



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

CASE NO: 12398/19

(1) <u>REPORTABLE: YES / NO</u>
(2) <u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3) <u>REVISED.</u>
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SIGNATURE

In the matter between:

GARY MICHAEL TAYLOR

Applicant/Accused

And

THE REGIONAL COURT MAGISTRATE- Mr Nemavhidi

First Respondent

THE STATE

Second Respondent

In re:

THE STATE

The State/ 2nd Respondent

And

GARY MICHAEL TAYLOR

Accused/Applicant

Neutral Citation: *Garry Michael Taylor v The Regional Court Magistrate – Mr. Nemavhidi & Another* (Case No: 12398/2019) [2023] ZAGPJHC 604 (31 may 2023)

JUDGMENT

THUPAATLASE AJ (JOHNSON AJ Concurring)

Introduction

[1] The applicant seeks the following relief in regard to the criminal prosecution that is pending against him in the Palm Ridge regional court:

(a) to review and correct or set aside the judgment delivered by the 1st respondent under case no. SCC 252/2016 in the regional division of Gauteng at Specialised Commercial Crime's court in terms whereof it was decided that the court lacked jurisdiction to grant a permanent stay of prosecution.

(b) further and/or alternative relief.

[2] The applicant is charged with the offence of fraud. In the court a quo the applicant sought relief in the following terms:

(a) that the prosecution of the accused be permanently stayed;

(b) alternatively, any lesser relief including relief set out in Section 342A

of the Criminal Procedure Act. Further or alternative relief.

[3] After hearing the application the learned regional magistrate ruled that the regional court did not have jurisdiction to grant the order sought by the accused. This ruling was given without providing reasons nor were any reasons granted subsequently. According to counsel for the applicant this was despite a request for such reasons. This has left this court to grope into the dark as to the reason why the learned regional magistrate gave the order. There was no mention about the fate

of the alternative 'lesser relief set out in Section 342A of the Criminal Procedure Act' that the applicant sought in the event that he unsuccessful in obtaining the relief.

[4] At this stage I can just add that both respondents filed notice to abide, though Adv. Tickner from office of the DPP and a prosecutor in this matter appeared before this court. He informed the court that the matter is ready to proceed to trial.

Grounds of Review Application

[5] The grounds of review as stated by the applicant are as follows:

5.1. the finding of an absence of jurisdiction is a mistake in law that led to reviewable irregularity- this finding prevented the 1st respondent from directing his mind to the issues and from determining the case fully and fairly.

5.2. the court a quo has jurisdiction in that the facts and circumstances alleged by the Accused brought the application for a permanent stay of prosecution within the ambit of Section 342A of the CPA with particular reference to:

5.2.1 section 342A (2) (f) and (i) and the actual or potential prejudice caused by the loss of evidence, problems regarding the gathering of evidence and the weakening of the evidence.

5.2.2. the court's duty in terms of section 342A (1) of CPA to investigate any unreasonable delay in the completion of the proceedings which would include the delay caused by the South African Police and/or the State in failing to secure material evidence inaccessible to the Accused and the substantial prejudice that followed the eventual loss of such material evidence.

[6] The contention of the applicant is that the learned regional court magistrate had jurisdiction on account of various sections of the Constitution. The applicant specifically refers to section 35 (3) (a) and (b) (1), section 8(1), section 9 (1) and sections 165 and 170 in the event it is to be found that the application for a permanent stay of prosecution does not fall within the ambit of section 342A of the CPA.

[7] It is a further submission by the applicant that the learned regional magistrate had the power to grant permanent stay of prosecutions as derived from the Constitution itself as interpreted by case law.

[8] The applicant contended it will be contrary to the Constitution if it can be found that the magistrate's court does not have neither the duty nor the power to comply with section 35 (3) of the Constitution in the absence of legislative measures.

[9] It is not apparent from the record whether there was any attempt to enquire into any alleged undue delay. The court appears to have been preoccupied with whether it enjoyed jurisdiction to entertain an application for permanent of stay of prosecution. This is clear from the request by the learned magistrate that parties provide further heads of argument specifically on the question of jurisdiction. This is also clear from the short order the court a quo granted.

[10] This court will therefore approach the matter from the narrow point decided by the magistrate, namely whether the magistrates' court has during to order permanent stay of prosecution of proceedings pending before it. The court a quo appears not have enquired into the causes of the undue delay if any, and then to use the remedies provided by section 342A to issue an appropriate order. In order to avoid prolixity this court will not deal extensively with section 342A as it is apparent that the court a quo did not base its decision on that section.

[11] On the papers properly considered the review application does not seem to be based on any gross irregularity occurred during the proceedings. It appears the review application is based purely on jurisdictional challenge, that is to say on the finding that the learned magistrate concluded that he lacked jurisdiction to grant that was sought.

Background

[12] The applicant is facing 76 counts of Fraud alternatively 76 counts of Theft. The alleged offences were allegedly committed over a period of ten (10) years. The period in question is from 15 August 2005 to 27 March 2015. The amount involved is said to be R 6 393 920. 99. It appears that the offences were allegedly committed during the period that the applicant was employed by Discovery as Head of

Operations and appears to have been responsible for a big portfolio. He resigned on 11 May 2015.

[13] The history of the prosecution reveals that after the applicant was provided with a chargesheet, he requested further particulars. The first request was on the 10 March 2017 and the State responded on 19 April 2017 and thereafter a request for further and better particulars was submitted and the State responded on 26 June 2017. It appears the applicant was not satisfied with the response and according to him he further discovered that the State had failed to secure some evidence.

[14] On 04 October 2017 the applicant applied to have the charges against him withdrawn. The request was rejected by the State. This was communicated to the applicant on the 27 of October 2017. It is interesting to note that in his founding affidavit the applicant claims on two instances that the State has been pressurising his defence attorneys to set trial date. The impression is that the State has been willing to commence with the trial. Adv. Tickner informed the court that the State is ready to commence with the trial. It is also important to note that in his founding affidavit the applicant submits that the stay of prosecutions will be the only remedy. There is no mention of considerations under section 342A.

Does the magistrate's court have jurisdiction.

[15] The question whether or not the regional magistrate's court has jurisdiction to entertain an application for a permanent stay of prosecution has been considered by various divisions of the of the high court. These various decisions have unfortunately yielded different conclusions. The court shall proceed to consider these judgments with a view of seeking guidance.

[16] The South African law is rights based and the Constitution is the supreme law of the Republic. In ***Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*** [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44 the court stated that *there is only one system. It is shaped Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*

[17] The point was also emphasized in the case of ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*** [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) when the court stated at para [22] that ‘the question of the relationship between the common law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter.’

[18] The starting point is therefore the Constitution and the decisions of the constitutional on the subject. In the case of ***Sanderson v Attorney General Eastern Cape*** 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1675 (CC). The court confirmed that a high standard is required before an order to permanently stay prosecution can be granted.

[19] The issue of pretrial prejudice was dealt with specifically in the case of ***Lethoko & Another v Minister of Defence & Others*** 2021 (2) SACR 661 (FB) where the court held that: ‘*They brought the administration of justice into disrepute, and they could have done much better to uphold their duty to ensure expeditious finalisation of the case. The charges against the applicants are serious. The crime . . . was committed against their employer, and the theft was blatantly committed in relation to the property of the taxpayer and law-abiding citizens of the country. The evidence against the applicants is strong. On the other hand, the applicants are represented by sturdy and experienced counsel, they face no trial prejudice. Prejudice on other levels such as training, and promotion opportunities, can be addressed on other points of law. It is high time for the matter to go on trial and for justice to take its course. A healthy democracy and the protection of the citizen in general demand that cases of this nature be tried and concluded. The inappropriate management of criminal cases by individuals must not cause the rule of law to fail the country.*’

[20] The majority decision in the case of ***S v Naidoo 2012 (2) SACR 126 (WCC)*** dealt with the issue of jurisdiction of the magistrate’s court to order permanent stay of jurisdiction. At para [16] of the judgment the court stated ‘*magistrates’ courts do not ordinarily enjoy jurisdiction to judicially review administrative or constitutional action, or to make declaratory orders. That well-established limitation on their jurisdiction probably explains why the wording of s 342A of the CPA, which does afford a basis*

for a magistrate to make an appropriate delay related order, is limited to delay after the commencement of proceedings, that is, delay which occurs while the matter is under the supervision of the court. The appellant was in essence applying for a declaration that he could not be prosecuted. He was seeking a remedy which would avert his trial, rather than one which asserted his right to a fair trial. The difference between the two concepts in the context of the issue currently under consideration is illustrated by the fact that it does not lie within a magistrate's power to give declaratory relief, while it does fall within a magistrate's duty to ensure that criminal proceedings conducted before that court are so conducted as to assure an accused of a fair trial. In our view the inclusion of the right to have a trial begin without unreasonable delay as one of the elements of a fair trial within the ambit of s 35(3) of the Constitution does not detract from the relevance of the aforementioned dichotomy for jurisdictional purposes. For the moment we are concerned not with the content of the implicated right, but with identifying the forum in which the particular remedy sought in this case could competently be granted.'

[21] The majority continued to pose the question at para [17] '*Do the Magistrates' Courts Act, the CPA or the Constitution expressly invest the magistrates' courts with the jurisdiction to make such orders? They do not. Is the authority to make such orders necessarily implied in the functions which the magistrates' courts are mandated by statute to discharge? Again, in our view, the answer is in the negative. Any notion that constitutional principle requires that the magistrates' courts should, by necessity, have an implied broader jurisdiction to determine matters implicating fundamental rights is rebutted in the following dictum of the Constitutional Court in para-138 the Certification judgment: 'The mere fact that some, but not all, courts have jurisdiction to decide constitutional issues does not mean that CP VII has not been complied with. Differences between the jurisdictions of lower and higher courts are not an unusual feature of court systems elsewhere in the world. The CA was entitled to confine jurisdiction over particular matters, including constitutional jurisdiction, to the higher courts, as has been done in the IC. The fact that such a decision was taken does not mean that the judiciary lacks the jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It means no more than that litigants who wish to turn to the courts for enforcement of such rights must look to the higher and not the lower courts.'* (footnotes omitted)

[22] At para [18] the court further commented that ‘ *in the result, an accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(d) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal proceedings (in other words, in circumstances not provided for in s 342A of the CPA) must bring the application before the high court having jurisdiction. By contrast, what we have termed ‘intracurial’ delay — delay occurring after the commencement of criminal proceedings — is a matter falling to be dealt with exclusively by the court seized with the criminal proceedings.*’ The court endorsed and followed the earlier decision of the same division ***in Attorney General of the Western Cape; S v The Regional Magistrate, Wynberg & another*** 1999 (2) SACR 13 (C).

[23] The court in ***Naidoo v Regional magistrate, Durban and Another*** 2017 (2) SACR 244 (KZP) at page 126 the court considered a number of decisions of that division and decisions of other courts and concluded as follows:“[A]n accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(d) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal proceedings (in other words, in circumstances not provided for in s 342A of the CPA) must bring the application before the high court having jurisdiction. By contrast, what we have termed ‘intracurial delay’ – delay occurring after the commencement of criminal proceedings—is a matter falling to be dealt with exclusively by the court seized with the criminal proceedings.” The court followed ***Naidoo*** majority decision supra and did not follow the decision of ***Director of Public Prosecutions Kwa-Zulu Natal v Regional Magistrate Durban and Another*** 2001 (2) SACR 463 (N).

[24] In the case of ***Van der Walt v Director of Public Prosecutions*** [2021] 4 All SA 251 (ECG) at para [8] the court endorsed the view of the majority of ***Naidoo*** supra to the effect that the magistrate’s court enjoys no jurisdiction to stay proceedings based on pre-trial delay. *If the court goes through the above exercise and comes to the conclusion that the completion of the proceedings is being unreasonably delayed subsection (3) provides a list of possible remedies. Those remedies are quite detailed, all of them being intended to achieve one purpose, which is the elimination of the delay and the prejudice arising therefrom. It is apposite to point out*

immediately that an order for a permanent stay of prosecution does not eliminate a delay in pending criminal proceedings, it brings such proceedings to an abrupt end. It will be observed that the catch all provision in subsection (2)(i) is not provided for in subsection (3). In other words, there is no provision for a court to grant any order it deems fit save for purposes of eliminating the delay. In my view, the list in subsection (3) is exhaustive all of it being aimed at the elimination of any delay in pending criminal proceedings providing for no other outcome of the enquiry, certainly not a permanent stay of prosecution.'

[25] At para [9] the court concluded that *'If it is accepted that the whole purposes of the section 342A enquiry is to eliminate a delay in criminal proceedings before a court it cannot be correct, in my view, that an order for a permanent stay of prosecution eliminates a delay on any possible interpretation of the word, "eliminate". It clearly doesn't.'*

[26] The conclusion is inescapable from the decisions cited above that courts will not grant stay of prosecution orders without good reason. The threshold is, quite correctly, rather high. At stake is the integrity of the criminal justice system and the concomitant interest of public trust. Of course, stay of prosecution is an important remedy to protect the rights of individuals and to act as a corrective measure when the criminal process itself is no longer serving justice because of delays.

[27] I am fortified in my view by the SCA decision in **Zanner v Director of Public Prosecutions, Johannesburg** 2006 (2) SACR 45 (SCA) where it was decided that a permanent stay of prosecution was a drastic remedy which is to be granted sparingly and only for compelling reasons. Normally this would relate to trial related prejudice (unavailability of witnesses or fading memory).

Speedy trial

[28] It is so that included in the concept of fair trial is the right of every accused person to have his trial commence without unreasonable delay. This enshrined as constitutional right in section 35(3) (d) of the Constitution. The courts have identified three forms of prejudice that an accused potentially suffer in case of unreasonable delay, and these are:

1. the loss of personal liberty resulting from detention or restrictive bail condition;
2. the impairment of personal security resulting from loss of reputation, social ostracism or loss income or employment; and
3. trial related prejudice such as the memories of witnesses fading or unavailability of witnesses.

[29] In this case the appellant has emphasised the trial related prejudice. He contends that the fact that the State failed to secure and collect the evidence that was stored in the two computers he used while employed by the complainant. In order to determine the cogency of the contention it is important to regard once more at the history of this case. In ***Van Heerden & another v National Director of Public Prosecutions & others*** 2017 (2) SACR 696 (SCA) gave an emphatic warning that every enquiry into whether there has been an unreasonable delay must be based on the particular facts of each case. The applicant must demonstrate such deliberate conduct by the prosecution on a balance of probabilities. See ***S v Porritt & another*** 2016 (2) SACR 700 (GJ) at para [30].

[30] I have alluded the fact that the State advocate who is also a prosecutor in this matter has told the court that, the State is ready to commence with the trial. This was already made known to the applicant in June of 2018. The applicant has been provided with a chargesheet. It is not clear from the record why the accused is insisting to dictate how the State should conduct its case. The State is the *dominus litis* and should be allowed conduct the trial in the manner it prefers, of course without infringing on the rights of the accused.

[31] Already in December 2017 in response to the request that the charges against the accused be withdrawn, the State indicated its view that there is overwhelming circumstantial evidentiary material warranting the continuation of the prosecution despite the alleged failure by the complainant to supply the State with the content of the data stored in the computer the accused used during the period of his employment with the complainant.

[32] In the papers before the court, the applicant does not tell the court the exculpatory nature of the of the lost evidence. He alleges that there is weak case against him. In my contemplation that should be incentive enough for him to go to trial as the probability of an acquittal is high.

[33] The attempt by the applicant to litigate extra-curial is curious to say the least. It is the view of this court that such conduct has contributed to the delay. As an illustration after the State declined to accede to the request to withdraw charges, the applicant through a new firm of attorneys once again requested further particulars from the State. The response of the State is telling. In its response the prosecution informed the applicant that some the particulars requested were already furnished to the previous attorneys of record. The latter request came almost a year after the first request was made.

[34] A further tactic by the applicant to challenges the strength of the State without going to trial is borne about what he states in paragraph 13.2 of his replying affidavit where he states that *'not only is it impossible to test reliability of the 'hard copies' of information from the destroyed database but is also impossible to test the reliability of information originally entered into the database at an unknown date by an unknown person under unknown circumstances. The database itself cannot be investigated. Frankly, the mere fact that they succeeded in losing that amount of data shows that their system was unreliable or controlled by unreliable individuals.'*

[35] In our view this assertion can only be made by a trial court. The evidence that is required to be disclosed to the accused can only be evidence that the State intend to use during trial. It is not sufficient for an accused person applying for a permanent stay to rely on hypothetical prejudice. It must be actual significant prejudice. See **Sanderson** supra at para [38].

[36] Whether the right to a fair trial is infringed, is a matter best decided by the trial magistrate. In **Sanderson** the court further held that: *'Barring the prosecution before the trial begins . . . is far-reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.'*

[35] As this court observed at the commencement of the judgment trial pre-trial applications for a permanent stay of prosecution should generally be discouraged. ***Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others*** 2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (2) SACR 421 (CC); 2008 (12) BCLR 1197 (CC) para [65] where the court held: '*Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later*'.

Conclusion

[36] In conclusion I can do more than aligned with the sentiments of Koen J in the case of ***Essop v National Director of Public Prosecutions & Others*** (71222/19/P [2020] ZAKZPH (05 October 2020) at para [46] where he states that' *It is not sufficient for an accused person applying for a permanent stay to rely on hypothetical prejudice. It must be actual significant prejudice.*

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

Order

The court concludes that the order that the regional court has no jurisdiction to order permanent stay is correct.

Application to review and set aside the order is hereby dismissed.

THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT

I Concur

P JOHNSON

ACTING JUDGE OF THE HIGH COURT

For Applicant: Adv HC Mouton

Instructed by: Michael Krawitz & Co

For first Respondent: No appearance

For second respondent: Adv. Tickner

DPP Johannesburg

Heard on 15 May 2023

Judgment on 31 May 2023