Reportable

Republic of South Africa

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

Review Case No.

14/544/2010 High Court

Ref. No. 11140 Magistrate's

Serial No.27/2010

THE STATE

V

BONIFACE NDIBE ACCUSED

CORAM: The Hon Ms Justice T C **Ndita, (Zondi J) concurs**

DATE OF JUDGMENT: 14 December 2012

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REVIEW CASE NO. 14/544/2010

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MAGISTRATE'S SERIAL **N0.27/2010**

THE STATE

VS

BONIFACE NDIBE ACCUSED

REVIEW JUDGMENT

NDITA; J

[1] This matter is brought on special review by the magistrate Belivilie. The accused was charged in the main count with a contravention of s 5(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992, in that it is alleged that on or about 7th November 2000 and at or near Cape Town International Airport, he unlawfully and intentionally dealt in a dangerous and/or undesirable dependence producing substance, to wit, cocaine, with a mass of 3 842 grams. He pleaded not guilty to the main charge against him and also to both of the

alternative charges on the 19th April 2005. The accused was legally represented throughout the proceedings. The trial has a Song and somewhat protracted history. After numerous postponements, it would appear that two witnesses have been called by the prosecution in the trial. Subsequent to the evidence being heard, an application for the review of the proceedings was brought before this court on the basis that the inordinate delay caused the accused prejudice as he was arrested on 7 November 2000, and as on 24th May 2007, he had attended at the magistrate's court on 22 different occasions without there being a finality in the matter. The accused further requested this court to order that the prosecution be stayed permanently. The application served before Thring J, who dismissed it with costs on 13 February 2009.

[2] On 18 March 2009, the accused appeared before the magistrate and the prosecutor placed on record that the docket was still at the High Court, presumably for the review proceedings. The record reveals that Mr Van der Merwe, who represented the accused objected to a further postponement of the case due to unavailability of the police docket. The matter was consequently struck off the roll by the presiding officer and no other reason is specified for the granting of such an order. The matter was however, partly-heard before another magistrate. It seems that the case was reinstated on the roll on 17 November 2009 when it was postponed for the docket and an IBU interpreter, after which eleven postponements followed, one of which was for the recalling of a witness. Matters took another turn on 18 January 2009 when the accused's new legal representative objected to the continuance of the trial, stating the matter had been struck off the roll in terms of s 342 A of the Criminal Procedure Act 51 of 1977 ("the Act") and thus, the magistrate's court

was functus officio and no longer had ‘focus standi’. The presiding magistrate came to the conclusion that the matter was enrolled erroneously and the proceedings relating to the striking of the roll be reviewed by this Court.

[3] The matter served before Baartman J, on 21 June 2009. It was returned to the clerk of the court sometime in September 2009 but there is no indication of what transpired before Baartman J. Nonetheless, the question that arises is whether the magistrate should have conducted the enquiry envisaged in section 342 A before striking the matter off the roll, and whether failure to do so results in the nullity of the order granted. The second issue is whether it is permissible for a presiding officer to strike off the roll a matter partly heard before another magistrate. The last issue can be shortly disposed of as follows: The powers provided for in s 342 A are not limited to the court before which a matter is partly heard. Proceedings involving an enquiry in terms of this section do not impact on the merits of the case and are purely investigative of unfairness of the delay in the prosecution of a case, whether evidence has been led or the plea has not yet been recorded. Waglay J, in *S v Khalema and five cases* 2008 (1) SACR 165 (C) at para 27 summarised as follows:

> There simply is no basis in law to hold that a district court is precluded by the provisions of s 89 of the Magistrate Courts Act from invoking the s 342 A of the Criminal Procedure Act. This section empowers a court to examine the reasons for delays in the finalisation of criminal proceedings pending before it, notwithstanding the fact that that court may not have the necessary jurisdiction to hear the trial, as the matters may be destined for the regional court or High Court.’

(See aiso Du Toit, Commentary on the Criminal Procedure Act at 33 - 16 A)

Although the exposition of the law by Waglay J related to s 89 of the Magistrate Court Act, the underlying principle is in my view, by parity of reasoning, equally applicable in this case regardless of the fact evidence was led before a different judicial officer. The magistrate who struck the matter off the roll was fully entitled to examine and investigate the cause of the delay. Whether this was done will be determined later in this judgment.

[4] The magistrate in submitting this matter for a special review sought guidance on whether it is peremptory for a presiding officer to conduct an enquiry when invoking the provisions of s 342 A and whether the delay would inevitably result in the trial being an unfair one. Section 35(3) (d) of the Constitution entrenches the accused's right to a speedy trial and provides that:

'Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay'.

Section 342 A 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 legal advisers, the State or witness,

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) the duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person can be blamed for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice cause 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 evidence, problems regarding the gathering of evidence and considerations of costs;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public, victims in the event of prosecutions being stopped;

(i) any other factor, which in the opinion of the court ought to be taken into account.'

In this matter, the accused had already pleaded to the charge and evidence led. Unreasonable delays arising in such an instance are provided for in section 342 A (3) which provides as follows:

"(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order

(a) …

(b) **…**

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution should not be resumed or instituted de novo without the written instruction of the attorney general.

(d) where the accused has pleaded to the charge and the State or the defence, as the case maybe, is unable to proceed with the case or refused to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case maybe, has been closed'

(e) that__

(i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of unreasonable delay caused by an officer employed by the **State;**

(ii) the accused or his or her legal adviser, as the case maybe, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay by the accused or his or her legal adviser, as the case maybe; or

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

(4) (a) An order contemplated in subsection 3 (a), where the accused has pleaded to the charge, and an order contemplated in subsection 3 (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case maybe, has given notice before hand that it intends to apply for such an order."

[5] This matter is concerned with the interpretation of s 3 (c) and (d). This is so because although the accused had pleaded and evidence led, the order issued by the presiding judicial officer was in terms of s 3(c). It is so that courts have a duty to ensure that that the rights in terms of s 35(3) to have trials commencing and being completed without unreasonable delay are enforced. Section 342(1) enjoins a court before which criminal proceedings are pending to 'investigate' the cause of the delay. In *S v Van Huysteen* 2004 (2) SACR 478 (C), Traverso J (as she then was) held that s 342 (3) (c) does not require that a formal enquiry be held nor that a formal finding has to be made. If the presiding officer enquires as to the reasons for the request for a further postponement and concludes that a further postponement would lead to injustice, that is sufficient. The learned judge further held that s 342 A merely provides guidelines for the factors which a court should take into account when deciding whether to refuse a postponement or not. 342A(3) does not require that a formal enquiry be held or a formal finding be made. At para [8],

page 480c-e the honourable judge heid that:

> **“Na my mening hoef daar geen formele ondersoek gehou te word of geen formele bevinding gemaak te word ingevolge hierdie artikel nie. Indien die voorsittende beampte navrae doen oor die redes vir die versoek om 'n verdere uitstel, en die mening huldig dat 'n verdere uitstel tot 'n onreg sal lei is dit na my mening voldoende. Na my mening le art 342A slegs riglyne neer oor die faktore wat 'n hof in aanmerking moet neem by die oorweging van die vraag of ’n uitstel geweier moet word al dan nie.”**

The learned judge recognising the importance and indispensabiiity of section 35 of the Constitution, stated the following at para [9] on 480e-f:

> **“[9] Hierdie artikel moet voorts ook gelees word teen die agtergrond van die bepalings van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 en meer bepaald die bepalings van art 35 daarvan, waarvolgens 'n beskuldigde se reg op 'n regverdige verhoor (met inbegrepe sy reg om sy verhoor sonder 'n onredelike vertraging te begin, en af te handel) aangestip word.”**

[6] Whilst in some cases it may be apparent ex facie the record that a further postponement is prejudicial to an accused person, the enquiry envisaged in s 342 takes into account that the decision to remove a matter from the roll ought to involve a consideration as well as balancing of all the factors listed in s 3(2) in assessing whether the deiay is unreasonable. It can be accepted that judicial officers to a large extent, and as they should, proactively recognise the

forms of prejudice an accused person can potentially suffer due to slow grinding of the wheels of justice. To this end, they sometimes tailor the postponement in such a way that the harsh impact of the delay is mitigated, or grant such relief as maybe appropriate in the circumstances of a particular case. However, where a court is faced with an application for the striking off the roll of a case due to unreasonable delays, thereby invoking the provisions of s 342 A, such a court is in my view, compelled to give effect to the provisions of the section. A holistic reading of the provisions of s 342 A leaves me with the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course necessitates an enquiry. The investigation includes taking into account the factors listed in s 2. Those factors are not limited to the prejudice suffered by an accused person and also include the impact an unreasonable delay may have in the administration of justice, the victim, and the States case. Even though S 342 (3) does not specifically state that a 'formal' enquiry be held, it does call at the very least for an enquiry, on the basis of which a finding must be made. Such an enquiry must have regard to the full conspectus of the factors in s 3 (2). In the absence of an enquiry, a court may find it difficult to assess whether a delay is unreasonable or how much systemic delay to tolerate. (See *Sanderson v Attorney-General* 1998 (1) SACR (227 CC) at page 243 para 35). That can only be determined when there has been an enquiry albeit informal, in which the conspectuses of the factors listed have been considered. This I say mindful of the fact that the bulk of the criminal cases are heard before the magistrate's court, and to insist on a formal enquiry is likely to be burdensome to the already overstretched court rolls. The finding should be followed by a remedy the court considers appropriate, depending on whether the accused person

had already pleaded or evidence led. 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.

[7] In the circumstances, I am inclined to agree with the *Huysteen* decision that s 342 requires neither a formal enquiry nor finding. The three stages need not be formalistic, but the record must reflect that there has been full compliance the provisions of s 342. The Constitutional Court in *Wild and Another v Hoffert NO and Others* 1998 (6) BCLR 656 (CC) at 668 para 31 alternatively 1998 (2) SARC 1 CC at 14 para 32 held that:

> **"Subsection 342 A (1) vests criminal courts with a duty to take the initiative in investigating ostensibly unreasonable delays in the completion of cases pending before them; subsection (2) lists a number of factors to be considered in such investigation; the following subsection provides a number of remedies , including the unprecedented power to make costs order in a criminal case."**

[8] The consideration of these factors is clearly intended to demonstrate that it is by no means only the accused who has a legitimate interest in a criminal trial

commencing and concluding expeditiously, since time immemorial it has been an established principle that the public interest is served by bringing litigation

to its finality. (See *Sanderson* 244 para 32). Although the *Sanderson* case was concerned with a permanent stay of prosecution, the views expressed are in my view, equally applicable with regard to all matters concerning unreasonable trial delays. The Court at para 30 said that:

> **"[30] The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is**
>
> presumed_____sometimes irrebutably_after the lapse of loosely specified time periods. I do not believe it would be helpful for our Courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise. The Courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial related variety is possibly the hardest to establish, and here as in the case of other forms of prejudice, trial courts have to draw sensible inferences from the evidence."

[9] The Court further recognised the enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from society and in para 36 it held thus:

> **"The qualifier reasonableness' requires 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.**
>
> We all benefit by our belonging to a society with a structural 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 of such 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 the delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment."

[10] In the present matter, it does not seem that any enquiry was conducted when the matter was struck of the roll on 18 March 2009. The record reflects the proceedings as follows:

'ON 18/03/2009
PO H.E. SMIT

PP E. HANSE

DF L. VAN DER MERWE

INT NO IBU
INTERPRETER

12h 40

PP: Docket still not at court. Docekt still at High Court.

Mr Van der Merwe: Confirm appearance. Object to another remand for the docket.

Docket since 19/02/2009 not at court.

Matter Struck off roll.'

The above excerpt reflects that there was no investigation of the unreasonable delay; had there been, it would have been easy to discern that the accused himself had brought review proceedings relating to the undue delay in the

prosecution of the case. Coincidentally, the decision dismissing the review application was made on 13 February 2009. Stated differently, by the time the magistrate struck the matter off the roll, an investigation would have revealed that the proceedings had been completed at the High Court. The accused in this matter had already pleaded to the charge. Where an accused has already pleaded to the charge, the remedy envisaged in s 342 A (d)-(e) is that of wasted costs order as striking a matter of the roll is reserved for those instances where an accused has not yet pleaded. Similarly, once a matter has been struck off the roll in terms of s 342 **(3)(c),** it can only be resumed or reinstated or instituted *de novo* with the written instruction of the Director of Public Prosecutions. (See *Naidoo and Others v NDPP and Others* 2005 (1) SACR 349 SCA para [34] and [44],

[11] For all these reasons, it follows that the order of the magistrates striking the case off the roll ought to be set aside. In the result the following order will issue.

[12] The order of the magistrate striking the case off the roil on 18 March 2009 is reviewed and set aside.

NDITA J

I agree. It is so ordered

ZONDI J