

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 28/97

JENNIFER EMILY HUTCHINSON WILD

First Appellant

BRIAN ALFRED CUTLER

Second Appellant

versus

AP HOFFERT NO

First Respondent

THE STATE

Second Respondent

THE ATTORNEY-GENERAL

Third Respondent

DIRK JAN DONDEERS

Fourth Respondent

Heard on : 10 March 1998

Decided on : 12 May 1998

JUDGMENT

KRIEGLER J:

[1] This appeal is directed at part of a judgment and order in the Natal High Court that refused the appellants constitutional relief.¹ It raises essentially the same two issues dealt with in the recent case of *Sanderson*², namely, alleged infringement of the constitutional

¹ The judgment, per Booysen J, McCall J concurring, is reported as *Wild and Another v Hoffert NO and Others* 1997 (7) BCLR 974 (N).

² *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC).

right to be tried within a reasonable time of having been charged (imprecisely but conveniently called the right to a speedy trial), and a consequential claim that prosecution on such charge be permanently stayed. As in *Sanderson*, the applicable constitutional provisions are those of the interim Constitution.³

[2] It will be convenient, first, to indicate the provisions of the interim Constitution that govern such cases; then to identify the principles laid down in *Sanderson* as being applicable; and, ultimately, to apply those principles - retooled insofar as may be necessary - to the facts of the case now under consideration.

[3] The first main issue, that of the right to a speedy trial, is dealt with in the interim Constitution under section 25(3), the fair trial provision, and the second issue under section 7(4)(a), the remedies section of the interim Constitution. Section 25(3)(a) reads as

Indeed, because of the similarity, set down of this appeal was held back pending judgment in *Sanderson*.

3 The Constitution of the Republic of South Africa Act 200 of 1993, insofar as here relevant, came into operation on 27 April 1994 and remained in force until it was replaced on 4 February 1997 by the (final) Constitution of the Republic of South Africa, 1996. As explained in *Sanderson's* case (n 2 above, paras 16 and 17), in terms of item 17 of schedule 6 to the final Constitution, cases pending upon its coming into operation are to be disposed of as if it had not done so, unless the interests of justice require otherwise. No such special consideration has been suggested here, nor is any apparent.

follows:

“Every accused person shall have the right to a fair trial, which shall include the right –
(a) to a public trial before an ordinary court of law within a reasonable time after
having been charged. . .”

On the face of it the language is quite clear. An accused person is guaranteed “the right to a . . . trial . . . within a reasonable time after having been charged”, the touchstone being the well-known criterion of reasonableness.⁴ Once such right is found to have been infringed, section 7(4)(a) of the interim Constitution renders the aggrieved person entitled to “appropriate relief”.⁵

4 See the discussion of the particular words in *Sanderson* above n 2, paras 1 and 18 to 21.

5 Id para 38 and the cases there cited.

[4] In the course of the analysis of the speedy trial component of section 25(3)(a) *Sanderson's* case recognised that prejudice to an accused person resulting from unreasonable delay could take many forms. Benefiting from a review of the treatment of analogous provisions in comparable legal systems,⁶ the judgment distinguished between delay which could jeopardise the fairness of the trial itself (e.g. the death or disappearance of witnesses), on the one hand, and on the other, more general delay-related prejudice not having a bearing on the trial itself. The latter kind of prejudice, so it was held, fell into two broad categories. First there was prejudice related to an awaiting trial person's loss of personal liberty, e.g. resulting from pre-trial detention or restrictive bail conditions. In the second instance there was a whole range of disadvantages inherent in the public nature of our criminal justice system, such as loss of reputation, social ostracism and loss of employment or income. In both instances speedy trial protection seeks to avoid or minimise prolongation of the train of events inevitably set in motion by arraignment and continuing until completion of the trial.

[5] The judgment also recognised the utility of a threefold categorisation of the kinds of interests protected by speedy trial provisions, namely, the right to liberty, to personal security and to a fair trial⁷, used by North American courts. Using that division the enquiry then turned to consider whether section 25(3)(a) was aimed at protecting only

⁶ Mainly Canada and the United States.

⁷ The terminology is broadly that used by the Canadian Supreme Court in *R v Morin* (1992) 8 CRR (2d) 193 at 202.

trial-related prejudice or whether the other two categories of interests also fell within its protection. The conclusion was that although the subsection - both textually and contextually - seemed to focus on the fairness of the supervening criminal trial, the protection it afforded indeed extended beyond specifically trial-related interests and embraced liberty and security (or social) interests of the kind mentioned above.⁸

⁸ *Sanderson* above n 2 paras 21-3.

[6] Those interests, so it was held, had to be taken into consideration in assessing the fundamental question whether there had been an infringement of the protection afforded by the constitutional imperative of a speedy trial. Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is not merely a trigger to an enquiry as to prejudice. It remains the most important consideration throughout the enquiry, bearing on the other considerations and, in turn, being coloured by them.⁹ Furthermore, other than is the case in some comparable jurisdictions, no formal line is drawn in our law between particular time spans regarded as acceptable and those that do not pass muster.¹⁰ Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case, starting with the nature, gravity and extent of the prejudice suffered, or likely to be suffered, by the accused. The most invasive prejudice suffered by a person pending trial is obviously pre-trial incarceration, which entails not only loss of personal liberty but often loss of livelihood and the ability to maintain dependants. Ordinarily, therefore, this form of prejudice will weigh heavily in deciding how long a wait is reasonable.

⁹ Id paras 27-8.

¹⁰ Id para 30.

[7] The second main feature considered in *Sanderson* as important was the gravity, nature and complexity of the case.¹¹ The judgment explains that this is not only a consideration in its own right but that it interacts with the time lapse, and also with the prejudice suffered by the accused. Thus, to take a simple example, an awaiting trial prisoner facing a straightforward and trivial case should not have to wait longer than any sentence of imprisonment that is likely to be imposed. In such a case a “reasonable” time would be short, requiring the accused to be brought to trial quickly. On the other hand there are cases like the one against the accused in *Sanderson*, where a difficult and long case was being investigated against a man who continued with his life much as before. The present case is also a complex one. It illustrates the situation that inevitably arises where a constitutional defence is raised in the magistrates' courts before the trial commences. Under the interim Constitution such a case could hardly come to trial quickly.¹²

11 Id para 34.

12 In terms of s 103(3) of the interim Constitution a magistrate's court should, where it considers it in the interests of justice, postpone a trial in which the constitutional validity of a law is raised so as

to enable the accused to test the point in a high court. If the challenged law is an Act of Parliament, the invalidation of which ordinarily falls in the exclusive jurisdiction of this Court, the high court may then (subject to certain further qualifications) in terms of subs (4) of s 103 refer the point to this Court for determination. Where other laws are in issue or where the parties consensually confer jurisdiction on the high court to consider an Act of Parliament, the high court can dispose of the matter, subject to possible appeal to this Court. Section 103(4)(b) requires the high court concerned to suspend the trial pending determination of the constitutional challenge, whether in the high court or upon referral to this Court. Even where the high court finally disposes of the challenge, there is inevitably some considerable lapse of time before the matter can be heard and judgment can be delivered. A referral or appeal to this Court will, of course, prolong the constitutional proceedings and push completion of the criminal trial even further into the future.

[8] 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.¹³ 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.

[9] The last aspect of the judgment in *Sanderson's* case to which attention should be drawn here is the balance it requires to be struck between competing societal and individual interests once a finding has been made that the delay was indeed unreasonable and the enquiry turns to remedies. A careful value judgement is required whenever a court considers the kind of relief that would be appropriate in a given case. Because of the flexibility allowed by section 7(4)(a) of the interim Constitution, a court can tailor a snug fit between infringement and remedy. More particularly a court need not resort to relief as drastic as a permanent stay of prosecution in order to remedy an infringement of the right to a speedy trial that does not entail trial prejudice. From that it follows, so this Court held, that in the ordinary course and absent irreparable trial-related prejudice, a stay

¹³ Id paras 32-5.

would seldom be the appropriate remedy.¹⁴

¹⁴ Id para 39.

[10] That conclusion should not be misunderstood, however. In *Sanderson* the relief sought was a permanent stay of the pending prosecution. Here, again, that is the form of relief being sought. In the result the emphasis of the discussion relating to relief has tended to fall on the suitability or otherwise of such injunctive relief.¹⁵ It should be underscored, however, that the conclusion that a stay is likely to be appropriate in a limited range of cases only does not mean that the provisions of section 7(4)(a) rarely come into play. Nor does it mean that the question whether a stay is appropriate in a given case is the most important feature of the speedy trial protection of section 25(3)(a), read with section 7(4)(a).

[11] On the contrary, the true effect and scope of the protection against unreasonable delay is much wider and more significant than - and should not be obscured by - the more dramatic and far-reaching remedy of a stay of prosecution. The crucial point of section

¹⁵ Indeed, the reported cases relating to the right to a speedy trial under s 25(3)(a) indicate that the focus has consistently fallen on the appropriateness of a stay. See *Coetzee and Others v Attorney-General, KwaZulu/Natal and Others* 1997 (8) BCLR 989 (D); *Moeketsi v Attorney-General, Bophuthatswana and Another* 1996 (7) BCLR 947 (B); *Berg v Prokureur-General van Gauteng* 1995 (11) BCLR 1441 (T); *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E).

25(3)(a) is that the Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That, in turn, means that both state prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duty under section 7(4)(a) of the interim Constitution to devise and implement an appropriate remedy or combination of remedies.

[12] What such remedy or remedies ought to be must obviously be left to be determined in the light of the circumstances of each particular case. I shall therefore reserve further discussion of appropriate remedies until the facts of the present case have been outlined. Nevertheless it should be mentioned at this point that there are many endemic blemishes in our criminal justice system that must be addressed conscientiously by investigating officers, prosecutors, judicial officers and administrators.¹⁶

[13] The relevant history starts nearly five years ago. During the early evening of Saturday 19 June 1993 the second appellant arrived at the first appellant's home in Durban. Shortly thereafter he took delivery of a couriered envelope allegedly containing

¹⁶ The vast majority of criminal cases are heard in the magistrates' courts, where the pressure is at its greatest. Consequently the thrust of what follows relates more specifically to those courts.

cocaine, whereupon several members of the South African Narcotics Bureau (“SANAB”), a division of the South African Police, raided the house. The appellants were arrested there and then on charges of dealing in or possessing cocaine, to which was added a charge of attempted murder arising out of a gunshot wound sustained by a policeman in the course of the raid. Some hours later the appellants were admitted to bail and the following Monday they formally appeared in the Durban Magistrates’ Court for remand on the two charges.

[14] The first appellant is an advocate, the second an attorney. Both are in private practice in Durban. Understandably their arrest, arraignment and appearance in court on such serious charges attracted publicity in national radio news bulletins as well as the Sunday and daily press. Equally understandably, such publicity caused them a great deal of social and professional harm and embarrassment, both at the outset and following their subsequent appearances in court.

[15] After the first formal appearance there followed a series of remands, initially to amend the conditions of bail and thereafter at the request of the prosecution “for further investigation”. In the interim a subpoena duces tecum issued at the instance of the first appellant (calling for production of a wide variety of SANAB documents) was set aside in the High Court¹⁷ because of its overbreadth, to be replaced by a more modest one shortly

¹⁷ The superior courts of South Africa used to consist of a number of provincial and local divisions of the Supreme Court of South Africa and supreme courts and high courts of the homelands. In

thereafter. The interlocutory proceedings did not have any discernible effect on the investigation of the prosecution case and on 5 October 1993 the matter was by consent set down for trial in the week of 24 to 28 May 1994. The prosecutor intimated that only the “cocaine-related charges” would be proceeding and the magistrate ordered compliance with a defence request for delivery of a formal charge sheet. The local commander of SANAB was also warned to attend on the trial date in response to a fresh subpoena duces tecum issued on behalf of the first appellant; at the same time the latter’s attorney placed on record a complaint that difficulties had been experienced in obtaining a sample of the alleged cocaine for analysis.

[16] The lengthy remand meant that the trial would commence after the interim Constitution had come into operation and the appellants were able to avail themselves of benefits that came into being with the advent of the constitutional dispensation. Thus, for instance, the constitutional speedy trial provision now relied on did not exist prior to 27 April 1994.¹⁸ However, it is an open question whether the time elapsed in the pre-constitution phase is to be taken into account and, if so, whether it can be measured on

terms of item 16(4) of Schedule 6 to the Constitution each of them became a high court when the Constitution came into force on 4 February 1997. In order to avoid confusion the new name is used even though the Court was at the time still known by its former name.

¹⁸ The relevant parts of the interim Constitution came into operation on that day.

the same scale as delay after the interim Constitution came into force. Be that as it may, the appellants were clearly mindful that the constitutional era brought benefits for accused persons.

[17] When the trial date came around, the case was not ripe for hearing. A number of events during the previous weeks rendered a further postponement inevitable. It is not necessary to itemise such events; suffice it to say that the prosecution was dilatory in a number of respects¹⁹ while the defence showed little eagerness for the trial to start. On the contrary, they had decided to avail themselves of the constitutional benefits and, to that end, had opted for a postponement. When the case was called, first appellant's counsel presented a carefully prepared argument in support of an adjournment. Among the grounds advanced was that the appellants wished to apply to the High Court in terms of the interim Constitution for a ruling on the appellants' right of access to the prosecution docket and the constitutionality of certain presumptions contained in the statute under which the appellants were being charged.²⁰ The application involving the challenge to the presumptions was governed by section 103 of the interim Constitution. On a proper construction of that section, once such an application has been granted and the proceedings have been launched in a high court, the control of those proceedings is vested

¹⁹ For example, on 3 March 1994 two former state witnesses, one Hirsch and Dirk Jan Donders, the fourth respondent in these proceedings, were joined as co-accused, apparently without notice to the defence, and on the day before the trial was due to start an amended charge sheet and incomplete further particulars were produced.

²⁰ The Drugs and Drug Trafficking Act 140 of 1992.

in the high court which has to decide whether the trial should be suspended to enable the matter to be referred to this Court, or whether the trial should continue in accordance with the provisions of section 103(2).

[18] In the result a postponement was granted, 4 October 1994 being fixed by consent as the new trial date. Although the clerk of the court was instructed to prepare the record forthwith and the appellants were put on terms to file their application for constitutional relief promptly, the time allowed for the application proved far too short. The application was launched promptly enough (citing two policemen and the State as respondents) and notice of intention to oppose was given fairly expeditiously. But none of the interlocutory respondents filed their answering papers,²¹ nor did the applicants exercise their rights under the Uniform Rules of Court to bring the application to a head. Instead there was a desultory and inconclusive exchange of correspondence between the parties' attorneys relating, among other things, to a contention by the state attorney that the Minister of Justice should have been joined as a party. In the result the application was no nearer completion by the time the criminal trial was due to start on 4 October 1994. The trial magistrate criticised the interlocutory respondents for their dilatoriness and postponed the trial yet again, on this occasion to 3 March 1995.

²¹ In the event their affidavits were filed on 2 March 1995.

[19] Once again the time allowed for completion of the application proved inadequate. Indeed there were a number of independent circumstances that made it impossible for the trial to get under way. First, because the respondents in the interlocutory case, despite having been publicly criticised by the magistrate, did not file any affidavits during the ensuing months. Nor was any pressure brought to bear on them by the appellants to do so. Instead the first appellant filed a lengthy supplementary affidavit shortly before Christmas 1994 in which she not only launched a sweeping attack on SANAB but alleged an unholy alliance between the police in the KwaZulu-Natal province and organised crime syndicates. The thrust of the new allegations was that the criminal charge against first appellant had been maliciously fabricated. Counsel for the appellants suggested in argument in this Court that the supplementary affidavit was intended to meet the State attorney's complaint of non-joinder. That may be accepted to have been the motive for the affidavit, its immediate effect, however, was to open a new and very much wider line of attack. The secondary effect was to alarm the state attorney who then planned a comprehensive defence to the new line. But there was no corresponding sense of urgency and the interlocutory case continued on its leisurely way. Some inconclusive correspondence (relating to the first appellant's new allegations) was exchanged but nothing of substance was done to facilitate the criminal case taking its proper course. Indeed, when the trial date arrived, the interlocutory application was no nearer resolution than it had been five months before. The magistrate had had enough. Apparently endorsing a

defence contention that the interlocutory respondents were defeating the administration of justice, he declined the prosecution's request for a further postponement of the trial and, when it declined to withdraw the charges, he struck the matter from the court roll.

[20] The appellants promptly withdrew the high court application as there was no longer any criminal charge pending against them.²² That move proved to be precipitate, or at least over-optimistic. The prosecution was determined to press on with the criminal case and informed the first appellant's legal representative accordingly during July 1995. On 10 November 1995 the appellants and the fourth respondent were summonsed to appear in the Regional Court in Durban ten days later on essentially the same drug trafficking charge as before. When the matter was called in the Regional Court, counsel for the first appellant argued that the original case was still pending and that the new case could therefore not proceed.²³ On 5 December 1995 the presiding magistrate (the first respondent in this case) dismissed the defence argument and granted the prosecution's application for the case to be postponed to 1 April 1996 for trial.

[21] The trial did not commence on that date, however. On 13 March 1996, some three-and-a-half months after the ruling by the first respondent and about a fortnight before the criminal case was due to start, the appellants brought an application in the Natal High

22 They did so by notice dated 7 March 1995.

23 In other words, a dilatory defence of *lis alibi pendens*.

Court claiming a stay of the prosecution on both common law and constitutional grounds.²⁴ In the event both lines of attack failed and, with the requisite leave,²⁵ the

24 The relevant prayers in the notice of motion read as follows:

“That the decision of the First Respondent (the Magistrate) on 5 December 1995 remanding Regional Court Case No. 41/4692/95 to the 1st April 1996, is hereby reviewed and set aside.

That it is declared that (the Applicants) were not tried before a Court of Law in respect of the charge of contravening section 5(b) alternatively contravening section 4(b) of the Drugs and Drug Trafficking Act No 140 of 1992, in respect of which they were arrested and charged on 19th June, 1993, within a reasonable time as provided by section 25(3) of the Republic of South Africa Constitution Act, No 200 of 1993. . .”

25 In terms of rule 18 of the Constitutional Court Rules the leave of this Court is required before an appeal such as this may be brought.

constitutional ground now forms the subject matter of this appeal.

[22] In the course of argument counsel invited the Court to divide the time elapsed from the commencement of the criminal proceedings (on the night of 19 June 1993) to the eventual remand ordered by the first respondent (on 5 December 1995) into various phases for the purpose of analysis. Each of such phases was then subjected by counsel to careful scrutiny. More specifically the period from 3 March 1995, when the matter was struck off, till mid-July of that year, when the attorney-general first intimated his intention to re-indict the appellants, was said by counsel for the appellants to have constituted a period of unreasonable delay.

[23] Looking at the case as a whole, the following seem to me to be the most material features in evaluating the reasonableness not only of that phase but of the entire period from beginning to end. First, although there was no singular urgency evident in the progress of the case from the night of the arrest until 24 May 1994, no serious criticism can be levelled at the prosecution in respect of that period. The remand to that date was consensual and benefited rather than prejudiced the appellants because it brought with it the advent of the interim Constitution and gave them additional defences. From 24 May 1994, once the appellants indicated that they intended applying to the high court for constitutional relief and were granted a remand for that purpose, the trial was barred by operation of law and remained so barred until that application was withdrawn on 7 March

1995.

[24] Moreover, in terms of the interim Constitution, this Court had exclusive jurisdiction with regard to the question whether the relevant provisions of the Drugs and Drug Trafficking Act were invalid. As long as the appellants' interlocutory application was pending, the criminal case simply could not be brought to trial. The constitutional issues raised by the appellants in that high court application were, at that stage and for some time thereafter, subject to uncertainty, both as to the substantive law and the appropriate procedure.²⁶ Indeed, this Court had not yet come into existence and was inaugurated only some three weeks before the criminal case was struck off. Moreover, the factual basis advanced by the appellants for their constitutional and common law demands, especially in the first appellant's supplementary affidavit filed on 22 December 1994, touched on questions of great importance and impugned the police up to the very highest level in the province. In the circumstances the delay on the part of the respondents to those proceedings in responding to the application was to some extent excusable. It is also a matter for comment that the appellants took no procedural steps, as they were entitled to

²⁶ Thus, for example, the question of access to material in the police docket was settled by this Court in *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) which was delivered on 29 November 1995. The constitutionality of a reverse onus was dealt with in *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) and *S v Bhulwana/S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) delivered on 8 June 1995 and 29 November 1995 respectively.

do in terms of the Uniform Rules of Court, to push the application to finality.

[25] Once the criminal case had been struck off²⁷ and the high court application was withdrawn, a period of some four months elapsed before the fresh case was mooted. Arguably the time period that elapsed before the attorney-general decided to resume the case was unreasonably long. That is certainly what counsel for the appellants forcefully contended in this Court, and seems to be what was found in the court below.²⁸ Such a conclusion is moreover fortified by the fact that the deponent to the answering affidavit on behalf of the attorney-general did not see fit to take the court into his confidence about that period from March to July 1995. Although it appears to be a significant period of time and although culpable delay on the part of the prosecution is the very crux of the appellants' case under section 25(3)(a), the answering affidavit does not proffer any explanation. In a case such as this, where there is a period of ostensibly culpable inactivity on the part of the prosecution, an inference of unreasonableness can more readily be drawn if no explanation is proffered. On the other hand it is clear from the papers that the criminal charges against the appellants are inherently serious and involve two accused who are clearly determined to mount a vigorous and formidable defence, probably necessitating a constitutional detour to the High Court and this Court. However,

27 The correctness of the decision on the part of the magistrate to strike off a trial which at that stage could not proceed in the face of the pending Supreme Court case was not fully canvassed before us. Suffice it to say that it seems questionable whether the prosecution could be faulted for not trying to proceed.

little purpose would be served by an exhaustive analysis of the reasonableness of the time period in question for the case does not turn on a determination of the question of infringement, but on the appropriateness of the remedy sought.

[26] The length of the four periods of delay identified by counsel, configured singly or jointly, their cause or causes and, ultimately, the question whether the one or other or all of them can be stigmatised as unreasonable are really beside the point. Those are all considerations bearing on the question of infringement of the appellants' right to be tried within a reasonable time, while their case fails on the question of the relief they seek. Therefore, even if one were to assume for purposes of argument that the time that elapsed between the charge and the trial was unreasonable, the appellants would still not be entitled to claim a stay of prosecution as a remedy for such delay. The only relief sought by them in these proceedings is a stay of prosecution. But such relief, so it was held in *Sanderson*, cannot be granted in the absence of trial-related prejudice or extraordinary circumstances.

[27] The appellants do not allege, nor is there any suggestion of, trial prejudice here. Consequently their claim for a stay of prosecution must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay

²⁸

See para 28 below.

nevertheless appropriate. No such unusual circumstances have been alleged in the affidavits, nor were any established in the course of argument. It follows that even if it were to be held that there had been an unreasonable delay in reinstituting the trial against the appellants, they could not be afforded the relief they sought in the High Court and on appeal here.

[28] The court below found that the attorney-general “is to blame for a substantial period of the delay” but that there were “insufficient grounds” for a stay in the absence of “trial prejudice”.²⁹ This, so the judgment suggests, meant that the appellants had failed to prove an infringement of their rights under section 25(3)(a). I would respectfully suggest that the finding that there had been no infringement conflates the question of infringement under section 25(3)(a) with that of remedy under section 7(4)(a). Although the successive steps of the analysis should not be performed in watertight compartments, their separate and distinct requirements should not be overlooked. The first leg of the enquiry is whether the right under section 25(3)(a) has been infringed. If not, that is the end of the matter. If the right is found to have been infringed then the enquiry turns to potential remedies under section 7(4)(a). A finding that the consequential relief sought is inappropriate must not be confused with the antecedent finding as to infringement.

[29] Before this judgment can be concluded there are some important observations to be

²⁹ See n 1 above at 987B-H.

made about the impact of sections 25(3)(a) and 7(4)(a) in cases where the passage of time causes prejudice to the accused falling short of the limited category where a permanent stay of prosecution would be appropriate. As already mentioned, presiding officers are duty bound to counteract all manifestations of unnecessary delay in bringing criminal cases to finality.

[30] This case presents two of the more egregious examples of avoidable delay: (a) district court trials that are characterised by a succession of routine postponements “for further investigation”,³⁰ and (b) the curious practice of postponing cases for no other reason than to fix a trial date later. Indeed, multiple postponements are endemic in our magistrates’ courts and all major centres have for many years dedicated one or more courts to remanding endless streams of cases; and many successive annual reports of the Department of Correctional Services have told of ever increasing thousands of awaiting trial prisoners adding to the overcrowding of correctional facilities. The financial cost to the country of maintaining a daily population of some tens of thousands of awaiting trial prisoners is enormous; the cost in social disruption and human misery incalculable.

³⁰ Often the accused remains in custody as a matter of course and virtually always there is no attempt to ascertain why the investigation remains incomplete.

[31] Accepting, as one must, that there are many reasons for the current state of affairs and that its resolution will take years of steadfast reform, in no way derogates from the fact that every accused charged under the interim Constitution is entitled to be tried within a reasonable time of having been charged.³¹ Nor does that state of affairs excuse magistrates and prosecutors from the duty to ensure that, within the bounds of what is reasonable, their courts are conducted and the accused who appear in them are treated in accordance with the prescripts of section 25(3)a) of the interim Constitution. On the contrary, although they may be powerless to repair systemic faults, prosecutors and magistrates can do a great deal to ensure that the day-to-day business of their courts respects such a fundamental requirement of fairness. It should also be repeated that delay cannot serve the wider interests of justice. Witnesses, complainants and the public at large have an interest in the speedy resolution of criminal cases.

[32] Commendably, the legislature has taken a major step in remedying the scourge of delays in criminal cases by furnishing criminal courts with practical tools that can be used in furthering the speedy trial objectives of section 25(3)(a). A new section 342A has been introduced into the Criminal Procedure Act 51 of 1977 by section 13 of Criminal Procedure Amendment Act 86 of 1996. Although this is neither the time nor the place to comment in detail on the section, the novel provisions of which will have to be interpreted and applied by courts other than this one, it can and should be observed that proper

³¹ The comparable provision of the 1996 Constitution, section 35(3)(d), provides that the right is to have the trial begin and conclude without unreasonable delay.

application of such provisions could materially contribute to protection of an accused person's rights under s 25(3)(a). Subsection 342A(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 a costs order in a criminal case.³² The interpretation of the new section and its practical application in the administration of the criminal justice system will be worked out by the courts over time. In doing so they will have to be mindful of the constitutional context created by section 25(3)(a) of the interim Constitution (and its successor in the final Constitution, section 35(3)(d)).

[33] The bench-mark set by the constitutional demand for a reasonably speedy trial does not propose anything revolutionary nor advocate standards of perfection. More importantly, it is not concerned with theory but with practical justice. Take, by way of example, the system of remands. Prosecutors should know that remands should not be applied for merely because the investigating officer so requests. An application to court which involves possible impairment of a fundamental right should not be made lightly and

³² Although the section in general was put into operation on 1 September 1997, the subparagraphs dealing with costs are still awaiting implementation.

prosecutors, officers of the court, should exercise independent professional judgement before making such applications. Such judgement may not be abdicated for the sake of cordiality with the police. If necessary, an unconscientious investigating officer should be reported to a superior.

[34] It goes without saying that, should an application for a remand be made by the prosecutor, the magistrate will remain mindful of the provisions of the Bill of Rights. In particular the magistrate should keep in mind the demands of section 25(3)(a) and the need to consider countering prejudice by using an appropriate remedy. An explanation can be demanded of the investigating officer, if necessary under oath. If the accused is in custody his or her release can be considered. Conditions of bail can be examined afresh and lightened. A relatively short period of remand can be ordered, coupled with an intimation that it will be the last unless there is a substantiated application for any further remand. Special orders can be considered to facilitate access by an accused who is in custody to defence witnesses or legal advisors. If the accused is not in custody but suffers some prejudice in having to attend court repeatedly, e.g. if difficult or expensive travel arrangements have to be made, steps to assist the accused or alleviate the burden can be considered.

[35] Ultimately, of course, a magistrate can refuse a postponement. If the accused has by then pleaded, an acquittal will probably follow. If not, the refusal of a postponement will

compel the prosecutor to consider a withdrawal of the charges, thereby curtailing any non-trial-related prejudice. It should be emphasised that the withdrawal of a charge is not a mere formality nor a device to circumvent the refusal of a postponement. Where a charge has been withdrawn or correctly struck off because the presiding officer has refused the prosecution a further postponement, reintroduction of the charge should be carefully considered. The effect of such an involuntary withdrawal was not examined in any great detail in this case, the focus of the debate falling rather on the time allowed to elapse between the withdrawal and the re-indictment. It would consequently be unwise to say too much on the topic. Nevertheless it can and should be observed that a withdrawal can in itself carry considerable weight in any evaluation under section 25(3)(a) of the reasonableness of a time lapse, and also in deciding on an appropriate remedy in terms of section 7(4)(a).

[36] 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.

[37] In the final analysis, the provisions of section 25(3) form part of the fair trial provisions of a bill of rights contained in a constitution dedicated to the creation of a “new order in which. . .all citizens shall be able to enjoy and exercise their fundamental rights and freedoms”.³³ Punishing the guilty is important, but it is at least equally important that it be done in a manner worthy of that new order.

[38] The court below declined to make any order as to costs. That was in conformity with the practice of this Court in cases such as this, and should be echoed.

[39] The appeal is accordingly dismissed, and there is no order as to costs.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Kriegler J.

³³ See the first paragraph of the preamble to the interim Constitution.

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For third Respondent	Mr CJ Hartzenberg SC and A de Wet, instructed by the State Attorney, Durban.
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