conduct;

(c) The letter concluded: ‘I cannot conclude on a reading of the papers alone that the prospects of a conviction are non-existent’.

The second rejection letter was dated 5 July 2019 and recorded that the reason for prosecuting further is because ‘… the deceased was shot from behind when he did not pose any threat or danger to the [applicant]. It is in the interests of justice that the matter is tried again.’

[58] The applicant is particularly critical of the last reason which relies on the deceased having been ‘shot in the back’ (in the light of the applicant’s defence that he was acting in self-defence) and submits that:

(a) In the previous trial the issue of the gunshot wound to the back of the deceased was extensively dealt with by the expert called by the State, who could not be unequivocal as to how the wound to the back might have been sustained;

(b) The onus is on the State to prove that the applicant's version of self-defence was false beyond a reasonable doubt, and that it will be unable to do so.

(c) The medical evidence of Dr. Charles was that, in respect of the deceased, there was a bullet entry wound to the front of his thigh, from which it could be concluded that at least one shot must have been fired from the front. He testified that there was also a bullet wound to the back of the chest but accepted that ‘…either the shottist was at the back or, like was postulated, the deceased turned to avoid a second bullet’.

(d) Given that evidence, the State’s submission that the prosecution is not doomed to fail, is not correct. It suggests that the deceased was shot from the front which contradicts the witnesses called by the State in the previous trial, and is more consistent with the statement by the late Mr Nair that the deceased had a firearm which he pointed at the applicant.

[59] Ultimately, whether the evidence adduced will prove to be sufficient in any prosecution is a matter for the trial court to determine. I am not persuaded on the above criticisms alone, that the prosecution should be barred from presenting its case.

Conclusion

[60] Whether the right to a fair trial is infringed, is a matter best decided by the trial magistrate.[53] In *Sanderson v Attorney-General, Eastern Cape*[54] held:

'Barring the prosecution before the trial begins . . . 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.'

[61] Pre-trial applications for a permanent stay of prosecution should generally be discouraged. *Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others*[55] held:

'Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later.'[56]

[62] I am not persuaded on the papers that the applicant has established prejudice which would entitle him to an order for the permanent stay of the second trial. Specifically, insofar as he relies on undue delay, and the application is based on s 342A of the Act and trial prejudice, the section is clear that it is '[the] court before which criminal proceedings are pending' which shall investigate any delay, and if found to be unreasonable, will, in the light of the particular circumstances, issue such order as the circumstances may require. That it is the trial court which should make that determination makes good sense. It will be steeped in the atmosphere of the trial, will be best able to

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[53] *Key v Attorney-General, Cape Provincial Division and Another* [1996] ZACC 25, 1996 (4) SA 187; 1996 (2) SACR 113; 1996 (6) BCLR 788 (CC) para 13.

[54] *Sanderson v Attorney-General. Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC) para 38.

[55] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (2) SACR 421 (CC); 2008 (12) BCLR 1197 (CC) para 65.

[56] That was in a slightly different context, dealing with s 35(5) of the Constitution and the exclusion of evidence obtained in a manner that violates any right in the Bill of Rights which if admitted would render the trial unfair or otherwise detrimental to the administration of justice, but the principle remains sound.

assess whether any prejudice has been unreasonable, and will be best placed to determine what order, if any, it should issue.

[63] If the applicant is unlikely altogether to receive a fair hearing because of particular prejudice, whether due to an unreasonable delay or due to the violation of some other constitutional rights, such determination should be made if and when the significant prejudice manifests itself. That is the appropriate time to make that determination. That the trial court is a magistrate's court, as in the present matter, should not, in my view, make any difference, but if I am wrong in that regard, and should the regional court not have the jurisdiction to order a permanent stay of prosecution, then the high court would at least have evidence of the actual prejudice which would have manifested itself before the trial court on which it can base its judgment, rather than having to speculate about what prejudice possibly might, or might not, result.

Costs

[64] The applicant and respondents have each respectively sought the costs of the application in the event of being successful. Orders for costs are not generally granted in criminal matters, and for sound reasons. Accused persons should not be discouraged from raising constitutional and other issues which might possibly favour them, on pain of incurring a possible adverse costs order if they don't succeed. Similarly, the State should not be discouraged from opposing applications which might have dubious prospects of success and which should be opposed in the greater interests of the administration of justice, because of the threat of having to pay the costs thereof, if unsuccessful. This is a further reason why matters of this nature should generally be determined by the trial court, save in limited exceptional circumstances.

[65] The respondents have been successful. They were represented by a member of the Directorate of Public Prosecutions and would, in any event, not have incurred costs separately. I do not intend making any award of costs.

Order

[66] The application is dismissed.

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KOEN J

Appearances

For the applicant:	Mr M Pittman
Instructed by:	Rashid Patel & Co 2 Torwood Drive Hayfields Pietermaritzburg
For respondent:	Ms P Pillay (083 252 3034)
Instructed by:	Director of Public Prosecutions (KZN) Pietermaritzburg.