

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 18849/18

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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In the matter between:

AUDREY DORIS PRINCE

First Applicant

STUART ROBERT ANTHONY PRINCE

Second Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

GAUTENG LOCAL DIVISION

Second Respondent

THE SENIOR PUBLIC PROSECUTOR SPECIALIZED

COMMERCIAL CRIMES COURT JOHANNESBURG

Third Respondent

JUDGEMENT

DANIELS AJ:

[1] The applicants, who are married to each other, seek an order, as set out in the notice of motion, as follows:

1. The prosecution against the Applicants currently before the Specialized Commercial Crimes Court, in Johannesburg under case no: SCCC 58/2012 be permanently stayed;
2. That the Respondents, in the event of opposing this application, be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

[2] The applicants allege that the long delay in prosecuting their case and the loss of documents by the state impact on their rights to a fair trial.

[3] Their application for a permanent stay of the prosecution against them is based on those two factors.¹

[4] The respondents state that the issue to be decided is whether the applicants' right to a fair trial has been infringed by the respondents' failure to provide certain documents.²

¹ This is set out in the applicants' practice note.

² This is set out in the respondents' practice note.

[5] The first applicant was a manager at the Strydom Park and Randburg branches of Nedbank and is alleged to have fraudulently transferred R8 764 095. 78 from various suspense accounts which she had access to and control over to accounts held in her and the second applicant's names.

[6] Both applicants are charged with 238 counts of fraud, alternatively theft. They are also charged with 238 counts of contravening section 4 (a) of the Prevention of Organised Crime Act, Act 121 of 1998.

[7] The respondents are part of the national prosecuting authority responsible for instituting criminal proceedings on behalf of the state, and for carrying out any necessary functions incidental to instituting criminal proceedings in terms of the constitution and the National Prosecuting Authority Act No 32 of 1998 and oppose the relief sought by the applicants.

[8] The first applicant has deposed to a short founding affidavit on behalf of herself and the second applicant, who has deposed only to a confirmatory affidavit. In the founding affidavit, the first applicant elected not to disclose the basis of the applicants' defences and did not explain why documents which she says the applicants require are necessary for her defence, although in her replying affidavit, she hints at a defence.

[9] Mr Roderick Vincent Montano ("Montano"), the applicants' former attorney of record has also deposed to an affidavit on behalf of the applicants.

[10] Mr Gideon Nwekeshane Nkoana ("Nkoana"), a deputy director of public prosecutions who is employed by the National Prosecuting Authority and is the Regional Head of the Specialised Commercial Crimes Unit in Johannesburg deposed to an answering affidavit on behalf of the respondents.

[11] Ms Sophia Jacomina Bothma (“Ms Bothma”) a forensic accounting consultant at Nedbank Group Financial Crime and Forensic Services deposed to a supplementary affidavit on behalf of the respondents.

[12] The relevant history, which is set out in the brief founding affidavit, is confirmed by Nkoana in his answering affidavit and is not in dispute.

[13] The applicants seek an extreme remedy which needs careful consideration.

[14] In this regard it was said in *Sanderson v Attorney-General Eastern Cape*³, at para

“It is appropriate at this juncture to make some brief observations about the remedy sought by the appellant. Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – 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.”

[15] One of the grounds on which the application is based is the long delay in finalising the prosecution as mentioned above.

[16] In *Sanderson vs Attorney-General Eastern Cape* [1997] ZACC 18 at para [25], Kriegler J noted that the critical question was how to determine whether a particular lapse of time was reasonable.⁴

³ *Sanderson v Attorney-General* [1997] ZACC 18

⁴ *Sanderson*. Para [25]

[17] With reference to *Barker vs Wingo* *Barker v Wingo, Warden* [1972] USSC 144; 407 US 514, 532 (1972), Kriegler J stated that the seminal answer is that there is a “balancing test” in which the conduct of both the prosecution and the accused are weighed and the following considerations examined:

1. The length of the delay;
2. The reason the government assigns to justify the delay;
3. The accused’s assertions of his right to a speedy trial and
4. Prejudice to the accused.

[18] This approach was referred to with approval in *Bothma vs Els* 2010 (2) SA 622 (CC).⁵

[19] In *Zanner v Director of Public Prosecutions*, [2006] ZASCA 56, Maya AJA (as she then was), stated that a permanent stay of prosecution is “a drastic remedy which is granted only sparingly and for very compelling reasons”⁶ and “Nevertheless, the fact of a long delay cannot per se be regarded as an infringement of the right to a fair trial. Whether there was an ‘unreasonable delay’ must be determined in the particular circumstances of each case, taking into account factors such as the length of the delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason thereof and the accused’s assertion to the right to a speedy trial.”⁷

[20] In *Rodrigues vs National Director of Public Prosecutions and others* [2019] 3 ALL SA 962 (GJ), Kollapen J noted that the Constitutional Court in *Bothma v Els* 2010 (2) SA 671 (CC) at para [37] had added a fifth factor, namely the nature of the offence and the public policy considerations which may be attached to it and concluded, with reference to the offence of murder that the fifth factor was relevant.⁸

⁵ *Bothma*. Paras [18], [35] and [36]

⁶ *Zanner* Para [10]

⁷ *Zanner* Para [14]

⁸ *Rodrigues*. Para [38].

[21] Kollapen J, also suggested that a sixth factor may also be important and that relates to the interests of the family and/or the victims of crime.⁹

[22] The legal basis for the application is based on the right contained in section 35(3)(d) which provides as follows:

*“Every accused person has a right to a fair trial, which includes the right to-
(d) to have their trial begin and conclude without unreasonable delay.”*

[23] The first applicant was arrested on 12 August 2003 and on that date appeared in the specialised commercial crimes court under case number SCCC 2001/2003 where she was granted bail of R75000,00.

[24] The case was apparently postponed on numerous occasions and commenced on 1 September 2009 when evidence was led.

[25] On 30 November 2011, the presiding officer, Mrs Ramlaal, recused herself from the case because she was retiring and the matter was postponed to 20 February 2012 on which date the first applicant’s matter was enrolled under case number SCCC 58/2012 and had to commence de novo.

[26] Mr Nkoana, who deposed to the answering affidavit on behalf of the respondents, states that the following facts are significant and should also be taken into account:

1. Throughout all the criminal proceedings the applicants were legally represented.

⁹ Rodrigues. Para [39]. Rodrigues was charged with being an accessory to the murder of an anti apartheid activist, Ahmed Timol who was murdered by security policemen. It was in that context that KollapenJ suggested that a sixth factor may be important.

2. In case number SCCC 201/2003, the original case involving the first applicant only, on 4th June 2004 the state and the defence were ad idem that the matter was trial ready and the case was remanded to 6 October 2004 for that purpose.
3. On 2 July 2009 the same case was still trial ready and was remanded to 2 September 2009 when it proceeded until the magistrate recused herself on 10 November 2011.
4. In case number SCCC 267/2009, the original case involving the second applicant only, on 15 October 2009 the state and the defence were ad idem that the case was trial ready and the case was remanded to 19 November 2009 for that purpose.
5. In case number SCCC 58/2012, the case involving the first applicant initially, on 28 August 2012 the state and the defence were ad idem that the matter was trial ready and the case was remanded to 1 October 2012 for that purpose.
6. On 10 March 2012, the second applicant was joined as accused 2 in case number 58/2012 following the withdrawal of the charges against him in case number 267/2009.
7. On 28 October 2015 the state and the applicants' then legal representative, presumably Mr Victor Montano, a partner at Alexander Montano Attorneys who withdrew as the applicants' attorney of record on 27 November 2019, were ad idem that the case was ready for trial and the matter was remanded to 15 February 2016 for that purpose.
8. On 15 February 2016, the defence indicated that there were documents which were required to prepare for trial and the current disclosure process was initiated.

[27] The respondents do not dispute these facts and they are common cause.

[28] Although neither the applicants nor the respondents have explained why there have been so many delays over the years, there were clearly regular communications between the parties over the years because Mr Nkoana says that

the state and the defence were ad idem, from time to time, that the matter was trial ready.

[29] The applicants do not suggest that they at any time either objected to the delays or sought to expedite the case against them as they were entitled to do.

[30] It is also common cause that the trial of the first applicant proceeded right up to the time that the presiding officer recused herself and that the matter was again set down for trial on 15 February 2016 but did not proceed on that date because the applicants sought various documents.

[31] In *Sanderson*, Kriegler noted with reference to delays that:

“An important issue related to prejudice should be clarified. It is the relevance of the accused’s desire that the trial be expedited. In some American cases, such as Barker, the extent to which the accused actually wants to go to trial looms very large. I respectfully disagree. Even if accused would rather avoid their contest with the state, they remain capable of suffering prejudice related to incarceration or the stringency of bail conditions or the exposure to a public charge. An accused should not have to demonstrate a genuine desire to go to trial in order to benefit from the right, provided that he can establish any of the three kinds of prejudice protected by the right.

Of course, an accused that has constantly consented to postponements could find it difficult to establish that he has suffered actionable social prejudice from resulting delays. But the question is not whether he wants to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.

On a related issue, I would suggest that if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under section 25(3)(a). The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the

prosecution in ways that are less formal. There is, however, no need for the accused to assert his right or actively compel the state to accelerate the preparation of its case. Provided that he has genuinely suffered prejudice as a result of the state's delay, he cannot be responsible for the state's tardiness."¹⁰

[32] That an accused cannot complain about delays when those may have been due to some fault on the part of the accused was reaffirmed in *Wild and another v Hoffert NO and Others* [1998] ZACC 5 at para [8] by Kriegler J, in the following terms:

"A further feature mentioned in Sanderson's case is the attitude of the accused towards delays and his or her role in prolonging the pre-trial period. Although the conclusion was that there need not be any assertion of the right to a speedy trial on the part of an accused, it was nevertheless emphasised that an accused who had been a party to or the primary cause of delay could not be heard to complain of such delay."

[33] Kriegler went further though and also noted that:

*"In the same context the judgment makes plain that fault on the part of the prosecution which results in delay is an important circumstance. Although the ultimate enquiry is whether the time between the charge and the trial is unreasonable, it is obviously relevant that the one or the other party is to blame, in whole or in part, for the delay."*¹¹

[34] With reference to a delay in the reinstatement a trial against an accused, Kriegler J said that unless trial prejudice is alleged, a claim for a stay of prosecution

¹⁰ Paras [32] and [33]

¹¹ Wild. Para 8.

must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate. ¹²

[35] Whilst it is true that the applicants, as pointed out by Kriegler J above, do not actively have to compel the state to accelerate its case, the applicants could have done so, but chose not to.

[36] The applicants have not challenged Mr Nkoana's assertions that the state and the defence were ad idem that the matter was trial ready. In other words, a reasonable inference to draw from that is that the applicants consented to the postponements and that they had consented to the matter being set down for trial on 15 February 2016. It can hardly be open to the applicants to now suggest that there were delays when they were participating fully in the proceedings.

[37] Under these circumstances, no serious criticism can be levelled at the prosecution in respect of the delays, especially as the postponements and the trial dates were consensual.¹³

[38] The applicants undoubtedly have the right to a speedy trial, that is a trial which begins and concludes without unreasonable delay but the question which remains is whether the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.¹⁴

[39] There was a pre-trial delay of four years between 20 February 2012, the date on which the first applicant's matter was enrolled under case number SCCC 58/2012 and 15 February 2016 when the matter was due to commence. Apart from the fact that the second applicant was joined as an accused very early in 2012, neither the

¹² Wild. Para [27]

¹³ Wild. Para [23].

¹⁴ Bothma v Els. Para 34.

applicants nor the respondents have explained why it took so long to set the matter down for hearing. The applicants simply state that various persons within the prosecuting authority dealt with the matter and the respondents do not even attempt to explain the delay.

[40] For that reason, the applicants' relief based on a delay in the pre-trial proceedings cannot succeed.

[41] What needs to be considered is whether the applicants have suffered trial related prejudice and whether exceptional circumstances justify a permanent stay of prosecution.

[42] The applicants argue that the delay will cause prejudice to them and that documents which have been lost will impact on their rights to a fair trial.

[43] Prejudice is an important factor.

[44] Before dealing with this issue it is necessary to comment on the pleadings.

[45] The first applicant must have a substantial amount of relevant information relating to the postponements and her original trial. However, the first applicant has deposed to a founding affidavit which contains the barest of details and has attached numerous annexures to that affidavit and simply asks that "same be incorporated as if specifically incorporated herein.

[46] Mr Montano has done the same. In his supporting affidavit, he has simply attached annexures, for example, a request for further particulars, lists of documents seized from the applicants, the heads of argument used in the application in the magistrate's court and the transcript of the judgement in the stay application.

[47] In *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) Joffe J said, with reference to the contents of affidavits generally that:

“It is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues for the benefit of the court and the parties who must know the case they are to meet in order to adduce evidence in the affidavits ... An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting upon it in respect thereof.”

[48] In *Van Zyl v Government of RSA and others* [2008] 1 ALL SA 102 (SCA) at paragraph 40, Harms ADJ said,

“... it is not open to a party merely to annex documentation to an affidavit and during argument use its contents to establish a new case. A party is obliged to identify those parts on which it intends to rely and must give an indication of the case it seeks to make out on the strength thereof”.

[49] The annexures attached to the applicants' affidavits contain a great deal of information but do not deal with the actual prejudice which the applicants have suffered as a result of the alleged delays and the loss of documents, except that the issue of prejudice is canvassed in the annexure containing the heads of argument files in the magistrate's court.

[50] The applicants must, at the very least, explain how the delay and the loss of documents have affected the preparation of their defence. In respect of the loss of

documents, the applicants are required to explain what documents have been lost and how they intend to use those documents.

[51] The respondents have also not been helpful and have not attempted at all to explain why the matter has taken so long to commence *de novo*, what steps were taken by them to locate the documents which were lost and whether the documents can in fact be retrieved or reconstructed. In fact, they studiously avoid the issue, when their duty is to assist this court.

[52] In this regard, in *Rodrigues*, Kollapen J, at paragraph [70] said as follows with reference to *Grootboom v NPA* 2014 (2) SA 68 (CC):

“In *Grootboom v NPA* the Constitutional Court, in dealing with the manner in which State organs are expected to litigate and be of assistance to Courts, remarked as follows:

“There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of State, the Constitution obliges them to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.””

[53] Mr Montano clearly received documentation relating to the trial, when he was appointed to represent the applicants because the first applicant states that:

“Pursuant from the perusal of documentation placed to the disposal of my current legal representative R Montano; my legal representative then requested further particulars”.¹⁵

¹⁵ “Para 17 of the founding affidavit.

[54] Montano confirms that he perused documents which were made available to him and thereafter requested further particulars. He does not indicate who made the documents available to him.

[55] On 15 February 2016, the date on which the trial was due to begin, he advised the court that he required additional documentation. His request for further and better particulars was dated 19 February 2016 and was served on 1 March 2016.

[56] The state could not respond to the request for further and better particulars because the documents which Mr Montano requested, including documents seized at the home of the applicants, for the purposes of preparing for trial had been either misplaced, or lost or destroyed.

[57] There is also some confusion as to who initially had possession of the documents.

[58] Despite the directions given by the presiding officer, the state was unable to provide the documents requested.

[59] That prompted the applicants to make an application in the specialised commercial crimes court under case number SCCC 58/ 2012, for a permanent stay of the prosecution in and during 2016. This application was heard on 1 September 2017 and then postponed to 13 October 2017 for judgement. On that day, the magistrate did not deliver a judgement but explained that he did not have jurisdiction to entertain an application for a permanent stay of the prosecution. By that time, a period of about 21 months lapsed since the date on which the trial was due to start.

[60] Mr Montano does not explain whether the documents which the state could not provide had hindered the applicants' preparation for the trial and why it had so hindered the trial preparation. He has also not explained why the delay and the loss of documents had made it impossible for the trial to commence and whether the delay and loss of documents would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.¹⁶

[61] Following that aborted application for a permanent stay of the prosecution in the magistrate's court, the applicants instituted this application on or about 16 May 2018.

[62] The applicants seek relief which is "radical" and should have dealt with the prejudice which they have suffered by the delay and the loss of documents in greater detail, but failed to do so.

[63] It is common cause that documents which the applicants claim they need to prepare for their defence and which were either directly or indirectly in the respondents' possession have been either misplaced or destroyed or thrown away.

[64] In paragraph 21 of their founding affidavit, the applicants claim that without those documents which the state had a duty to properly preserve, they will not be "*afforded an opportunity to place our (their) defence properly before Court and as such our (their) right to a constitutionally fair trial has been violated by the State.*"

[65] The issue is not simply whether the applicants will not be able to place their defence properly before the court, but whether they will suffer irreparable trial prejudice.

¹⁶ Bothma v Els. Para 34.

[66] In *Bothma*, the Court said the following with reference to irreparable trial prejudice.

“These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained.”

[67] The magistrate’ court had directed that a meeting be arranged between the parties and Nedbank, the complainant, to discuss the request for further particulars.

[68] Evidently the Nedbank audit reports were not available and had been destroyed. However, a report dated 23 October 2002 was supplied but, according to Mr Montano, it is incomplete and does not provide the applicants with information which would have been in the official audit report, although he does not state what that information contains.

[69] Nedbank has a document relating to the matter in its possession but won’t disclose it to the applicants’ due to client confidentiality.

[70] In her supporting affidavit, Ms Bothma states that a report, marked DCP060, is an automated transaction report prepared daily and reflects all the transactions processed by a teller for that day and is used to reconcile the bank notes and coin suspense account. The transaction report is used to deal with queries relating to

teller transactions, if the teller audit roll is not available due to either the teller audit roll being unavailable or because the teller printing machine malfunctioned. The transaction report contains the same information as the teller audit roll but in less detail.

[71] The transaction report contains the following information:

1. the staff number of the teller who logged onto the teller terminal;
2. the date and time of the transactions;
3. the account numbers of the client or the bank suspense account involved;
4. the amount involved and the type of transaction.

[72] According to Ms Bothma, only the relevant parts of the transaction report were provided to the “defence” because the transaction report contains the account numbers of all the bank’s clients. She avers that there is ample evidence which indicates the illegal movement of funds from the bank’s suspense accounts.

[73] The “defence” was also provided with documentary proof of how the first applicant concealed the illegal transfers and copies of the bank accounts held in the names of or under the control of both applicants which indicate that those accounts received the funds transferred by the first applicant from the bank’s accounts into those accounts.

[74] Mr Montano also received a comprehensive inventory of what had been seized in 2004 already.

[75] According to the first applicant, both she and the second applicant require those documents for their defence.

[76] She avers that she and the second applicant cannot properly prepare their defence and will be prejudiced as their right to a constitutionally fair trial has been violated by the state and has been compromised and made impossible.

[77] With reference to the documents which she says the applicants need for the purposes of preparing their defences, the first applicant simply refers to annexure "RM2" attached to Montano's affidavit. RM 2 consists of 3 pages, although the three pages are marked as being "page 1 of 4," "page 2 of 4" and "page 4 of 4" respectively. They are receipts issued by PricewaterhouseCoopers for items apparently seized from the applicants. Two of those pages contain details of household furniture and appliances which were taken from the applicants.

[78] Page 4 contains cryptic notes, namely, "1 x Nedbank cheque book, 4 x lever arch files re: docs relating to Stuart's liquor store and 1 x lever arch file re: personal/invoices of Stuart Prince were taken."

[79] The first applicant was legally represented during the first trial and must have received documents from the state for the purposes of that trial, but she makes no reference at all to any such documents. It is highly inconceivable that the first trial would have commenced without the first applicant being provided with all relevant information and documents, especially in the light of the seriousness of the charges against her and the amount of money involved. The first applicant has not explained what happened to those documents. The respondents, too, have not explained what happened to the documents pertaining to the first trial.

[80] The fact that her original trial had commenced suggests that at least the first applicant must know exactly what case the state intends to put forward and that she and the second applicant will be able to adduce evidence and challenge the state's evidence during the trial proceedings.

[81] Similar points were made by Ledwaba, AJ in *Roderigues v National Director of Public Prosecutions and others* (1186)/2019) [2021] ZASCA 87 when he said with reference to an appeal in respect of *Rodrigues vs National Director of Public Prosecutions and others* [2019] 3 ALL SA 962 (GJ):

“The right to adduce evidence and challenge the State’s evidence can best be dealt with during the trial proceedings. The appellant testified at the second inquest proceedings and challenged the evidence led there. He knows exactly what case the State intends to put forward.”

[82] The pending case is not a new case. It is the original case which is going to start *de novo*.

[83] Neither she nor Montano have provided any details about the documents which Mr Montano received, either from the applicants themselves or their previous attorneys or the state which related to the trial of the first applicant all of which would have been relevant to the second trial which is still pending as the second trial is based on the same facts as the first trial.

[84] In reply to Mr Nkoana’s answering affidavit and Bothma’s supplementary affidavit, the first applicant says that she has read both affidavits and then raises for the first time that she requires documents seized by the asset forfeiture unit as those will prove that the deposits into their accounts were from income generated from a bottle store run by the two of them.

[85] She also then says that the documents include the invoices, deposit slips, bank statements, purchase orders, copies of cheques and sales invoices all of which were apparently in five lever arch files and points out that the respondents have not complied with their request for further particulars.

[86] The first applicant does not reply in any detail to Ms Bothma's affidavit, except to say that the DCP060 report will be tilted in the state's favour if the deposit slips taken from them are not produced as they will not be able to disprove the state's case and the DCP060 report is not a summary of the documents taken from them.

[87] The allegation against the applicants is that the first applicant unlawfully transferred various sums of moneys from suspense accounts under the control of Nedbank to bank accounts held or controlled by her and the second applicant. These details appear from the charge sheet annexed as AP3 to the founding affidavit

[88] Ms Bothma says that they have been provided with all relevant documents in regard to those transactions.

[89] The applicants' defence appears to be that the deposits which were made into their accounts were generated from income produced by their bottle store but she does not explain why the amounts were transferred from suspense accounts under the control of Nedbank into her and the second applicant's bank accounts.

[90] It would be a great coincidence indeed if the amounts which the first applicant claims were deposits made from income generated from their bottle store, corresponded exactly with the amounts which were transferred from the suspense accounts into the applicants' bank accounts.

[91] It does not appear to me that any trial related prejudice arises from the fact that the state has not been able to provide some of the documents because they have been lost. Bothma says enough information has been provided and the applicants have not mentioned what documents they actually have in their possession and what documents they gave to Mr Montano.

[92] The applicants appear opportunistically to have raised their right to a fair trial because the state has not been able to provide documents.

[93] As support for the relief based on the delay and also the loss of documents, the applicants rely on *Broome vs Director of Public Prosecutions Wiggins v W, nmde Streeklandros Cape Town and others* [2007] ZAWCHC 61

[94] The charges against Broome and the other accused were based mainly on the manner in which the annual audits of various entities, known as the OWT Group, were done and the information contained in the financial statements which resulted from those audits.

[95] A substantial part of the documents seized had been lost and what remained were the usual internal records relating to the running of the company, including ledgers, debenture lists, participation bonds, cheque books, deposit books and personnel files.

[96] However, Broome needed access to information relating to the audit processes which record how the audit team performed its functions as auditors to the OWT Group.

[97] Broome contended that he and others would not be able to justify the work of the auditors unless they had a complete set of records. Broome had also furnished the DPP with a detailed exposition of what was missing and what material was at hand and had provided a full explanation of the significance of the audit papers from his perspective.

[98] I am not certain that Broome assists the applicants.

[98] In *Bothma*, Sachs J said the following with reference to *Broome*:

“One recent South African case where a stay was granted is Broome v Director of Public Prosecutions, Western Cape.⁸⁷ The applicants in that matter were accused of fraud allegedly committed between 1986 and 1994. In 1994, a governmental commission of enquiry seized audit files, documents, and records. There was a seven-year delay between the conclusion of the investigation and the formal charge in 2004, which the Court found inexplicable and inexcusable. Most importantly, the state had been responsible for the loss of documents instrumental to the defence (the applicants had provided a detailed exposition of the material that was missing and a full explanation of the significance of the working papers), in addition to denying the applicants access to the documents. Because the case concerned an audit that had been conducted by many people, the applicants and any witnesses they might call could not be expected to remember everything that had occurred in the course of the audit. One of the accused was old, and his memory was diminished. Witnesses had moved away or were untraceable, and those who remained could not remember the events clearly. In granting the permanent stay of prosecution, the Court concluded that—

“[i]f, on the facts, it is shown that an accused has been deprived of his right to prepare his defence to criminal charges, the interest of justice can never require such a person to stand trial – more particularly, if the prosecution is solely to blame for this state of affairs.”

It is notable that in the only case where a stay was granted, it was the state that had been responsible for the loss of crucial documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the state to prosecute someone and then deliberately or through an unacceptable degree of negligence deprive that

person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays. Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal.¹⁷

[99] Superficially, the facts in *Broome* seem similar to the applicants' case in respect of the loss of documents. But that is where the similarity ends.

[100] In *Broome*, as pointed out by Sachs J, the applicants had provided a detailed exposition of the material which was missing and a full explanation of the significance of the working papers.

[101] On the facts of that case, the applicant had been deprived of his right to prepare his defence and cannot be required to stand trial under those circumstances.

[102] The first applicant's first trial had commenced. She and the second applicant were legally represented at all times and had consented to the postponements. They also had documents in their possession and failed to provide an "exposition" of those and why they were necessary for the preparation of their defence, especially as Ms Bothma in her supplementary affidavit says that they were provided with all relevant documents.

[103] That statement by Ms Bothma has not been challenged by the applicants.

¹⁷ *Bothma*. Paras 73 and 74.

[104] The founding affidavit contains the barest of detail and the applicants have not provided any substantial evidence to show that their ability to prepare for their trial has been affected by the delay and the loss of documents.

[105] The evidence presented by the applicants and Mr Montano does not suggest that irreparable or insurmountable trial prejudice will result if the trial went ahead.

[106] There is absolutely no evidence to suggest that the documents which the applicants claim they need to prepare for their defence will taint the fairness of their trial.

[107] This is likely to be a neutral factor, in any, event as it applies equally to the state which carries the burden of proving an accused's guilt beyond reasonable doubt, as stated by Kollapen J in Roderiques.¹⁸

[108] Kollapen J also cited with approval the following remarks made in *Wild*:

“The conclusion that a permanent stay of prosecution is not appropriate relief to be granted to the appellants here, by no means puts paid to their rights under section 25(3)(a). Those rights and the duty to devise appropriate remedial relief for their infringement will continue throughout the trial. For example, it is trite that a judicial officer, when structuring sentence, is obliged to have regard to pre-trial detention and any other significant prejudice suffered as a result of the case hanging over the accused's head for a protracted period. Similarly, should it transpire that there had indeed been trial-related prejudice, this judgment would constitute no impediment to appropriate relief then being granted.”¹⁹

¹⁸ Para [86].

¹⁹ Roderiques. Para 87]

[109] The applicants application for a permanent stay of the prosecution based on the loss of documents cannot succeed.

[110] Finally, it is necessary to consider briefly the nature of the offence and the public policy considerations.

[111] The first applicant says that apart from being deprived of a speedy trial and access to evidentiary material, she and the second applicant have not been able to procure gainful employment as a result of the charges, have lost their assets, have been convicted in the court of public opinion, have had to make ends meet to pay for their legal costs for a long time and the long delay since their arrests, hers particularly, has caused severe prejudice to her and the second applicant.

[112] The applicants face very serious charges. They are alleged to have defrauded Nedbank of R8 764 095. 78. Not only is this a substantial amount of money, but the first applicant was a manager at Nedbank and occupied a position of trust. She had access to the suspense accounts in question.

[113] In *Sanderson*, Kriegler J stated with reference to the reasonableness of a delay and its impact on the accused that:

“The qualifier “reasonableness” requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared

to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the play-thing of the state or of society.”²⁰

[114] I accept that a long time has elapsed since the first and then the second applicant were arrested.

[115] However, society's needs to curb fraud, theft and corruption must also be taken into.

[116] In a case like this in which the applicants are accused of serious offences, there is a “profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused.”

[117] The applicants will have an opportunity of proving their innocence during a trial and, if they are unable to do so, they will have to face the consequences.

[118] It is not necessary to consider the sixth ground advanced by Kollapen J, namely, the interest of the victims and their families.

[119] Kollapen J made the remarks about the sixth ground in a particular political and social context in which a prominent anti-apartheid hero had been murdered by the security police during the apartheid era, 47 years ago. With reference to those

²⁰ Para [36].

tragic circumstances, the victims, in that case the family of Ahmed Timol and the South African people as a whole are entitled to justice and the decision to prosecute Roderiques will “ventilate the truth of what occurred and for the applicant’s guilt or innocence to be determined by a court of law.”²¹

[120] That is not to say that the interests of the victims and their families do not have to be considered in matters involving fraud. This is not, however, such a case.

[121] Despite the conclusions I have come to, the applicants will not be remedy-less.

[122] The respondents indicated during the hearing that the prosecution will commence without delay, if this application is dismissed.

[123] Should the prosecution authorities delay the prosecution for any reason the applicants will be able to utilise the provisions of section 342A of the Criminal Procedure Act which provides as follows:

342A. Unreasonable delays in trials.—(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;

²¹ *Roderiques*. Para [96].

- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
- (i) any other factor which in the opinion of the court ought to be taken into account.

[124] In *Raves v Director of Public Prosecutions, Western Cape and Another* (A150/2020) ZAWCHC 11, the court had to consider an appeal against the refusal by the court a quo to grant a permanent stay of the prosecution pursuant to section 342A(3)(a) based on repeated postponements in the prosecution resulting in unreasonable delay.

[125] In the court a quo Slingers AJ had observed that such an order is granted sparingly and only for compelling reasons and that a bar is likely to be available in a narrow range of circumstances, for example where it is established that the accused has suffered irreparable trial prejudice as a result of the delay.²² I mention *Raves* merely to illustrate that the same factors as those which must be considered when deciding whether to grant a permanent stay of prosecution will apply to a section 342A application.

²² Para 56.

Order:

[126] In the result, the following order is made:

1. The application is dismissed.
2. No order is made as to costs.

E. DANIELS

(Acting Judge of the Gauteng Local Division)

Date of hearing: 3 March 2022

Date of Judgement: June 2022

APPEARANCES:

On behalf of The Applicants : Mr Ditheko Lebethe

Instructed by : Ditheko Lethe Attorneys

On behalf of The Respondents : Adv PJ TICNKER

Instructed by :Specialised Commercial Crime Unit