IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

REPORTABLE
CASE NO: 1800/2011

In the matter between:

JOSEPH ARTHUR WALTER BROWN	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE)	Second Respondent
THE NATIONAL COMMISSIONER OF POLICE	Third Respondent
THE PROVINCIAL COMMISSIONER OF POLICE (WESTERN CAPE)	Fourth Respondent

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Coram	:	**Henney, J**
Judgment by	:	**Henney, J**
For the Applicant	:	**Adv J Van Niekerk**
Instructed by	:	ABRAHAMS & GROSS ATTORNEYS
For the Respondent	:	**Adv C Webster SC**
Instructed by	:	OFFICE OF THE STATE ATTORNEY
Date(s) of Hearing	:	**1 AUGUST 2011**
Judgment delivered on	:	**28 SEPTEMBER 2011**

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JUDGMENT DELIVERED ON THIS 28TH DAY OF SEPTEMBER 2011

HENNEY, J

Introduction:

1. We live in a democratic society where the rights of an accused in a criminal trial, is of paramount importance. The Constitution of the Republic of the

South Africa sets out rights that need to be followed. The Constitution demands that when dealing with criminal trial, those that act on behalf of the state act with due diligence.

2. The issue in this case is not only about that but also the public's legitimate right to know about the involvement of people who have committed serious crimes which have had an adverse result on the public.

3. The former Chief Justice Sandile Ngcobo made a speech at SANEF in February 2010; his speech was entitled 'Justice and the Media' and stated the following: *"Indeed without the media, there could be no constitutional democracy. The media not only provides the main forum for the great societal debate that is democracy; it also sustains that debate by supplying the information that the people need to make the political, economic, and cultural choices that constitute the fabric of our democratic society".*

4. He went further stating: *"the media does so much more than enabling democracy by informing and educating the people. It also ensures that the people know their rights and the way to enforce those rights. Its serves as a watchdog and indeed as one of the strongest and most important checks on the power of all three branches of government. And in a diverse society like ours, it has the potential to act as a unifying force and to provide a voice for the voiceless, marginalized and disadvantaged. For these reasons, the protection and encouragement of the free press, freedom of*

speech and the free flow of information are cornerstones of our Constitution's Bill of Rights".

5. The rights to the freedom of press are important however, as with the fair trial rights in the Bill of Rights, there are limitations. The rights of the accused are also entrenched in the Bill of Rights in terms of section 35. With both of these rights there is a balancing interest that should take place.

6. The public need to be informed about what is factually correct and the media is able to do this, however at times what the media states is not always factually correct.

7. When dealing with the rights in the constitution, one will have to ask the question if one right may override another right. In this matter we look at the right to freedom of press and other media and whether or not this right might infringe the right to a fair trial.

Background:

8. During March 2007 the applicant was charged for the first time with *inter alia* theft and fraud and was released on bail of R1 000 000.00.

9. The applicant was then arrested during August 2007 in respect of the Fundi and Infinity matters under case number 31/66/2008 and released on a bail amount of R5 000.00.

10. On 4 April the applicants legal representatives held discussions with the Directorate of Special Operations (the "DSO") that the applicant would not be arrested again until the next court appearance on 24 April 2008.

11. There was a warrant of arrest for the applicant's wife, however on the 35th of April the wife together with the two minor children left South Africa and moved to Australia, without informing the DSO.

12. The applicant was arrested on 9 May 2008 on the warrant that was obtained on the 3 May 2008 for Antheru.

13. On 26 to 28 May 2008 the High Court heard an application from the applicant to determine whether or not the warrants for both the applicant and the applicant's wife were valid as well as the validity and lawfulness of the applicant's arrest. The court found that the warrants were valid and that the arrest of the applicant was lawful and justified.

14. The applicant was granted bail by the Magistrate's court on 27 October 2008 in terms of the Antheru matter.

15. The applicant launched an application for the stay in the criminal proceedings which forms the subject matter of the present application on 10 December 2008 under case number 20459/2008. The papers were accordingly filed in the matter and it was set down for hearing on 17 November 2009.

16. On 10 November 2009 the applicant withdrew the stay of the criminal proceedings and tendered the costs thereof.

17. The present application for the stay in proceedings was launched on 31 January 2011. This application was done 14 months after the first application for the stay in proceedings was withdrawn.

Relief sought:

18. The applicant has applied to this court for the immediate and permanent stay of the prosecution against him in the High Court and Magistrate's Court in respect of the Fidentia Group Companies Investigation on the following basis:

    18.1 the misconduct and partiality of the prosecutor and the investigating officers of the DSO and the current prosecutor Mr van Vuuren SC in respect of the criminal charges pending against (him);

18.2 the unlawful conduct of certain prosecutors of the former DSO and investigating team to appoint an attorney of their choice to represent (him) in respect of Plea Bargain negotiations whilst (he) was medically unfit and incarcerated at Pollsmoor during 2008;

18.3 the wide and adverse media coverage against (him) in respect of the Fidentia Group which has resulted in the general public, some judicial officers and lawyers viewing (him) as a fraudster and thief having stolen billions from widows and orphans.

Legislative framework:

19. The Constitution of the Republic of South Africa[1] contains the Bill of Rights. Section 16 deals with freedom of expression stating: ' Everyone has the right to freedom of expression, which includes- (a) Freedom of the press and other media; (b) Freedom to receive or impart information or ideas;...'.

20. Section 35(3) of the Constitution state: *"Every accused person has a right to a fair trial,..."* Section 16(1) states: *"Everyone has the right to freedom of expression, which includes – (a) freedom of the press and other media; (b) freedom to receive or impart information..."*.

21. These rights are, however subject to limitation in terms of section 36 of the Constitution stating: "*the rights in the Bill of Rights may be limited only in terms*

[1] The Constitution of the Republic of South Africa Act 108 of 1996.

of 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,...".

Stay in proceedings:

22. A stay in proceedings is said to be a drastic remedy[2]. A court may grant a stay in proceedings on various grounds. Either party may apply to the court for a stay in the proceedings. This stay in proceedings may be on a temporary or permanent basis.

23. The court will use its discretion when it comes to a stay in proceedings[3], there are no rigid guidelines that the court ought to follow and therefore each case will be based on its own merits, this might not be a general discretion however the discretion ought to be exercised sparingly and in exceptional circumstances[4]. "To bar prosecution before the trial begins is far reaching...(t)hat will seldom be warranted in the absence of significant prejudice to the accused".[5]

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[2] LAWSA: Vol 5(2) par 387.
[3] *Southern Metropolitan Substructure v Thompson* [1997] 1 All SA 571 (W) 577, 1997 2 SA 799 (W); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 2 SA 636 (W); *Williamson v Schoon* 1997 3 SA 1053 (T); *Spier Properties (Pty) Ltd v Chairman of the Wine and Spirit Board* [1999] 2 All SA 446 (C) 452I, 1999 3 SA 832 (C); *Western Cape Housing Development Board v Parker* 2003 3 SA 168 (C), 2005 1 SA 462 (C), [2006] 3 All SA 84 (C).
[4] *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd and Another* 1999 (4) SA 1039 (T) at 1048H – I; *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* [2009] ZASCA 49, [2009] 3 All SA 491 (SCA) overruling *Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others* 2009 3 SA 305 (W); *Kuiper v Benson* 1984 (1) SA 474 (W).
[5] *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Another* 2008 (1) SACR 178 CPD.

24. The party applying for the stay in the proceedings will have to prove to the court that the stay in proceedings is the viable option. "The appellants or the accused must satisfy the Court of the facts upon which they rely for the contention that the right to a fair trial has been infringed".[6] If the prejudice is said to not be trial related then there are other remedies that one could use that would be less radical than the stay in proceedings[7].

25. The accused ought not to apply for a stay in prosecution on the ground that he or she is likely to be prejudiced by external factors, the party must prove that there is irreparable trial related prejudice and that the extraordinary circumstances will justify such a drastic relief (my underlining).

Prosecutorial misconduct:

26. The Webster's New World Law Dictionary defines prosecutorial misconduct as an illegal act or failing to act, on the part of a prosecutor, especially an attempt to sway the jury to wrongly convict a defendant or to impose a harsher than appropriate punishment.[8]

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[6] *Broome v Director of Public Prosecutions, Supra.*
[7] *Broome v Director of Public Prosecutions, Supra.*

[8] Webster's New World Law Dictionary Copyright © 2010 by Wiley Publishing, Inc., Hoboken, New Jersey.

27. Section 25(1)(a) to (c) of the National Prosecution Authority Act[9] (the "NPA") states that, *'A prosecutor shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-*

(a) under this Act and any other law of the Republic; and

(b) by the head of the Office or Investigating Directorate where he or she is employed or a person designated by such head; or

(c) if he or she is employed as a prosecutor in a lower court, by the Director in whose area of jurisdiction such court is situated or a person designated by such Director'.

28. Further, section 20(1) of the NPA provides that the prosecutor has the power as contemplated in section 179(2) of the Constitution[10] and all other relevant sections of the Constitution, for example, to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

29. To illustrate, in *S v Basson*[11] it was said that *'It flows from s 179(2), the State's power to institute criminal proceedings, that the prosecution of crime is a matter of importance to the State. It enables the State to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens. And by providing for an independent prosecuting authority with power to institute criminal proceedings on behalf of the State, the Constitution makes*

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[9] Act 32 of 1998.
[10] The Constitution of the Republic of South Africa, Act 108 of 1996.
[11] 2007 (1) SACR 566 (CC) at 144.

it plain that effective prosecution of crime is an important constitutional objective.'

30. The court in *S v Rozani, Rozani v Director of Public Prosecutions, Western Cape and Others*[12] held that, *'A prosecutor is expected at all times to act in a manner which is responsible and fair to the accused, and to be candid and open with the court. Hence it is said that it is the duty of a prosecutor to place all the material before the court which is at his disposal, provided that it is relevant and admissible'.*[13]

31. It is then clear from the latter that the prosecutor has a duty to ensure that an accused's right to a fair trial is protected and not to act arbitrarily. In *Wesso & another v Director of Public Prosecutions, Western Cape,*[14] it was said that, 'Prejudice resulting in an unfair trial is absent where the applicant seeks a stay of prosecution on the ground that the prosecution obtained inadmissible evidence which it might use at the trial'.

32. It must also be asked whether a stay of prosecution is the *only* remedy available to the accused'. Uijs AJ, further pointed out that in *North Western Dense Concrete CC & another v Director of Public Prosecutions (Western Cape)*1999 (2) SACR 669 (C) at 683[15] a stay of prosecution was granted on

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[12] 2009 (1) SACR 5470 (C) at 550A.
[13] See also S v Naude 2005 (2) SACR 218 W at 220h-j where it was also said that, the prosecutor has a duty to ensure fairness in any trial in which he or she was prosecuting.
[14] 2001 (1) SACR 674 (C).
[15] At 683*h–j* Uijs AJ said: 'In my view, instances where solemn agreements were concluded between accused persons and the prosecuting authorities, in terms whereof those accused persons gave up certain rights in exchange for an abandonment of prosecution, are instances where a stay of prosecution would be the appropriate remedy, where the State subsequently

the ground, amongst others, that the applicants had no other remedy to protect their rights. In the latter case the DPP reinstituted a prosecution against the applicants after a negotiated plea agreement had been reached. However, the court in *S v Tshotshoza & others*[16] held that, 'the requirement that a prosecutor should act fairly 'does not mean that he cannot and should not diligently try and obtain all admissible evidence against an accused'.

Trial by Media:

33. There is no legislation that governs trial by media. Our courts have not dealt with a matter such as this, where a stay in prosecution was requested as on the grounds as claimed by the applicant. The term trial by media relates to a matter that has received extensive media coverage prior to the trial commencing, this is known as pre trial publicity. The argument here would be that the pre trial publicity would adversely affect one of the parties and would be prejudicial to the parties' right to a fair trial.

34. The reports relied on by the applicant to show that there was adverse media publicity is not in dispute. The Court will deal with this issue in evaluating the merits of the application; whether these rights to a fair trial had been affected thereby, will be discussed elsewhere in this judgment.

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appears to renegade on what it had offered as a *quid pro quo* . . . I can think of no other way in which the rights of such persons can be adequately protected.'

[16] 2010 (2) SACR 274 (GNP) at [26]).

Summary of evidence:

Applicant's Case

35. The complaints in respect of which relief is sought is based on the fact that the applicant contends that the respondents have shown vindictiveness, prejudice and animosity towards him. This, the applicant alleges is based on the sole fact that he has committed no criminal act and the respondents are trying to fabricate the allegations against him. The respondents, especially, in the person of Adv Morrison SC ("Morrison") who had been influenced by the curators in the liquidation application that runs parallel with these proceedings, to pursue these criminal charges against him. He claims that he had been unfairly treated when he was arrested deliberately and without good cause.

36. Morrison had made it clear at one stage that even if bail is granted, he would merely bring fresh charges against him and he would continuously oppose bail and make sure that he remains in custody. The respondent contends that the whole intention of the respondent's representative was to ensure that he would never be released on bail and that he remains in custody at Pollsmoor to force him to enter into a plea bargain so that he can plead guilty. Due to this, he was incarcerated and on 12 May 2008, he was allegedly sexually assaulted at the back of a police vehicle by other detainees en route to Pollsmoor prison. As a result of this, he was left extremely traumatised and he felt completely humiliated.

37. The applicant further contends since 2007, Mr Mopp ("Mopp") who represented the former Directorate of Special Operations acted in a vindictive

manner towards him. He openly accused him in correspondence of being guilty of a range of offences including money laundering, racketeering fraud and theft. He never only alleged that he had been guilty of committing these offences but stated this as a matter of fact. At the time of his arrest, attorney William Booth ("Booth") represented him with Khan ("Khan") acting in an advisory capacity. Mopp appears to have a personal grudge against him and Booth.

38. Mopp and Morrison assisted by Tertia du Toit were reluctant to deal with Booth during plea bargain discussion. As they were prejudiced and disliked Booth, he had to let Booth stand down and according to the applicant he had to approach Mr Hunter ("Hunter"), another attorney, to deal with in respect of the negotiations. The prosecutors as well as the investigators lost all impartiality and became completely personal in this matter.

39. Hunter also failed to reach any agreement. Morrison was reluctant to inform him as to whether the investigation was finalised and was also reluctant to consolidate all charges into one charge sheet. They were also un-co-operative in respect of, the time it would take to finalise the investigation and the consolidation of the charges. The applicant states further that in and during June 2008, after his arrest, whilst being hospitalised as a result of the attack on him, the investigating officer, Mr Edwards ("Edwards") came to visit him, at that stage he was at a very low ebb in addition to his poor physical and mental state.

40. He was advised by Edwards that Morrison would only be prepared to enter into plea bargain negotiations, provided that he used another attorney other than Booth or Khan. This discussion took place whilst he was extremely traumatised and, under medication and treatment by a psychiatrist. Edwards conveyed to him that Morrison would prefer to deal with attorney Joe Weeber ("Weeber") with whom the DSO had a good relationship.

41. Although he had never spoken to Weeber before, or had any knowledge of his capabilities as a lawyer, Edwards told him that Morrison had a very good relationship with Weeber and he was given the telephone number of Weeber. This happened over the weekend. He thereafter, phoned Weeber and arranged for him to visit him in hospital. The service of Booth, who was the attorney at that stage, was then terminated. Weeber was appointed to represent him to enter into plea bargaining discussions with the DSO. Thereafter when he appeared in court, Morrison requested the court not to refer him back to hospital despite his illness, but rather to Pollsmoor prison. The Magistrate ordered that the applicant be detained at Goodwood Prison, however, due to the fact that his co-accused Maddock was detained at Pollsmoor the applicant was referred to Pollsmoor, despite a district surgeon testifying that he would not be safe at Pollsmoor due to the previous attack on him.

42. During his detention at Pollsmoor, his condition deteriorated rapidly because he could not consult with his doctor, Dr Cilliers. The reports of Dr Cilliers was sent to his attorney, Weeber and his partner, who nevertheless despite this,

continued consulting with him and they had held various discussions with Mopp and Morrisson. Due to his mental state at that time, he is unable to give full details of his discussions with Weeber and his partner Mr Van Wyk. He can however, recall he was questioned about his roll in the affairs of Fidentia, his involvement in the various court cases and his defences thereto.

43. He was not in a position to say to what extent Weeber revealed details of his disclosures to the DSO at the time. He is of the view that Weeber and his partner should not have questioned him about his involvement in Fidentia and had to stop all discussions and negotiations with the DSO, due to his poor health and mental condition of which they were aware of. Only when Khan came to visit him at Pollsmoor, was he advised to stop all the plea bargaining negotiations due to his ill health and Khan assisted him in giving instructions to Booth to apply for bail and for Weeber to stop the plea bargaining negotiations. Weeber, however, in Khan's absence, persuaded him not to apply for bail, but to rather continue with the plea bargain. Khan again persuaded him not to continue with the plea bargain negotiations, whilst Weeber again persuaded him to continue.

44. On 29 July 2008, just before he had to appear in court, Weeber presented him with a document in respect of a plea bargain which Morrison wanted him to quickly peruse and sign.

45. When he read the document, he was shocked to see that he was required to plead guilty to crimes he had no knowledge of. Fortunately, his attorney, Khan

was there and advised him not to sign any documents. Thereafter Weeber's services had been terminated. This angered Morrison and his prosecuting team and he wanted the document they had presented to them to be returned.

46. As a result of this conduct of the respondents, to influence him to terminate the services of his attorney, Mr Booth and to engage an attorney of their choice was a clear violation of his constitutional right to a fair trial. He further contends that Weeber had questioned him extensively on his involvement in the affairs of Fidentia and his defences to the criminal charges. He is unable to say to what extent this had been revealed to the DSO.

47. It is therefore according to the applicant, highly probable under the circumstances, that the DSO has by unfair means obtained valuable information about his knowledge and defences presently against him at a time when he was not mentally well enough through the planting of their own lawyer to represent him. He further contends that Morrison was one of the main perpetrators who openly during court proceedings fed the media with false information. In particular, during the bail hearings he deliberately in the presence of the press, claimed that there was over R1.6 billion deposited into his wife, Susan's account.

48. The applicant further contends that he had been tried and convicted by the media. The applicant submitted the media reports and articles written about him were prejudicial towards him. He submitted papers to the court quoting the Mail and Guardian, the Cape Argus, Deborah Patta, Carte Blanche,

Moneyweb and a Marie Claire article, all discussing the applicant and his behaviour and the large sum of money allegedly 'stolen' from widows and orphans.

49. He contends further that as a result of this media campaign not even the judiciary have been spared in being influenced against him and he cites two examples where Davis J and Traverso DJP had made remarks about him during court cases.

50. In short, the case of the applicant is built on these allegations.

Respondent's Version:

51. The respondent's case is mainly based on an Answering Affidavit of Morrison, the allegations are denied in its entirety where it is alleged that there was misconduct or impartiality. Morrison further denies that he had been party to any unlawful conduct on the part of the prosecutors of the former DSO and the investigating team, regarding the appointment of an attorney to represent the applicant in a plea and sentence agreement. Morrison, whilst acknowledging that there had been wide and adverse media coverage relating to the applicant and Fidentia, denies that it constitutes a basis for a pursuant stay of prosecution.

52. He further contends that it is not for this court, but the trial court to determine the merits of the case against the applicant. He states there is in fact a strong

case against the applicant. He further denies that the DSO conveyed false information to the media. The information which he and other members of the DSO disseminated had been in the context of addressing the court during court appearances. Nothing false was conveyed to the court and was correct in each instance.

53. By virtue of the profile of the matter, the magnitude of the charges, Morrison contends it as inevitable that the media has reported widely on the matter. He has given the correct figures of the amount involved as R1,6 billion and he cannot account for the inaccuracies in the reporting of the media.

54. Morrison also denies that Mopp prejudiced the applicant by considering him as being guilty. In his letter, Mopp is responding to an entirely unrealistic proposal relating to a plea and sentence agreement which Hunter on behalf of the applicant had proposed. The plea and sentence agreement was initiated by the applicant on more than one occasion.

55. Morrison admits that the applicant was arrested in the Antheru matter during May 2008 at the offices of his attorney on the instructions of the Head of the DSO Advocate Mopp. A decision was taken not to arrest the applicant immediately on 3 April 2008 after a warrant of arrest had been issued. It had been agreed with the applicant's attorney that he would not be immediately arrested, but at his next court appearance on 24 April 2008 and a warrant of arrest would be effected and the matter be placed on the roll. Once it was learned however, that his wife and children left South Africa in a surreptitious

fashion, it appeared that they had negotiated in bad faith. He was then considered to be a flight risk.

56. Morrison further denies that the applicant had been placed under pressure by the prosecutors and investigators to enter into a plea and sentence agreement. The initiative to enter into such agreement was at the instance of the applicant.

57. He does not deny that at the Cape Town Court that if the bail application had succeeded, the applicant might still be arrested on other matters. He however, does deny that if the applicant were released he would continuously oppose bail and ensure that he remains in custody.

58. According to him, the applicant conveys a distorted picture of the circumstances of the plea and sentence negotiations. The question regarding this was raised for the first time by the applicant personally and thereafter by an attorney John Hunter from Johannesburg who acted on his behalf.

59. This was it seems not successful and no progress was made on 10 September 2007 between Morrison, Edwards and Hunter. Thereafter, Hunter contacted him again and wanted to meet him and Edwards again.

60. Morrison thereafter on page 679 – 685 of the record sets out a detailed explanation as to what transpired between their office and Hunter.

61. Booth got involved in this matter as Hunter's Cape Town correspondent. Booth thereafter became involved in the plea and sentence negotiations on 4 April 2008. These discussions continued to 15 April 2008 however nothing came of it.

62. He denies that he, Mopp or Du Toit were reluctant to deal with Booth at any stage. He further denies that there was any prejudice or dislike against Booth.

63. It is also not correct that Booth was required to stand down and that Hunter was engaged to deal with the DSO in respect of negotiations. He also denies that he was un-co-operative and that he did not want to furnish any information to Booth regarding the particulars of the charges against the applicant. The DSO was however, not inclined to accede to unrealistic proposals regarding the section 105A plea and sentence negotiations emanating from the applicant. He further denies that he expressed an unwillingness to enter into plea negotiations with Booth or Khan.

64. He was however, of the view that it would be in the Applicant's interests to deal with Counsel who had experience in putting together plea and sentence agreements. Morrison says that from his understanding of Edward's affidavit, it was not conveyed to him according to Morrison that he (Morrison) would prefer to deal with attorney Weeber. That Edwards, in fact when he referred to Weeber, he referred to a person that would be in a position to instruct counsel to enter into plea negotiations. The applicant is misleading the court if he says that Edwards has said in evidence that either Mr Mopp or Morrison did not

want to negotiate with Khan or Booth because of a bad relationship that existed. This is a fabrication of what is contained in the record. From his understanding, Edwards did give the particulars of Weeber when he visited the applicant. The discussion between applicant and Weeber does not fall within his knowledge. He was present in court on the day when Weeber took over from Booth, where Booth conveyed to the court it was due to a lack of funds.

65. In law, no provision is made to detain an accused in a private clinic; for this reason he requested the court, that the applicant be held in the hospital section of the prison. The applicant is, speculating if he contends that Weeber might have conveyed privileged information to him and he in fact denies that anything like this happened.

66. The applicant despite the condition he says he was in, continued to give Weeber instructions in regard to negotiating the plea and sentence agreement. Despite this, it had been placed on record by Mr Khan that Weeber had a specific mandate to negotiate a plea and sentence agreement and when he was unable to negotiate a suitable agreement within the prescribed time, his mandate was terminated.

67. During the court appearance in Court 31, Cape Town in July 2008, a three page letter was handed to Weeber prior to the proceedings in court. This was by no means a formal plea and sentence agreement, but simply a letter setting out a basis upon which the DSO would find it acceptable to enter into a plea and sentence agreement. This was a tentative proposal and Morrison says he

considered it to be nothing more than a draft working document. It is also clear from the document that there was no provision made on it to be signed. It was given to Weeber about an hour before the court appearance. As there was no provision made for it to be signed, there was no request that it be quickly perused and signed. The applicant could also have not been surprised by the contents thereof, as it had been the subject matter of earlier decisions.

68. Thereafter, the applicant appeared in court and Khan very clearly places on record that Weeber took over from Booth and Weeber's specific mandate was to negotiate a plea bargain which had come to an end due to delay in having it finalised. Khan does not place on record that the applicant had been placed under undue pressure to enter into the plea agreement. No suggestion had been made that Weeber had been planted by the DSO to act to the detriment of the applicant.

69. The other important piece of evidence of the respondent is that of the investigating officer, Colonel Edwards. Edwards who has since retired has confirmed the statements made by Morrison. Edwards further contends that even after the most recent application for the stay of prosecution had been launched, the applicant had contacted him on 22 February 2011 and once again the applicant had initiated a process of negotiating a plea and sentence agreement. The applicant was informed that due to his retirement, Edwards would no longer be the investigating officer, and that Colonel Roelofse would be dealing with the matter, but the applicant insisted that he (Edwards)

arrange and be present at the meeting. It was arranged on 23 February 2011, that they meet on 24 February 2011.

70. Due to the false allegations that the applicant made in this application and the prior application against the prosecution and investigation authorities, it was requested that he send a letter, that it was on his insistence that they meet and discuss the terms of a possible plea and sentence agreement. Edwards further stated that because it had been alleged that he was instrumental in attempting to trick the applicant into entering a plea and sentence agreement he requested the applicant to send a letter stating that it was at his instructions that a meeting be held. Kobus Roelofse confirms the version as to the meeting that took place on 24 February 2011.

71. The other important evidence as regards to the second allegation is that of Weeber, an attorney who says that he came on record for the applicant on Sunday 9 June 2008. He consulted with the applicant and the applicant requested that he represent him in this matter due to the fact that he was unable to meet the financial requirement of Booth who was his attorney at that time. The following day, Monday 10 June 2008, Booth withdrew as attorney on the basis of the applicant's inability to pay his fees. His instructions from the applicant was that the matter be finalised and instructed him to negotiate a plea and sentence agreement on the applicants behalf. As a result of this, he took instructions from the applicant on more than one occasion. Although he had met Morrison prior to receiving this instruction, he denies that he had a

very good relationship with him. The only contact he had with him was in the context of another matter.

72. Whilst visiting the applicant in hospital and during the period of his mandate from 9 June 2008 to 29 July 2008, the applicant had been able to function quite lucidly and was able to give him clear instructions regarding his need to enter into plea negotiations. He denies that he revealed any privileged information to the DSO arising from his consultations with the applicant. The applicant is untruthful if he says that he had convinced or persuaded him to enter into plea negotiations.

73. He further confirms the evidence of Morrison regarding the document that was given to him to discuss with the applicant at court on 29 July 2008. They were invited by the DSO to discuss this and come up with counter proposals. Once an agreement has been reached, a draft plea and sentence agreement and a draft indictment would have been made available on or before 15 August 2008. He denies that he presented the applicant with a document he had to quickly peruse and sign, as there was nothing to sign. The applicant was not shocked about the contents thereof.

74. For the purposes of this application, I will not refer to the other affidavits of Mopp and Du Toit as it merely confirms what was said above.

Evaluation:

75. I will now deal with the first two points raised in the relief as one for the sake of convenience as they refer to the impartiality and the prosecutorial misconduct.

76. In dealing with the facts in motion proceedings where there is a dispute of fact, the well established rule as laid down in the Plascon-Evans Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) is applicable. The rule states that a final order can only be granted on the facts averred to in the applicants affidavits, which had been admitted by the respondent together with the facts alleged by the respondent justify the granting of such an order.

77. In dealing with the allegations of the applicant in this matter most of which have been disputed by the respondents, the court will apply the above-mentioned rule.

78. The respondent's version in my view does not consist of bold or un-creditworthy denials where it can be regarded as far fetched. The version of the respondents therefore plays a crucial role in determining whether the relief should be granted in these proceedings. I will now deal with the allegations herein.

79. As regards to the first claim of alleged misconduct and partiality, I am unable to find that any of the prosecutors or members of the investigating team had made them guilty of such conduct. The claims of unfair treatment are

unsubstantiated, contrived and a concoction of the imagination of the applicant. These claims are wholly inconsistent with the actions and behaviour of the applicant as shown by the respondents and as borne out by the more plausible version presented by the respondents.

80. The allegations which form the basis of the charges against the applicant are not a product of fiction created by the investigators and prosecutors but based on evidence they have objectively acquired. The applicant's desire to have entered into a plea and sentence agreement with the prosecution bears testimony to this and it creates sufficient grounds for at least a *prima facie* case against the applicant.

81. In their dealings with the applicant, he had failed to show that they were not fair and responsible.

82. It can hardly be a complaint against them if they acted in the interest of the State and did not succumb to the unrealistic requests of the applicant contrary to the dictates of what is expected of them as prosecutors and investigators. For example, where they had evidence that he was involved in a further offence, and had gone to a Magistrate to acquire a warrant for his arrest, whilst they had the power to arrest him, they decided not to do so and only did so when they suspected he might be a flight risk, when his wife secretly left the Republic. If they had failed to act, they would have failed in their duty as prosecutors.

The prosecutors in my view were also quite correct in rejecting a plea and sentence agreement, with which they did not agree with and it can hardly be said that they are prejudiced towards him, if; such a plea and sentence agreement as proposed would be unjust.

The prosecutors were entitled not to accept anything with which they did not agree with.

It was then up to the applicant to take the matter either on trail or leave it to the trial court to decide what is just and equitable.

83. Insofar as the second ground upon which the applicant basis his application, when he says that they have acted unlawfully for allegedly having appointed an attorney of their choice to represent him in respect of plea negotiations, I find that this allegation is also without any substance and merit. From the version as presented by the respondents which I have to accept, this allegation is far-fetched and patently dishonest. See *Plascon-Evans v Van Riebeeck Paints.*

84. It is clear from the evidence that there was a desire right from the beginning on the part of the applicant to enter into plea negotiations. This fact is clearly borne out in the correspondence between his attorney Hunter and the respondents.

85. In court, when Weeber withdrew, it was conveyed that Weeber was only appointed for the purpose of securing a plea and sentence agreement in the time frame mentioned. No mention was made that Weeber had colluded in an unlawful manner with the investigators and prosecutors to unlawfully and in an underhand manner to extract a plea and sentence agreement from him.

86. The following statement was made by Khan: *"May it please Your Ladyship, I appear on behalf of the accused in this matter. M'Lady, there's been, from what I have heard from Mr Morrison that since Mr Weber took over from Mr Booth on the previous occasion all they've been doing, they've been engaged in negotiations in terms of a plea bargain and apparently has come to an end now".*

87. He then goes further to state: *"It's been going on for a long time now since the last appearance. It's almost more than six weeks ago and he was informed last week by Mr Brown that if by today there is not an acceptable proposal, then his mandate for that specific purpose for which he was appointed would terminate."*

88. There were no remarks made as to Weeber and the manner in which he conducted himself during his term of mandate. This is an indication that Weeber was appointed by the applicant himself. Weeber was given a specific mandate; once the plea and sentence agreement could not be reached the mandate was terminated. I can see no misconduct on the part of Weeber, he

was given a mandate and then his mandate was terminated by the applicant himself.

This was not disputed by the applicant and is a clear and unequivocal indication that the applicant is trying to mislead the court.

89. After all this and after this application was launched the applicant contacts Edwards on 22 February 2011, who assisted him to facilitate a meeting with the new investigating officer Roelofse, to once again on the version of the respondents, start a process which would result in plea negotiations.

Once again, this is a further attempt to mislead the court.

90. This is not consistent with the allegations the applicant makes against the respondents in so far as both the first and second complaints are concerned. For this reason and the reasons stated above his application is not convincing.

91. Before concluding this matter I will now deal with the final ground of this application. It is common cause that this case had attracted wide spread media attention, due to the magnitude and the circumstances surrounding these charges. The applicant referred to several articles that were written about him and submitted it in the papers before the court.

92. Based on all the articles the applicant referred to, I am of the view that there was indeed adverse media coverage. On a conspectus of the evidence if one

is to have regard to the reports written and publicised about his involvement, objectively speaking creates a perception that there had already been a pronouncement on the allegations against the applicant.

93. In terms of the stay of proceedings the applicant will have to prove that the adverse media coverage will indeed give rise to trial related prejudice that would lead to an unfair trial. The applicant will also have to prove that there are extraordinary circumstances that are applicable in this matter.

94. The applicant based his argument on case law presented to this court. Most of the cases that dealt with a trial by media or adverse media coverage were international cases with different judicial systems as to South Africa; the other cases presented for the stay in proceedings related to instances where there were delays in the prosecution.

95. *S v Harper and Another: In re S v Baleka and Others*[17] dealt with trial by media making the following statement: *"A reason for the objecting to the prejudging of issues to be tried by a court of law is that it may affect the mind of those who may later be witnesses or possible even of the judicial officer."*[18]

96. The applicant referred to an article[19] discussing *R v Glennon*[20] the following statement was made: *"No-one could seriously deny that freedom of speech is fundamental to a democratic society. Similarly, a feature of any democratic*

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[17] *S v Harper and Another: In re S v Baleka and Others* 1986 (4) SA 214 (T).
[18] *S v Harper and Another: In re S v Baleka and Others* 1986 (4) SA 214 (T) at para 122.
[19] Allan Ardill, *"prejudicial pre-trial media publicity"* [2000] AltLJ1.
[20] *R v Glennon* (1992) 173 CLR 592.

society is that a citizen has the right to be tried fairly before that person may be denied their liberty. Societies that fail in either respect are correctly described as tyrannical or totalitarian while it is true that on occasions freedom of speech may compete with 'fair trial' rights, it should never be the case of one determining the other to the point of extinguishment. Instead it should be question of timing delayed in the interest of ensuring a right to a fair trial."

97. Another paper that was written on the same topic was by Susan Hanley Duncan[21], she stated that with reference to jurors, that prejudicial publicity may bias jurors resulting in decisions based not on evidence presented at the trial but the influence of inflammatory and irrelevant information that was previously heard or seen in the media.

98. Amy Elvidge[22] again addressed the right to open justice, the freedom of expression, the right to a fair trial and the balancing of the rights; she discusses the stay in proceedings and makes the following statement: *"Permanent stays of criminal proceedings are rarely granted; no New Zealand authorities exist in which a permanent stay of criminal proceedings has occurred on the basis of adverse publicity. The Court of Appeal has noted, 'to stay a prosecution, and thereby preclude the determination of the charge on the merits, is an extreme step which is to be taken in the clearest of cases.' However, a stay may be granted if the publication is so prejudicial a fair trial cannot occur, even with the use of remedial mechanisms."*

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[21] Susan Hanley Duncan, *'Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy"* Legal Studies Research Series Paper No: 2009-04 page 756.

[22] Amy Elvidge, Dissertation titled: *"Trying times: The Right to a Fair Trial in the Changing Media Environment"* October 2008, Univeristy of Ogato, Dunedin.

99. In *Montgommery & Ors v Her Majesty's Advocate and The Advocate General for Scotland*[23] Lord Hope of Graighead referred to *Stuurman v H.M. Advocate* 1980 J.C. 111 discussing the special circumstances when a stay in the proceedings will occur, it stated: *'The special circumstances must indeed be such as to satisfy the Court that, having regard to the principles of substantial justice and of fair trial, to require an accused to face trial would be oppressive. Each case will depend on its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects for fair trial the question for the Court is whether the risk of prejudice is so grave that no direction of the trial Judge, however careful, could reasonably be expected to remove it.'*

100. The *Montgommery* case made reference to Article 6(1) and (2) of the convention stating: "The applicant's submissions as to the adverse publicity are, in essence, a complaint that the jury in his case could not have impartially tried his case because no jury could fail to have been influenced either by the events of 11 September 2001or by the negative effect on his reputation by hostile media publicity. The Court has stressed that a tribunal, including a jury, must be impartial from a substantive as well an objective view (see Sander v. the United Kingdom, no 34129/96, s22, ECHR 2000 V). The personal impartiality of a judge must be presumed until there is proof to the contrary. The same holds true in respect of jurors."

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[23] *Montgommery & Ors v Her Majesty's Advocate and The Advocate General for Scotland* [2000] UKHLD1 (19 October 2000).

101. In the case of *Sanderson v Attorney-General, Eastern Cape*[24], there was an application for a stay in proceedings based on a delay in the proceedings. Kriegler J made the following statement: *"Even if the evidence he had placed before the Court has been more damning, the leave appellant seeks is radical, both philosophically and socio-politically. Baring the prosecution before a trail begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching."*

102. In many countries such as the United States, Canada, New Zealand and England make use of the jury system. The jury is made up of members of the public that will sit in the trial and hear the evidence presented and will decide on the verdict. Based on the cases submitted to the court, it is possible that the jury might be influenced by the media in some way or another.

103. However, many of these cases also state that the jury is more than capable of making a decision and reaching a verdict without taking the media and publicity into account, the jury take instructions from the judge to not take the publicity into account and they follow these instructions. In *V v United Kingdom*[25] the presiding officer gave the jury a warning to put out of their minds anything which they might have heard or seen about the case outside the courtroom, in this matter the application for the stay in proceedings was dismissed. It was said that the repeated warnings being given to the jury by the judge was sufficient to obviate any risk of prejudice from the publicity[26].

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[24] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 CC at 52 para 24.
[25] *V v United Kingdom* [1999] ECHR 171; *D v Director of Public Prosecution* [1994] 2 I.R. 465 page 13.
[26] *D v Director of Public Prosecution* [1994] 2 I.R. 465 page 19.

104. The legal system differs in South Africa. There is a presiding officer appointed and that presiding officer will adjudicate the matter and decide on the outcome[27]. The presiding officer may be assisted by an assessor who will be appointed to hear the matter with him or her.

105. The presiding officer is a trained official who knows the justice system and who is impartial when he or she is sitting in their official capacity. A judge is a person of high integrity and honesty. Judges take an oath when they are appointed to uphold the law and to administer justice in an appropriate manner.

106. The *Bangalore Principles*[28] are international judicial standards that provide a framework for regulating judicial conduct. These principles have been endorsed by the United Nations General Assembly and South Africa has adopted these principles. The principles feature six core judicial values of pre-eminent importance to the fair and effective functioning of judicial systems. The judicial values are; independence, impartiality, integrity, propriety, equality and lastly competence and diligence.

107. The preamble to the *Bangalore Principles* state that these principles "*are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the*

[27] *Pelser v Director of Public Prosecution, Transvaal and Others* 2009 (4) SA 52 TPD.
[28] Bangalore Principles of Judicial Conduct, 2002, available at: http://www.undoc.org/pdf/crime/corruption/judical_group/Bangalore_principles.pdf.

executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge".[29]

108. In terms of independence, it states that *"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects".* In light of this *"A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*".

109. The principle relating to impartiality states that *"Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall perform his or her judicial duties without favour, bias or prejudice".*

110. Should a judge find him or herself in a situation where they are not able to be impartial then the principle states that the judge will have to take the following steps:

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[29] Bangalore Principles of Judicial Conduct, 2002.

"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice".

111. In *Bernert v Absa*[30] Ngcobo, J referred to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*1999 (4) SA 147 (CC) where it was dealing with the question of recusal, the following statement was made:

> *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the*

[30] *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at para 30

adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

112. The third principle relates to the integrity of the judge stating that the integrity is of essential importance to the proper discharge of the judicial office. The fourth principle deals with propriety, stating that *"Propriety, and the appearance of propriety, are (sic) essential to the performance of all of the activities of a judge".*

113. In terms of the fifth principle dealing with equality, it states: *"ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office. A judge shall not, in the performance of*

judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds".

114. And lastly the sixth principle is competence and diligence, stating that the judicial duties of a judge take precedence over all other activities. In light of these principles it is evident that a judge ought to maintain these principles in adjudicating a matter.

115. Judges have years of experience and are aware of the dangers of media reports on 'high profile' cases. The judge will however, view each case based on its own merits. *Pelser v Director of Public Prosecution, Transvaal*[31] stated: *"A Judge is a trained judicial officer and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the evidence produced in the case he is actually trying."*

116. In the Magistrates Court's the assessors that are appointed are lay people, however here it is important to note that the assessor merely gives their input to the presiding officer. The final decision is left for the presiding officer. The assessor will give reasons for their opinion, however if the presiding officer is of a different view then the presiding officer will state in his reasons that he differs with the assessors. Sec 93 ter of the Magistrate's Court Act[32] deals with assessors. It states that the Magistrate will have discretion on whether or not

[31] *Pelser v Director of Public Prosecution, Transvaal and Others* 2009 (4) SA 52 TPD at p56 para 9; *Danisa v British and Overseas Insurance Co Ltd* 1960 (1) SA 8000 DAT 801 F-G.
[32] Magistrates Court Act 32 of 1944 section 93ter.

to appoint an assessor in a matter. The assessor's that are appointed will take an oath in writing or make an affirmation subscribed to him or her before the Magistrate, stating that they will '*make a considered finding or decision or give a considered opinion, as the case may be, according to the evidence tendered in the matter*'[33].

117. The assessors that are appointed in the High Court are not lay people but rather those who have been selected because *"in the opinion of the judge who is presides at the trial, has experience in the administration of justice or skill in any matter which may be considered at the trial."*[34] These are usually people who have had legal training and practical experience in the operation of our legal system; they will sit with the presiding officer and provide input on the evidence presented in the trial. The assessors will take an oath prior to hearing any evidence that he or she will give a true verdict upon the issues to be tried.[35] Assessors will usually have a relationship with the judge[36]. The presiding officer will consult the assessor; however, the ultimate decision on the outcome of the trial is left with the judge.

118. In *Banana v Attorney-General*[37] it was said that the trial court was the better place to decide the principal question. This was the same view of *Nankissoon Boodram v Attorney General*[38] stating: *"that the proper forum for a complaint about pre-trial publicity in pending criminal proceedings was the trial*

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[33] Magistrates Court Act 32 of 1944 section 93ter subsection (5).
[34] Criminal Procedure Act 51 of 1977 section 145.
[35] Criminal Procedure Act 51 of 1977 section 145(3).
[36] *Banana v Attorney-General* 1999 (1) BCLR 27 (ZS) at 37 (7)
[37] *Banana v Attorney-General* 1999 (1) BCLR 27 (ZS)
[38] *Nankissoon Boodram v Attorney General of Trinidad and Tobago and Another* [1996] 2 LRC 196 at 206 h-l; *Phillips v Nova Scotia* [1995] 28 CRR 1 at 36.

court, where the judge can assess the circumstances which exist and decide whether the available procedures are sufficient to enable the jury to reach its verdict with an unclouded mind; or whether, exceptionally, a temporary or even permanent stay of the prosecution was the only solution".

119. In order for a stay in proceeding to be granted the applicant would have to show that the media coverage was adverse. The adverse media coverage would have to be prejudicial and would lead to him not having a fair trial. The media coverage has been adverse in this matter; however, the applicant has not shown a link between the adverse media coverage and the effect that it would have on the evidence that would be presented during the trial, if any and how it would result in him not having a fair trial.

Conclusion:

120. In light of above, as regards to the first two complaints, I am of the view that the applicant has therefore failed to convince this court that the prosecutors and investigators are guilty of misconduct and impartiality and secondly, guilty of unlawful conduct in that they had appointed an attorney of their choice to represent them in respect of plea negotiations.

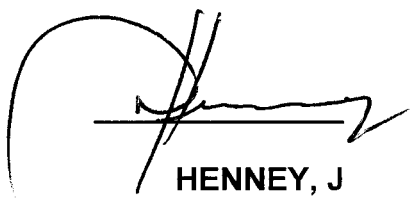
121. I am of the view that the applicant has not been able to prove that the adverse media coverage would lead to trial related prejudice. Based on the papers before the court the applicant has failed to show the trial related prejudice affected because of the adverse media coverage.

122. We will be confronted in South Africa where there is adverse media coverage for a particular case but that in itself can not be sufficient grounds to show that it would warrant a stay in prosecution. In the past judges have adjudicated and dealt with such cases.

123. The applicant was also not able to show that there were extra ordinary circumstances present to justify a stay in the proceedings. The applicant concentrated on the media aspect, and did not submit any evidence to show that an extra ordinary circumstance existed in this matter that would lead a stay in the proceedings being considered. I am of the view that no proper case was made out for the extra ordinary circumstances that would give rise to the stay in proceedings. In light of the above, I therefore reach the following conclusion.

Order:

The application is dismissed with costs.



HENNEY, J