IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 63/2019

In the matter between:

DK GOLDING & 15 OTHERS **ACCUSED 1 TO 16**

and

THE STATE **RESPONDENT**

RULING: APPLICATION IN TERMS OF SECTION 342A OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

Chetty J:

[1] An application was brought in terms of s 324A of the Criminal Procedure Act 51 of 1977 ('the Act') by all of the accused (to whom I refer interchangeably as 'the defence') contending that the various delays which have been occasioned in the course of their criminal trial have been attributed solely to the prosecution. The cumulative effect of these delays, it was submitted, adversely impacts on the right of the accused in terms of s 35(3)(*d*) of the Constitution to their trial beginning and concluding without unreasonable delay. It is not in dispute that there have been numerous delays in the criminal trial which commenced in August 2021. These delays have taken the form of State witnesses not being available punctually at court, or adjournments being occasioned where one witness has concluded his or her testimony, without the State having another witness in readiness to testify. The State, the accused contend, has an abundance of resources in the form of three Senior State Prosecutors, together with the Investigating Officer as well as an entity

called UBAC, which provided private forensic investigative assistance to the Department of Economic Affairs and Tourism, essentially the complainant in the criminal trial. In contrast, all but one of the accused, have privately funded their defence. It was submitted that the prolonged duration of the trial, exacerbated by the unreasonable delays, has taken a financial toll on the accused, apart from the emotional and societal impact concomitant with a trial which is constantly in the public eye.

[2] For its part, the State does not deny the allegations that various witnesses have not been at court punctually, or in isolated instances, failed to arrive at the appointed time. However, it was contended on behalf of the State that many of their witnesses are private individuals who are employed in the entertainment and events management industry. It is therefore not possible to secure the attendance of witnesses to remain at court for an entire day, in the anticipation that they may be called to testify. Ms *Ramouthar*, who appeared on behalf of the State in this application and who is a member of the prosecution in the trial, submitted that the delays which have taken place were largely beyond the control of the State prosecutors, who have done their utmost to ensure that not a single court day was lost in its entirety because a witness was not available to testify. Counsel is quite correct in this regard. However, the basis of the application which has been brought by the accused is that the trial has been characterised by a 'stop-start' procedure, with significant time being lost where witnesses were not available immediately following the conclusion of the testimony by an earlier witness. Cumulatively, several hours (and conceivably days) have been lost in this fashion.

[3] The founding affidavit, deposed to by the attorney for the 16th accused, sets out the history of delays from the commencement of the trial until March 2022 when the matter was adjourned to 3 October 2022. I should point out that the matter was adjourned as all of the time allocated to it in the criminal session in March 2022 had been utilised. The next available date, suitable to all parties and I, is 3 October 2022. Accordingly, the adjournment is not as a result of a postponement at the instance of either the accused or the State.

[4] In so far as the delays are concerned, reference was made to the proceedings in November 2021 when the State completed the cross-examination of a witness, Ms Subban, shortly before 11h30. It then transpired that the next witness, Ms Diane Mitchell, who is employed by the Department of Economic Affairs and Tourism, was unable to attend court as she was attending a portfolio committee meeting. It was later learnt that she had been unable to secure the necessary 'trip authorisation' enabling her to travel from Pietermaritzburg to Durban. It further transpired that the State had not subpoenaed Miss Mitchell. Accordingly, the remainder of the day was lost due to the State not securing a backup witness. The court at that stage expressed its displeasure at the adjournment, with the matter only proceeding the next day, when the witness was punctually in attendance and tendered the reasons for her absence the previous day.

[5] The trial was thereafter adjourned to the period commencing 21 February 2022 to 18 March 2022. During this session the matter was punctuated by several short delays, occasioned by witnesses either not being at court when they were due to testify, or witnesses not being available upon the conclusion of the testimony of an earlier witness. Again, the cumulative effect of these delays is what the accused contend constitutes 'unreasonableness' on the part of the State, prejudicing their right to a speedy trial. Apart from the impact which the prolonged trial has had on the accused, the latter submit that the continuous delays in the smooth running of the trial impacts on the due administration of justice. It would appear that the series of delays in the period February to March 2022 served as the catalyst for the launching of the present application in terms of s 342A of the Act.

[6] The accused do not seek drastic relief such as a stay of the proceedings. In light of their contention that these delays have been occasioned solely by the State, they submit that the appropriate relief would be for the State to be placed on terms to ensure that the further witnesses it seeks to call all be subpoenaed in advance to minimise the risk of the continuity of the trial being broken. To the extent that the State intends relying on certain documents, that these be disclosed in advance to the defence, again with the purpose of ensuring that adjournments are not necessitated by the defence having to take instructions as to the admissibility of these documents, or whether admissions from the accused would be forthcoming.

[7] In regard to the last mentioned, it should be noted that the defence counsel during the course of the last session continuously bemoaned the fact that witnesses were being called to testify in relation to financial transactions, when if the State had disclosed in advance the purpose of the witnesses being called, such evidence could have been obviated by admissions from the accused.

[8] The State opposes the application brought in terms of s 342A, and the relief sought by the accused. As stated earlier, the State does not deny the delays which have occurred in the course of the trial. They however contend that the matter is complex, spanning several charges against multiple accused, and involving financial transactions of juristic entities and natural persons. The State refuted the suggestion that all of the delays occasioned during the course of the trial to date were attributable solely to it. They pointed to instances when accused were not at court at the commencement of proceedings on certain dates in September and October 2021 as they were busy obtaining their Covid-19 test results, which the court insisted on at the time in light of the heightened rates of infection. In addition, the State alluded to time lost as a result of load shedding, which was out of their control. Time was also lost on occasion where the venue of the trial had to be relocated to adequately cater for the number of defence counsel as well as the digital recording equipment not being in working order. In respect of these instances, time lost was minimal in comparison to that occasioned by the delays when State witnesses were not available to testify.

[9] The high watermark of the opposition by the State appears to be that it is *dominis litis* and should be able to prosecute its case without interference from the accused, and perhaps more subtly, from the court. Put differently, it was submitted that prosecutors should be able to perform their 'professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal and or other liability'. During the course of argument, counsel for the State submitted that the delays which have been occasioned in the course of the trial, even if considered cumulatively, do not reach the threshold of the unreasonableness as required in terms of s 342A.

[10] Counsel for the State further submitted that even if it is found that the delays were attributable to the State, there has been no wilfulness on the part of the State to hinder the proper administration of justice to prejudice the rights of the accused to a speedy trial. It was submitted that courts should not be overly eager to limit or interfere with the legitimate exercise of prosecutorial authority, recognising at the same time that the prosecution's discretion to prosecute is not immune from scrutiny by the court. Mr *Howse SC*, who appeared with Mr *Naidoo* for the accused, submitted that there has been a failing of prosecutorial diligence in the manner in which the State has presented its case thus far, referring to the 'stop-start' manner in which witnesses have been called to testify. Far from a finding of an unreasonable delay being equated to tardiness or ineptitude directed at a member of the prosecuting counsel, Mr *Howse* correctly submitted that the facts and relief sought in this application are directed to alleviating problems with the further conduct of the proceedings. The application is not intended to penalise or sanction any member of the prosecution. It is not pivotal to the enquiry in terms of s 342A to make an adverse finding that a particular person has been responsible for the delays – at least, not in this matter. As the court in *Ramabele v S and a related matter* 2020 (11) BCLR 1312 (CC), para 56 stated:

'The overarching aim of section 342A is to "provide courts with a statutory mechanism to avoid unreasonable delays in the finalisation of criminal proceedings". Section 342A empowers a court to examine the reasons for the delay. In order to ascertain whether the delay is reasonable or not, courts consider an array of factors as stipulated in section 342A(2).'

[11] *Ramabele* in paragraph 57 clearly states that s 342A is 'the vehicle for giving practical application to the section 35(3)(d) right to have a trial begin and conclude without unreasonable delay'.[1] Despite the prosecution's uneasiness at the application, with the innuendo that it constitutes harassment or intimidation by the accused, one must be mindful that s 35(3)(*d*) of the Constitution entrenches an accused's right to an expeditious trial. Where an accused is of the view, on proper grounds, that his rights are being infringed, he is entitled to bring an application in terms of s 342A.

[1] The court was citing Currie and De Waal *Bill of Rights Handbook* 6ed (2018) at 798.

[12] This court is acutely aware of the power vested in the State to advance its case in the manner deems fit, and no attempt should be made to encroach on that prerogative. At the same time, it cannot mean that the State, because it is *dominis litis*, is immune from criticism from the defence or the Court. The presiding judge has a duty to ensure that a trial is conducted in a manner which is conducive to the proper administration of justice, ensuring fairness both to the State and the defence. As various authorities have set out, a firm hand by the judge is required where there is evidence of an unreasonable delay. Ultimately, the judge has to direct and control the criminal proceedings – they are not just umpires. See *S v Ngcobo* 1999 (3) BCLR 298 (N) at 302, quoting from *R v Hepworth* 1928 AD 265 at 277 where it was held that '[a] judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to the recognized rules of procedure but to see that justice is done'. See also *May v S* [2005] 4 All SA 334 (SCA) para 28 where the court stated:

'Even if the magistrate did play a more active role than is usual for a judicial officer, in itself that is not unfair. Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.'

[13] I am satisfied that the accused were justified in bringing the application. What remains is to consider, as set out in *S v Ndibe* [2012] ZAWCHC 245 para 6, which was quoted in *Ramabele* para 62, are the remaining stages of a s 342A application:

'It seems to me that, once the provisions of s 342 are invoked, the following three stages must be followed:

(1) investigation of the cause of the delay in the finalisation of the case, taking into account the listed factors;

(2) making of a finding whether the delay is reasonable or unreasonable;

(3) depending on the stage of the proceedings, the application of the remedies provided.'[2]

[14] *Ramabele* in paragraph 56 holds that in the event of a court finding that the delay is unreasonable, s 342A(3) provides an '*open list*' of potential remedies. This

[2] See also *Lethoko and another v Minister of Defence and others* 2021 (2) SACR 661 (FB) paras 13-18 and *Essop v National Director of Public Prosecutions and Others* [2020] ZAKZPHC 57 paras 13-18 for a discussion on s 342A.

would be in line with the views expressed in *S v Bhuda* [2006] ZAGPHC 96 para 8 where the court stated:

'In terms of subsection (3) if the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue *any such order as it deems fit in order to eliminate delay* and any prejudice arising from such delay. . .' (my emphasis.)

[15] The first question to be answered is whether the delays, viewed in their totality, can meet the threshold of 'unreasonableness'. The court in *Ramabele* in paragraph 58 referred to its earlier decision in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) and made the following observations in paragraph 59 regarding what would constitute an unreasonable delay:

'Therefore, the approach is as follows: courts ought to consider whether a lapse of time is reasonable by considering an array of factors including: (a) the nature of the prejudice suffered by the accused; (b) the nature of the case; and (c) systemic delay. Courts have developed further factors such as the nature of the offence as well as the interests of the family and/or the victims of the alleged crime. A proper consideration of these factors requires a value judgment with reasonableness as the qualifier. Furthermore, it is a fact specific inquiry.'

[16] In reaching the '*value judgment*' referred to in *Ramabele*, I am obliged to take into account the nature of the charges against the accused, as this has a direct bearing on the duration of the trial. Apart from the witnesses being called, the State relies heavily on volumes of financial records and reports, all of which were made available to the defence at the commencement of the trial. The accused contend that they are suffering financial prejudice as a result of the prolonged trial. The State cannot be blamed for the duration of the trial and there is nothing to suggest that they have dragged their feet or called irrelevant witnesses. It would be treading a dangerous path for the court to intervene, at the behest of the accused, to prescribe to the prosecution as to the number of witnesses they should call or the manner in which those witnesses are to be lead. This would impinge on the right of the prosecuting authority to conduct the prosecution, trampling on the separation of powers.

[17] The delays which the accused have referred to, even cumulatively, may amount to a day or two in total out of a period of over three full sessions. At best, it

would constitute an annoyance when witnesses are not available punctually, or not available to follow as soon as another has completed their evidence. I agree that it is disruptive to the smooth flow of the proceedings. However, the State's explanation as to why these disruptions have taken place is not implausible. Notionally, all of the State's witnesses can be subpoenaed to ensure their attendance on any given day. However, as has been pointed out, many of the State's witnesses are private businessmen and women, mostly in the events industry. The State cannot predict the duration of cross-examination of its witnesses and it would be hardly fair to witnesses to require them to spend days at court waiting their turn to be called. During this time, their ability to earn an income is severely disrupted. The witness fees paid to them are paltry in comparison to their inability to be productive in these times. None of the witnesses has refused to attend court or done so without explanation.

[18] I accept the criticism by Mr *Howse* that the investigating officer could play a more active role than he has to date in co-ordinating the manner in which witnesses become available to testify. This would obviously entail an enhanced level of communication between the prosecution team and the investigating officer. It is inevitable that in a trial of this nature, given the numerous counts against the accused, their number and the number of State witnesses being called, delays are bound to occur. The fact that such delays have occurred, and will presumably still occur for the duration of the trial does not necessarily equate to a conclusion that the delays have been unreasonable.

[19] Ms *Ramouthar*, while opposing the application and any relief contended for in s 342A(3), assured the court that the prosecuting authority was committed to the remainder of the trial being conducted with minimal interruption, particularly with regard to the availability of witnesses to testify without the inordinate loss of time between witnesses being called. To this end, and particularly with regard to witnesses testifying where documentary evidence will be relied on, the State had no objection to informing the defence, in writing before or at the beginning of each week, of the witnesses it intends calling. In that way, the defence (who are already in possession of the witness statements and documentary evidence) will be able to prepare in advance for such witnesses. If they are of the view that admissions may

be forthcoming from the accused which would obviate the need for a witness to be called, such discussions could be held timeously with the State. In that way, delays and the duration of the trial could be streamlined.[3]

[20] In *Wynne-Jones and another v S: In re S v Wynne-Jones and another* [2012] 2 All SA 311 (GSJ) para 170 stated :

> 'As a consequence, this Court must ensure that the order it is about to issue addresses the concerns of the applicants and also safeguards the interests of the greater populace as it also ensures that the criminal justice system and the general administration of justice are enhanced.'

Although the application in terms of section 342A was not granted in that case, the court nevertheless in para 171.3 ordered that one of the supplementary affidavits be provided to the accused. While the textual interpretation that emerges from section 342A is that a court is empowered to make certain orders, this emerges, in my view, *only* once it finds that the delays occasioned were unreasonable.

[21] Mr Naidoo contended that even if I were to make no apportionment of blame as to the cause of the delays, or a finding that the delays were not unreasonable, I would not be precluded from granting orders that prospectively would ensure an expeditious use of time in order to streamline the trial, and the manner in which witnesses was secured to be in attendance. I am not persuaded by that argument as the rationale for any orders or relief being granted pursuant to a s342A application is the finding of an unreasonable delay. Absent such a finding, I am uncertain that any relief contemplated in s342A(3) would be competent.

[22] Having carefully reflected on the nature of the delays, the complaint from the accused and the explanation tendered by the State, I am unable to conclude that a

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[3] See *A Practical Guide to the Ethical Code of Conduct for Members of the National Prosecuting Authority,* published by the National Director of Public Prosecutions in 2004. Specifically, with regard to time management, the following is stated:

> '1.3.3 Time management
> - Prosecutors must see to the timeous preparation and planning of all hearings and avoid unreasonable delays.
> - Prosecutors should ensure the maximum utilization of court time.
> - Punctuality is of the utmost importance to prosecutors.'

case has been made out for an 'unreasonable delay' as contemplated in s 342A. It follows that there is no scope for any of the orders sought on behalf of the accused.

[23] Mr *Howse* submitted that even if I were to find that there was no basis to issue relief in terms of s 342A(3), I could nonetheless do so under the rubric of s 168 of the Act. I am not persuaded by the argument. Section 168 deals with adjournments generally during the course of proceedings. This matter has already been adjourned to 3 October 2022. That has occurred by reason of the proceedings having been incomplete at the end of the previously allocated session in March 2022. This was not due to any shortcoming on the part of the State.

[24] In the result, while the application under s342A fails, the accused are not left without redress. The State has agreed and committed itself to certain mechanisms which will be implemented for the remainder of the trial aimed at minimising the delays complained of by the accused. These are set out in paragraph 19 above. They will be held to those undertakings.

[25] I make the following order:

The application is dismissed.

M R Chetty

Appearances

For the applicants: Mr JE Howse SC (with him N R Naidoo)
Instructed by:
Email:
Ref:

For the Respondent: Ms R Ramouthar
Instructed by: Specialised Commercial Crime Unit, DPP
Address:

Email: Ref:

Date Judgment reserved: 20 April 2022

Date of delivery (my email to parties): 11 May 2022