IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

MINISTER OF JUSTICE **2ND RESPONDENT**

MINISTER OF POLICE **3RD RESPONDENT**

IMITIAZ AHMED CAJEE **4TH RESPONDENT**

FIRST AND THIRD RESPONDENTS' HEADS OF ARGUMENT

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1 INTRODUCTION

1.1 The applicant seeks an order in terms of which he is granted a permanent stay of prosecution for the murder of Mr. Ahem Essop Timol ("**Mr. Timol**") on or about 27 October 1971.

1.2 The application is opposed by the respondents on the grounds set out in their answering affidavits.

2 THE APPLICANT'S CASE AND BASIS OF OPPOSITION

2.1 The effect of the order which the applicant seeks is that he shall not be prosecuted for the murder of Mr. Timol. The murder of Mr. Timol is one of the most tragic murders committed against anti-apartheid activists and it is one of those "*crimes that do not go away*[1]".

2.2 When one has regard to how[2] Mr. Timol was murdered and why no one was prosecuted for his murder, the answer to the application should be a simple no and that the applicant's criminal trial should proceed. This, however, is not the only issue to be taken into account.

2.3 Furthermore, when regard is had to the evidence of how anti-apartheid activists such as Mr. Timol were ill-treated up to the days leading to the murder of Mr. Timol, one fails to resist the temptation to say that this application should not even be before this Court. The applicant's own sense of justice must dictate that there is a need to bring this matter to an end – for him and Mr. Timol's family and that a permanent stay of prosecution is not going to bring that closure. The applicant himself can only clear his name through a trial and not by a stay of prosecution.

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[1] Bothma v Els 2010 (2) SA 622 (CC) at 654A

[2] See the 2017 Inquest Judgment.

2.4 The relief which the applicant seeks is based on an unfounded allegation that "*the prosecution will infringe my constitutional right of a fair trial*" promised in section 35(3) read with section 12 of the Constitution.

2.5 In particular, the applicant says that the prosecution will infringe:

2.5.1 his right to a fair trial that is procedurally fair and it is not instituted with an unlawful or improper motive;

2.5.2 his right to have the trial to begin and be concluded without unreasonable delay;

2.5.3 his right to be informed of the charge against him with sufficient detail;

2.5.4 his right to adduce and challenge evidence effectively;

2.5.5 his right to remain silent.

2.6 In addition to relying on section 35(3) of the Constitution, the applicant also seeks to rely on section 342A of the Criminal Procedure Act 51 of 1977 ("**the CPA**").

2.7 There is no dispute that the applicant has the rights which he says he seeks to protect[3]. What is in dispute is that the criminal prosecution is going to violate such rights in such a manner that it would be impossible for him to have a fair trial as promised in section 35(3) of the Constitution.

2.8 The applicant ignores the fact that the function of a criminal trial Court is not only to try and convict people and send them to jail. A criminal Court is also responsible for ensuring that accused people have a fair trial in exactly the same manner promised in the Constitution. For this reason, unless it is properly established, with admissible evidence, that a fair criminal trial would be impossible to achieve, there can be no basis to accede to the applicant's claim for a permanent stay of his criminal trial.

2.9 No case has been made to even suggest, that a fair trial would be impossible or that the criminal Court before which the applicant must appear is no longer going to be able to ensure that he gets a fair trial.

2.10 In a criminal trial, it is the responsibility of the trial Court to safeguard the rights of the accused and the interests of the public. Of importance, it is also the responsibility of the trial Court to ensure that criminal proceedings are not used for unlawful or improper motives. There is nothing placed before this Court to suggest that the criminal trial Court is no longer in a position to discharge these important responsibilities.

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[3] The applicant became vested with the rights in section 35(3) of the Constitution when he was arrested for the murder of Mr. Timol.

2.11 In Bothma v Els 2010 (2) SA 622 (CC) the Constitutional Court emphasized that section 35(3) of the Constitution entrenches the right to a fair trial for every accused person. In addition, the Court said that the obligations imposed by section 35(3) "*bind courts to ensure that criminal trials conducted before them are fair*." Accordingly, unless it is established by admissible evidence (and not by speculation) that a trial Court is no longer in a position to ensure that a fair trial takes place, a permanent stay cannot be competent.

2.12 An analysis of the applicant's founding papers shows that there is no evidence on the basis of which even a slight suggestion could be made that the trial Court is no longer in a position to safeguard any of his rights to a fair trial. To the extent that the criminal Court is still in a position to safeguard the applicant's rights to a fair trial, there is no basis to stop the prosecution.

2.13 The applicant says that whilst he was a member of the then security branch of the then South African Police, he did not cause "*the death of the deceased.*" This is the very same version which the applicant has maintained ever since Mr. Timol was killed. The reason why the applicant is able to say this at this very stage is simply because he has had an opportunity to reflect on what happened on the day on which Mr. Timol was murdered and having made such a reflection, the applicant has again satisfied himself that he did not do it. This being the case, there can be absolutely no basis to suggest that the applicant has memory problems.

2.14 The applicant even tells the Court that he was not present at John Vorster Square "*where the deceased was held over, these days on any of these days*" which shows that his memory is not so bad that it would be impossible to have a fair trial.

2.15 The applicant was arrested for Mr. Timol's murder for the first time on 30 July 2018 and appeared in Court for the first time on 18 September 2018. Accordingly, there was absolutely no delay, let alone an unreasonable delay, between the date on which the applicant was arrested and the date on which he appeared in Court for the very first time.

2.16 Despite having been arrested, the applicant was not detained in the sense of being locked-up in police custody waiting to be brought to Court. The applicant's arrest did not in any way interfere with any of his freedoms than it was strictly necessary to bring him to Court. Accordingly, the applicant was not subjected to the most invasive prejudice of pre-trial incarceration.

2.17 As it will appear below, the State's case is simply that the rights which the applicant says he wishes to exercise and which he says must be protected were not infringed and there is no threat that they are going to be infringed.

2.18 In paragraph 19.16 of his founding affidavit, the applicant says that the first respondent has "*already made available to my legal team the case docket and <u>all</u> information relevant to the envisaged trial.*" This being the case, the applicant cannot complain that his right to information required by him

for purposes of him preparing for his defence has been infringed. This application was filed in October 2018. On the applicant's own version, by that time, the State had already given him "*all information relevant to the envisaged trial.*"

2.19 The applicant also tells the Court that the docket consists of in excess of 10 000 pages and that "*the only material of recent origin relates to medical evidence from pathologists, with reference to the injuries and death of the deceased and expert evidence relating to the probable trajectory of the body falling from the 10th floor and/or roof of the building to the ground.*"

2.20 One fails to understand as to why the applicant seeks to create an impression that it is uncertain as to whether Mr. Timol fell from the 10th floor or from the roof of the building in issue. On his own version, he was with Mr. Timol inside a room on the 10th floor of the building in issue when Mr. Timol fell therefrom. Accordingly, it does not lie in the applicant's mouth to perpetuate the impression that Mr. Timol could have fallen from the roof of the building in issue.

2.21 It is clear from what the applicant says that he has already considered the contents of the docket and now knows what case he is called upon to answer and what evidence the State has against him. In fact, he suggests that the State does not have evidence of murder against him. In the light of this, there can be no basis to suggest that the applicant's right to be

provided with everything he needs to prepare for his defence has been irreparably violated such that a fair trial is no longer possible.

2.22 Of importance, it is clear that the applicant has been able to, within such a very short period of time, assess all the evidence which the State has against him and clearly contrast it with what he has and what he remembers and what he knows about the murder of Mr. Timol to be able to come to the conclusion that the State does not have evidence of murder against him. The applicant is not required to do anything more than this during his criminal trial. In the premises, the applicant cannot be heard to suggest that the delay in arresting him has affected his ability to put up a defence against the charge of murder.

2.23 Insofar as the applicant has already been given all the evidence against him and he has already considered and assessed such evidence, the applicant's case would have been better if he had told the Court of the evidence contained in the docket which, due to the lapse of time, he would not be able to contradict or deal with during the criminal trial. On the contrary, the applicant tells the Court that there is nothing new other than the expert evidence procured recently for purposes of the 2017 inquest proceedings.

2.24 The applicant does not in his founding affidavit say that he is not in a position to procure his own medical and expert evidence to contradict that of the State or that such inability is attributed to the belated prosecution. He indeed has ample time to procure such evidence. Even better, the applicant

can ask the criminal Court to give him such time as he requires to procure such evidence either before or during the criminal proceedings. The applicant is even in a better position to attend to this due to the fact that he now knows in advance what case the State intends to make based on the new evidence contained in the docket.

2.25 Whilst the applicant complains about the State's reply to his request for particulars, the CPA makes provision for well tried and tested remedies which the trial Court will no doubt give him if he is entitled thereto in order to remedy his complaint that the State's reply to his request for particulars is not sufficient.

The alleged improper motive

2.26 The alleged improper motive is based on the fact that the applicant says that the 2017 inquest "*concluded in its findings that I was not involved in causing the death of the deceased.*" It is on this basis that the applicant seeks to contend that he should not be prosecuted for murder because "*a charge of premeditated murder*" is "*directly contrary to the findings by the Presiding Judge in the re-opened proceedings.*" There is no merit in this.

2.27 The fact that the "*charge of premeditated murder*" is "*directly contrary to the findings by the Presiding Judge in the re-opened proceedings*" does not mean that the prosecution is being conducted with or for an unlawful or improper motive. There is not even a basis to suggest, let alone rationally

contend that this makes it impossible to hold a fair trial or that the criminal trial Court is no longer able to safeguard his right to a fair trial.

2.28 In each criminal trial where an accused pleads guilty, his or her case is that the State does not have a case or evidence against him or her. This is not different from what the applicant is saying in this case. It cannot be correct that it must follow that in each of such cases a fair trial would be impossible and that there must be a permanent stay of criminal prosecution.

2.29 It was not the function of the 2017 inquest Court to decide whether there is evidence to convict the applicant of murder. The 2017 inquest Court did not suggest that a criminal trial Court cannot on the same evidence, find that there is basis to justify charging the applicant with murder.

2.30 The suggestion that the institution of a murder charge against the applicant is inconsistent with the Prosecution Policy is wrong.

2.30.1 The applicant seeks to create an impression that the first respondent, when deciding to prosecute him, did not take into account the availability of sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.

2.30.2 The applicant bases his aforesaid conclusion simply on the basis that the 2017 inquest Court did not say that he should be charged with premeditated murder as the State has now done.

2.30.3 It was not the function of the 2017 inquest Court to assess "*whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution*" of premeditated murder. This is the first respondent's function and the first respondent is not in this regard constrained by the findings of the 2017 inquest Court.

2.30.4 The mere fact that the first respondent has now decided to charge the applicant with murder despite the fact that the 2017 inquest Court did not say that the applicant must be charged with murder does not on its own mean that the prosecution is for an ulterior, unlawful or improper motive. At all material times, the first respondent has always been entitled to assess the evidence available to it and decide whether such is enough "*to provide a reasonable prospect of a successful prosecution.*"

2.30.5 All that the first respondent is required to do is to "*assess*" whether there is sufficient and admissible evidence to provide a reasonable "*prospect*" (or likelihood) of a successful prosecution. This simply requires the first respondent to apply its mind to the available evidence and ask whether such evidence could result in a successful prosecution of an accused person. The first respondent has done this and decided to charge the applicant with murder.

2.30.6 The 2017 inquest Court was only required to record, amongst others, "*whether the death was brought about by any act or omission prima*

facie involving or amounting to an offence on the part of any person." In paragraph 335 of the 2017 inquest judgment the inquest Court recorded, amongst others, the following finding:

"*(d) Timol's death was brought about by an act of having [been] pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder.*"

2.30.7 The 2017 inquest Court was not required to do more than what is recorded in paragraph 335(d) of its judgment. Once the inquest Court has made the finding which it has made in paragraph 335(d) of its judgment, it is then up to the first respondent to decide if any person should be charged with the murder of the deceased.

2.30.8 Having charged the applicant with murder, it is up to the State to use the available evidence, which the applicant has already received and assessed, to convince the criminal trial Court that the applicant is guilty of the murder of Mr. Timol. In simple terms, the State must now convince the trial Court to agree with it that the available evidence is sufficient to convict the applicant.

2.31 The applicant's suggestion that the medical experts who conducted the first postmortem examination are no longer available to him clearly does not

justify the allegation that the criminal prosecution is being conducted with an ulterior, unlawful or improper motive. The applicant has already told the Court that he is now in possession of the police docket and has already gone through the evidence contained therein and assessed it and satisfied himself that there is no new evidence other than new pathological reports.

2.32 The new pathological reports were clearly based on information and documents which are contained in the docket to which the applicant has already been given access. There is absolutely nothing which prevents the applicant from employing his own pathological experts to use the very same evidence used by the State to generate new expert reports. In this regard, the applicant has not told the Court as to why he is not in a position to employ the same type of experts employed by the State to generate for him his own new medical expert reports based on the very same facts or information and documents relied upon by the State's experts.

2.33 There is obviously no merit in the applicant's suggestion that "*extremely long time delay also caused serious impairments on the memories <u>of all possible witnesses</u>*" due to the fact that on the applicant's own version, he was the only person with Mr. Timol on the 10th floor room from which Mr. Timol fell to his death. This is the event which, according to the 2017 inquest judgment resulted in Mr. Timol's death. One fails to understand as to which "*all possible witnesses*" the applicant is referring to in circumstances where Mr. Timol's fall from the 10th floor room was only witnessed by himself.

2.34 None of the issues listed in paragraphs 42 and 43 of the applicant's founding affidavit justify the suggestion that the prosecution is being conducted for an ulterior, unlawful or improper motive.

2.35 In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 295, a unanimous Supreme Court of Appeal said:

"*[37] ... A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.*

[38] This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others illustrate and explain the point. The police had confiscated machines belonging to Highstead for purpose of

charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorized by statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction, the reliance on this line of authority is misplaced as was the focus on motive." (Own emphasis).

2.36 Assuming that the applicant is correct in saying that his prosecution is for an improper or unlawful motive, his remedy is not the relief which he seeks in this application. His remedy lies in proceedings for malicious prosecution. In Tsose v Minister of Justice And Others 1951 (3) SA 10 (A) (referred to in NDPP v Zuma above), Schreiner JA said the following which equally applies in alleged improper prosecutions[4]:

"*... An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution. In such a case the only remedy of the arrested person would be an action for malicious prosecution in which he would have to*

prove not only an improper motive but also the absence of reasonable cause for prosecution ..." (Own emphasis).

2.37 There is no evidence placed before the Court to prove that the first respondent has no intention to successfully prosecute the applicant or that the available evidence does not show that there are reasonable and probable grounds for prosecuting. Even if it may be found that there are no reasonable and probable grounds for prosecuting, the remedy for that lies in an action for malicious prosecution because a final conclusion on this issue can only be made after the end of the criminal trial.

2.38 This Court cannot now, without hearing any of the State's evidence and without even considering the contents of the docket conclude that the prosecution is for an improper or unlawful motive. It is only the trial Court which can make that determination after which the applicant's remedy lies in an action for malicious prosecution.

2.39 In addition to the above, even if it may be found that the applicant is correct in saying that the State does not have evidence implicating him in the murder of Mr. Timol there is another sharp and short answer to his complaint and it is this: The State will in that event not be able to make out a *prima facie* case of murder against him and an application could be made on his behalf for a discharge in terms of section 174 of the CPA after the close of the State's case. For as long as this remedy remains available and

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[4] At page 17E-F.

competent, a permanent stay of prosecution ought not to be granted because this remedy is also designed to protect an accused against a baseless long trial.

2.40 In the circumstances, the reliance on an alleged improper or unlawful motive as a basis for a permanent stay of prosecution is misplaced and ought to be rejected.

Undue delay

2.41 The other basis upon which the applicant seeks the relief which he seeks is that there has been an undue delay in prosecuting him. In simple terms, the applicant's case is that the State took too long to commence with his criminal trial.

2.42 For his aforesaid contention, the applicant seeks to rely on the provisions of section 35(3)(d) of the Constitution.

2.43 The reasons for the delay in prosecuting cases such as the present are fully set out in the first respondent's supplementary answering affidavit and they may be summarized as follows:

2.43.1 After the conclusion of the TRC process, the State, on whose behalf the first respondent prosecutes, decided to establish another amnesty process similar to the TRC amnesty process. The correctness of this decision is not in issue in this application and the first respondent is

not even called upon to defend it. In any event, such a decision was not taken by the first respondent.

2.43.2 The envisaged second amnesty process was intended to benefit people such as the applicant who, for one reason or another, did not apply for amnesty through the TRC process. The government clearly wanted to ensure that all those who were involved in the *conflicts of the past* were granted amnesty and be forgiven. This did not work.

2.43.3 Engagements at government level to give effect to the aforesaid decision obviously took long to produce the desired results and resulted in what would appear to be an understanding that cases such as the present were not going to be prosecuted. At the very least, the then Minister of Justice's understanding was that she would be consulted if and when decisions to prosecute cases such as the present were to be taken.

2.43.4 The correspondence attached to Advocate Chris MacAdam of the first respondent shows that cases such as the present were not allocated the necessary investigation resources which they deserved as a result of which they were not investigated and prosecuted

2.43.5 The then head of the first respondent, Advocate Vusi Pikoli is on record as having complained and registered his frustrations arising from the political interference in his prosecutorial decision-making

processes relevant to cases such as the present. One hears Advocate Vusi Pikoli's cries for justice by reading his affidavit and letters.

2.43.6 An analysis of the first respondent's supplementary answering affidavit, the affidavits of Advocates Vusi Pikoli and Chris MacAdam shows that the first respondent was a victim of the political decision referred to above insofar as, despite its willingness and readiness to prosecute, it was clearly made impossible for it to prosecute. Advocate Pikoli even suspects that he was fired for having decided to prosecute cases such as the present.

2.44 Whilst one would want to punish the executive for acting in the manner in which it did relevant to the prosecution of cases such as the present, the remedy of a permanent stay of prosecution was never intended to and was not designed to punish the executive or the prosecution for belated prosecution.

2.45 When regard is had to the contents of Advocates Pikoli and MacAdam's affidavits, one understands why it is the Court's function, and not the Executive's function to protect the Court's processes from abuse. This was appropriately put as follows in Reg v Jewitt (1985) 2 SCR 125:

"*Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of*

this sort there is only one possible answer. <u>The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of the law is not abused</u>." (Own emphasis).

2.46 In the premises, the fact that there was interference with the first respondent's decision-making process relevant to the prosecution of cases such as the present does not on its own justify the drastic and exceptional remedy which the applicant seeks in this application. This is more so because the interference in issue has not been shown to have resulted in it being impossible for the trial Court to ensure that a fair trial take place. In simple terms, the interference in issue did not result in it being impossible for the applicant to have a fair trial.

2.47 In addition to the above, the delay in issue has not in any way resulted in it being impossible for the trial Court to hold a fair trial. A fair trial is still possible with all of the applicant's rights fully protected.

The right to adduce and challenge evidence

2.48 The applicant further complains that his right to adduce and challenge evidence has been materially affected by the delay in bringing him to trial.

2.49 There is no merit in the applicant's complaint because:

2.49.1 The applicant has not in his founding affidavit articulated with sufficient particularity the type of evidence which he says he is no

longer going to be able to adduce at the trial relevant to the charge of murder. Despite being in possession of the docket, the applicant has not told the Court as to which evidence, relevant to the murder charge, would be impossible for him to challenge, and if so, the basis of such an impossibility.

2.49.2 The suggestion that the applicant is no longer able to reconstruct his movements leading up to the day on which Mr. Timol was murdered is irrelevant because his movements before the date on which Mr. Timol was murdered are irrelevant.

2.49.3 Even on his own version, the applicant was at the scene of Mr. Timol's murder on the date on which Mr. Timol was murdered. For this reason, the applicant's movements before the date in issue are irrelevant.

2.49.4 The fact that the applicant may or may not have interrogated Mr. Timol or that those who may have interrogated Mr. Timol are now deceased is irrelevant as far as the charge of murder against the applicant is concerned. This is because the applicant's version is that those who may have interrogated Mr. Timol were not present when Mr. Timol, according to the applicant, jumped out of the room on the tenth floor of John Vorster Square police station.

2.49.5 The alleged lack of evidence also affects the State and the applicant would be entitled to a discharge in terms of section 174 of the CPA if the State does not produce evidence to prove his guilt.

2.49.6 The applicant says that he has already considered the contents of the docket and that there is nothing therein which implicates him to the murder from which he seeks to escape prosecution. This being the case, it must necessarily follow that he either has evidence to contradict the State's evidence or, as he says, the evidence does not justify the murder charge. On either version, the prosecution cannot prejudice the applicant because he must be able to obtain a discharge in terms of section 174 of the CPA at the close of the State case or show that he did not kill Mr. Timol.

2.50 The charge of murder from which the applicant seeks to escape has nothing to do with his alleged interrogation and ill-treatment of Mr. Timol. As far as the applicant is concerned, his own version about Mr. Timol's fall from the 10th floor is already on record. According to the applicant, it was only himself and Mr. Timol inside a room on the 10th floor of the John Vorster Square Police Station when Mr. Timol fell therefrom. The question which arises from the evidence carefully collected and recorded by the 2017 inquest Court is whether Mr. Timol was physically able to outrun the applicant, open the window of the room in question and jump therefrom. The new medical expert evidence again carefully collected and recorded by

the 2017 inquest Court is based on the information and documents which have already been provided to the applicant.

2.51 There is nothing in the applicant's founding affidavit to suggest that the applicant is not in a position to procure his own experts to use the same evidence for his own benefit.

2.52 Insofar as the applicant complains that the State has not provided him with such further particulars as he considers to be necessary to prepare his defence, he has remedies which the trial Court will give him if he is entitled thereto including an order compelling the State to provide such further particulars as the trial Court will deem necessary to ensure that the applicant's right to a fair trial is protected.

2.53 Insofar as the applicant has remedies which are available to him through the trial Court, there can be no rational basis to contend that a fair trial is not going to be possible. For this reason, there is no basis to grant a permanent stay of prosecution.

Alleged prejudice

2.54 The applicant further contends that his state of health is of such a nature that he would be prejudiced if his criminal prosecution is not permanently stayed.

2.55 There is no merit in the applicant's suggestion that he suffers from medical conditions which would make it impossible to have a fair trial. This is so because the applicant has not placed any admissible evidence before the Court to establish or prove the existence of the medical problems that he complains of.

2.56 It would not be for the first time that the State prosecutes a person of the applicant's age and with the medical conditions that are referred to in the applicant's founding affidavit, which the State does not accept exists.

2.57 In the circumstances and on the facts set out by the applicant in his founding affidavit, there is no basis to rationally contend that a fair trial cannot take place. Without a case being made to suggest that a criminal prosecution would be impossible, the applicant is not entitled to the relief which he seeks in this application.

3 STAY OF PROSECUTION: THE LEGAL POSITION

3.1 The general rule is that it is for the first respondent, who represents the State, to decide if and when to commence a prosecution. If a prosecution has commenced, it is also for the first respondent to decide if it should continue.

3.2 In Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), Kriegler J said the following about the remedy which the applicant seeks in this application:

"*[38] It is appropriate at this juncture to make some brief observations about the remedy sought by the appellant. Even if the evidence he had placed before the Court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by section 7(4)(a) of the Interim Constitution. In interpreting that provision in Fose v Minister of Safety and Security we adopted a flexible approach that is certainly inconsistent with the availability of a single remedy in North American jurisdictions. In our interpretation of section 7(4)(a) we understood "appropriateness" to require "suitability" which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.*

[39] *Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay*." (Own emphasis).

3.3 On the other hand, in any prosecution, the Court's duty is to promote justice and prevent injustice, not only to the subject of the prosecution, but also to the victim of the crime in issue and the community at large. It is from its duty to promote justice and prevent injustice that the Court has the power to stay a prosecution if its continuation would result in an injustice. The Court exercises this power if the subject of the prosecution is not going to have a fair trial and the continuation of the trial itself would constitute an abuse of the Court process. The trial Court is the one which is in the best position to assess this situation and make a determination.

3.4 The power of the Court to permanently stay a prosecution is not one which is exercised everyday and simply because there is a request to do so. It is a power which the Court exercises when it is clear that it is not possible to

have a fair trial. If it is still possible to have a fair trial, a permanent stay is not competent.

3.5 The special power to stay a prosecution is not intended to and ought not to be exercised or used in order to punish or discipline the prosecution or the police. Of importance, this power ought not to be exercised because the prosecution and the police have taken unmeritorious decisions in relation to the investigation and the prosecution in issue. Doing so would amount to an improper exercise of the Court's jurisdiction.

3.6 The applicant for a permanent stay bears a heavy burden of establishing that the continuation of the prosecution would result in an unfair trial or that it amounts to an abuse of the Court process. In this regard, the applicant must prove that he has been prejudiced in the presentation of his case such that a fair trial is no longer possible. This means that such an applicant must also satisfy the Court that there is nothing that could be done by the trial Court to remedy such prejudice and to ensure that a fair trial takes place. A permanent stay is not competent if there are other mechanisms which could be employed by the trial Court to prevent an injustice and to ensure that the right to a fair trial is realized.

3.7 On the other hand, where reliance is placed on delay in prosecuting, the prosecution must satisfy the Court that a fair trial was still possible. A mere allegation of delay, even a long delay, does not on its own place the

prosecution under an obligation to satisfy the Court that a fair trial is still possible. This is because a delay on its own is not conclusive.

3.8 For the prosecution to be placed under such an obligation, the applicant must first prove that there has been an unreasonable delay in prosecuting him which unreasonable delay has resulted in substantial prejudice to him which makes it impossible for a fair trial to take place. Without this being done, the prosecution does not attract an obligation to justify the delay because in that event, the delay has not resulted in it being impossible to have a fair trial.

3.9 An accused person can only be prosecuted after having been arrested and charged with an offence. An applicant for a stay of prosecution cannot base his application on the fact that the police took too long to arrest him. If that were to be allowed, criminal prosecutions are not going to take place. In addition, it would be impossible for the Court to draw a line and fix a date within which a person must be arrested and tried with reference to the date on which the offence was committed.

3.10 A person who has not been arrested and charged does not prepare for a trial. The applicant in this case cannot say that he would have assembled and preserved evidence of his innocence for all these years because he could not have expected to be arrested and charged with the murder of Mr. Timol. On his own version, he did not do it and there has never been a basis to arrest him for murder.

3.11 Since criminal prosecutions are instituted in the name of the State and therefore the people, there is a very strong public interest in the prosecution of crimes and in particular, where the accused person has murdered a political activist such as in this case. It is for this reason that a permanent stay of prosecution in a case such as the present ought not to be granted – and if it is granted, it should be granted as a remedy of last resort.

3.12 In this case, it has not been established that the continuation of the prosecution is going to result in the trial being unfair or that the integrity of the trial or the criminal justice system itself is going to be compromised. On the contrary, a permanent stay of the prosecution is going to set a very bad precedent as far as other cases such as the present are concerned. A stay would automatically result in the other outstanding cases having to be dropped and that is not going to be in the public interest. The participation of the fourth respondent in this application shows that the public interest requires cases such as the present to be prosecuted.

3.13 In an application such as the present, the Court should have regard to the following:

3.13.1 a permanent stay of prosecution remains the exception even where the delay is said to be unjustifiable. In this case, no case has been made by the applicant to establish that the delay is unjustifiable and that this case is exceptional to justify a permanent stay;

3.13.2 a permanent stay ought not to be granted where there is no serious and significant prejudice to the applicant which cannot be remedied by the trial Court;

3.13.3 a permanent stay can only be granted if the trial Court cannot, through its powers, regulate, by issuing appropriate directives, any of the issues complained of by the applicant so as to ensure that a fair trial takes place and the alleged prejudice is remedied. No case has been made to establish that the trial Court is no longer in a position to remedy any alleged violations of rights.

3.14 Section 35 of the Constitution promises three categories of different rights to three categories of persons – arrested, detained and accused persons. The section does not apply to people who are not arrested, detained and accused persons and does not apply retrospectively.

3.15 Section 35 of the Constitution promises a trial within a reasonable time. This reasonable time can only be calculated from the time that a person is arrested and then charged. It is indeed so that, in relevant parts, section 35(3) of the Constitution provides that:

"*(3) Every accused person has a right to a fair trial, which includes the right –*

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary Court;

(d) to have their trial begin and conclude without unreasonable delay;

...

(i) to adduce and challenge evidence." (Own emphasis).

3.16 The nature of the rights promised in section 35 of the Constitution is such that:

3.16.1 they are vested upon arrested, detained and accused persons and not upon people who have not yet been arrested and charged;

3.16.2 a person can only exercise the right to be "*informed of the charge*" once he or she had been arrested and become an accused person;

3.16.3 a person can only have the right "*to have their trial begin … without unreasonable delay*" once he or she had been arrested and become an accused person.

3.17 A person does not become an accused person until he or she has been arrested and charged with an offence. For this reason, a person who has not yet been charged cannot claim to have the right to a fair trial. Similarly, a person who has not yet become an accused person cannot claim a right to be tried without unreasonable delay because he or she has nothing to be tried for.

3.18 In *Bothma*, the Court clarified the position as follows:

"*Delay in bringing proceedings*

[30] It will be noted that s 35(3)(d) and a companion section dealing with the right to adduce and challenge evidence, grant protection only to accused persons. Mr Els was not on any understanding of these provisions an accused person between 1968 and the initiation of Mrs Bothma's prosecution. If the definition of 'accused person' were to be read narrowly, then Mr Els' challenge based on delay could well have failed immediately. The delay by Mrs Bothma between initiating the private prosecution and going ahead with the trial was relatively short … Having regard to these facts, any delay in

beginning and concluding the trial itself could not easily have been regarded as so unreasonable as to justify aborting the prosecution." (Own emphasis).

3.19 In this case, the applicant became vested with a right to a fair trial the moment he was charged with murder. It is from that moment that he became entitled to claim the right to have his "*trial begin and conclude without unreasonable delay*." The applicant could not have enforced a right to have his "*trial begin*" before he was even charged.

3.20 In *Bothma*, the Court said that sections 12 and 35 of the Constitution must be viewed in seamless conjunction in that they provide[5] "*carefully thought procedural protections designed to prevent a repetition of the grievous abuses of people's rights and dignity experienced in the past*."

3.20.1 Section 12 of the Constitution provides for the right to freedom and security of the person and expressly includes both the right not to be deprived of freedom arbitrarily or without just cause, and the right not to be detained without trial.

3.20.2 Having reached the conclusion that Mr. Els was not an accused person before he was charged with rape and that there was no unreasonable delay between the date on which he was charged and the trial date, the Court concluded that the question before it was "*not whether his*

[5] At page 635J-636A.

rights under s 35(3)(d) have been violated – clearly they have not been. It is whether in a broader sense his right to a fair trial would be irreparably violated as a consequence of the extreme belatedness of the prosecution." This is because the right to a fair trial should not be anchored exclusively in section 35(3)(d). The *Bothma* Court further stated that:

"*In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence*." (Own emphasis).

3.21 In the premises, the question which this Court must answer is whether, "*in all the circumstances*" of this case, the belatedness of the prosecution which came about as a result of the need to find a political solution to cases such as the present, is of such a nature that it "*would inevitably and irremediably taint the overall substantive fairness of the trial*." The answer to this question must be in the negative because:

3.21.1 The trial Court remains capable to ensure that a fair trial takes place. The trial Court is competent to grant such remedies as may be necessary to protect the applicant's rights.

3.21.2 The applicant has not identified any relevant evidence upon which he could have relied for his defence which has been lost as a result of the delay in prosecuting him.

3.21.3 The policemen who interrogated Mr. Timol would not have given any evidence as to how Mr. Timol was pushed from the 10th floor of John Vorster Square police station because that incident happened in their absence.

3.21.4 There is no evidence placed before the Court to suggest that the applicant suffers from any medical condition which makes it impossible for him to remember the events in issue and to give coherent instructions to his legal representatives.

3.21.5 The applicant himself decided not to participate in the TRC process which concluded its investigations without the benefit of his version of events. Even if the applicant would have simply repeated his denial before the TRC, the matter could have turned out differently.

3.21.6 The need to find a political solution which resulted in matters such as the present not being prosecuted is not and of itself a basis to justify a permanent stay of prosecution because it has not in any way and on its own rendered it impossible for a fair trial to take place. In any event, that process was embarked upon to benefit people such as the

applicant and cannot now be used by the applicant to justify a permanent stay of prosecution.

3.21.7 There is no evidence placed before the Court to establish that the applicant has suffered any irreparable and insurmountable trial prejudice to such an extent that a fair trial has become impossible. In this regard, the Court said the following in *Bothma*:

> "*[68] … Irreparable prejudice must refer to something more than the advantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this contest must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained*." (Own emphasis).

3.22 In any event, even an unreasonable delay does not on its own justify a permanent stay of prosecution. In Wild And Another v Hoffert NO And

Others 1998 (3) SA 695 (CC) the Constitutional Court found that there was an unreasonable delay but concluded that there was no trial-related prejudice or exceptional circumstances to justify a permanent stay of prosecution. The Court said the following about time delays which equally applies in a case such as the present:

"*[6] … 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. 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. 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 likelihood and the ability to maintain dependents. Ordinarily, therefore, this form of prejudice will weigh heavily in deciding how long a wait is reasonable*."

3.23 In this case, the applicant has not suffered what the Court considered to be the most invasive prejudice because he was never subjected to pre-trial incarceration. One of the most important issues to be taken into account is that the fact that a permanent stay is refused does not mean that an accused person such as the applicant no longer has access to the rights promised in section 35(3) of the Constitution. In *Wild*, the Court further said:

> "*[36] The conclusion that a permanent stay is not appropriate relief to be granted to the appellants here, by no means puts paid to their rights under s 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*." (Own emphasis).

3.24 The above conclusion is consistent with the duty of the Court, throughout the trial and until judgment is granted, to safeguard the accused person's rights to a fair trial. In the premises, the fact that a permanent stay of prosecution is refused does not absolve the Court from its duty to ensure that an accused person such as the applicant herein gets a fair trial.

3.25 In *Bothma*, the Constitutional Court responded to complaints which are similar to the applicant's complaints as follows:

"*[79] There can be no doubt that the delay of almost four decades has created significant prejudice to Mr Els in making his defence. It is not that he claims that age has withered or custom staled the vitality of his mind or memory. His argument is that the passage of time has robbed him of the ability to call witnesses and denied him the right to produce material evidence that would contradict the allegations made by Mrs Bothma.*

[80] The first to notice is that there has been no suggestion that Mrs Bothma herself has acted in any way to destroy evidence. Secondly, the lack of specificity in relation to the alleged rapes would be precisely the kind of information to be dealt with at the trial. Thirdly, no weight was given to the fact that Mrs Bothma also suffered prejudice, in particular, from being unable to call the domestic worker to corroborate her story.

[81] The key controlling element, as far as fairness of the trial is concerned, would be the presumption of innocence. <u>The gravity of the offence and the public interest in ensuring that perpetrators are brought to book can never in themselves justify a conviction if the evidence is insufficient</u>. In this

respect, the contention by Mr Els's counsel that the paucity of surviving evidence could result in an innocent man going to jail, cannot serve as a basis for stopping the proceedings in advance of the trial. The trial court will be obliged to give due weight to the evidential deficit facing Mr Els. In the words of L'Heureux-Dubé J in the Canadian Supreme Court:

> *"Difficulty may well be experienced by an accused in gathering rebuttal evidence. [Yet] . . . the potential for such difficulty is likely one of the reasons why the prosecution bears the heavy onus of proving all aspects of guilt beyond a reasonable doubt. In that regard the criminal system has always taken into consideration that it will occasionally be difficult for an accused to demonstrate innocence, and has removed the need to do this, by putting a high onus of proof upon the Crown." (Her emphasis.)*

And should the trial court err, the court hearing an appeal should, in the circumstances of a case like the present, be especially attentive to ensuring that any doubt would favour the accused.

[82] What this boils down to, however, will be that it is up to the trial court to ensure that Mr Els has a fair trial. It would be ill-

advised at this stage to rehearse scenarios. The possibility exists that after Mrs Bothma has presented her evidence, an application could be made for a discharge on the ground that no prima facie case has been made out. It is not desirable to speculate on the different forensic permutations possible. What is sure is that if the trial proceeds to its conclusion and all the available witnesses whom the parties wish to call are led, the trial court would be obliged to give due weight to all the difficulties that Mr Els would have had in presenting his evidence. If, bearing this in mind, his guilt is not proved beyond reasonable doubt, he must be acquitted."

3.26 There is one fundamental point which the applicant has missed and it is this: the right to have a trial begin within a reasonable time is separate from the overriding right to a fair trial [See Poter v Magill; Weeks v Magill [2002] 2 AC 357 HL]. As a result of this separation, it does not necessarily follow that every time that a trial does not commence within a reasonable time, the prosecution must be stayed. It is only if a fair trial is no longer possible that a stay could be granted – even then, as a remedy of last resort.

3.27 Even if it may be contended that a fair trial is no longer possible, a permanent stay will never be an appropriate remedy if a lesser remedy will adequately vindicate the right to a fair trial.

3.28 The reliance on paragraph 3(C) of the Prosecution Policy is wrong and does not take the matter any further.

3.28.1 The alleged non-compliance with the Prosecution Policy does not justify a permanent stay of prosecution. The alleged non-compliance has not been shown to have rendered it being impossible to have a fair trial.

3.28.2 The correct position is that the first respondent did take into account the provisions of paragraph 3(C) of the Prosecution Policy and concluded that the long-time period from the date on which the crime was committed and the date on which the applicant was charged does not justify a decision not to prosecute because no significant prejudice has been suffered and it is still possible to have a fair trial.

3.28.3 There is, in any event, no case made to suggest that the alleged non-compliance with the Prosecution Policy amounts to an abuse of the power to prosecute or that it has significantly prejudiced the applicant. The applicant himself does not claim prejudice as a result of the alleged non-compliance with the Prosecution Policy and the Court cannot assume prejudice arising from this issue where none is claimed.

3.28.4 Even if it may be found that the first respondent did not apply the Prosecution Policy, it does not necessarily follow that a fair trial is no

longer possible. The Court can, in any event, only intervene where to allow the prosecution to continue would bring the administration of justice into disrepute. The applicant and the fourth respondent have not made out a case that the first respondent is guilty of bringing the administration of justice into disrepute or that the trial would bring the Court processes into disrepute.

3.29 A permanent stay of prosecution in this case would amount to granting the applicant immunity or amnesty from prosecution – which he, in his own wisdom, refused to take from the TRC. It also amounts to asking the Court not to exercise its jurisdiction to try the applicant and to resolve what is no doubt one of the most painful killing of a political activist.

3.30 The justification for a permanent stay of prosecution is to prevent the Court's processes from being employed in a manner which is inconsistent with the recognized purpose of the administration of justice and therefore constituting an abuse of the Court process. See Dupas v The Queen (2010) 241 CLR 237 at paragraph 37 and Jago v The District Court of New South Wales (1989) 168 CLR 23.

3.31 When considering whether to grant a permanent stay, the Court must necessarily have regard to the public interest of the people of the Republic of South Africa who want people charged with crimes to stand trial – in particular, those who are accused of killing political activists whose blood was spilled in the quest for the democracy which we now have and enjoy.

More so, in circumstances where such accused people were given an opportunity to apply for amnesty through the TRC process and, in their own wisdom, decided not to participate in that process.

3.32 Before granting a permanent stay, a Court must first be satisfied that the continuation of the prosecution would involve unacceptable injustice or unfairness or would constitute an abuse of the Court process. In addition, the Court must be satisfied that there are no other available means of bringing about a fair trial.

3.33 The above issues are the basis on which the applicant's case must be considered. When regard is had to the above issues and what the applicant says in his founding affidavit, it is clear that he has not made out a case for the relief which he seeks.

3.34 In *Sanderson*, there was a lengthy delay in bringing the accused to trial. The accused then asked for a permanent stay of the prosecution because there had been an unreasonable and inexcusable two years' delay in prosecuting him thereby infringing his right to a speedy trial.

3.34.1 The Court carefully considered the position of an accused person and the importance of the right to a fair trial and to a speedy trial in particular.

3.34.2 The Court further recognized that an accused person is subjected to various forms of prejudice and penalty as a result of the mere fact that he or she is an accused person. In this regard, an accused person is looked at differently in the society and his or her integrity is doubted and is accordingly subjected to social prejudice. It is because of these forms of prejudice to which an accused person is inherently subjected that the trial must be within a reasonable time.

3.35 From 1971 to 2018, the applicant was never arrested for the murder of Mr. Timol and has never been an accused person and was never treated as such. This being the case, he was never subjected to and could never have been subjected to the forms of prejudice which Kriegler J wrote about in *Sanderson*.

3.36 The *Sanderson* Court considered that a Court should have regard to the impact of the delay on an accused person. At paragraph 30, the Court said:

"*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 hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalization that the lapse of time heightens the various kinds of prejudice that s 25(3)(a) seeks to diminish.*"

3.37 In *Sanderson*, the Court considered that the following factors were important and must be taken into account:

3.37.1 The nature of the prejudice suffered by the accused, from incarceration to restrictive bail conditions and trial prejudice even carried through to mild forms of anxiety. The greater the prejudice, the shorter should the period within which the accused is tried. The applicant was never subjected to pre-trial incarceration or restrictive bail conditions which would justify the relief which he seeks.

3.37.2 The nature of the case. In this regard, the Judges must bring their own experiences to bear in determining whether the delay complained of is over-lengthy. In this case, the Court must also have regard to the manner in which Mr. Timol was killed, the manner in which Mr. Timol's death was covered-up for almost five decades and the fact that the applicant herein chose to remain quiet about what he knows about the murder.

3.37.3 The systemic delay. The Court said that systemic failures are probably more excusable than cases of individual dereliction of duty. In this case, there is no evidence of individual dereliction of duty.

3.38 In this case:

3.38.1 the applicant has not suffered any trial-related prejudice from the time of his arrest. It is even so that he does not complain much about the period from when he was arrested;

3.38.2 the nature of the case is such that the public interest can only be served by bringing the applicant to trial;

3.38.3 the manner in which Mr. Timol was killed is such that the applicant must stand trial. Society cannot be made to continue to imagine Mr. Timol being thrown from the tenth floor of the John Vorster Square Police Station without any consequences;

3.38.4 the reason why the applicant was not prosecuted earlier is because of the political interference narrated in the answering affidavits and evident from Advocate MacAdam's affidavit. In this regard, the Court must take into account that it must have been difficult, if not impossible, for the first respondent to handle and stop the political interference to which they were subjected. Advocate Pikoli says that he suspects that he was fired for deciding to prosecute cases such as the present and he himself reached a "*dead end*" trying to prosecute cases such as the present;

3.38.5 a permanent stay of prosecution is far-reaching and no exceptional circumstances exist to justify such a far-reaching and drastic remedy;

3.38.6 no case has been made that it is no longer possible to have a fair trial or that there are no other mechanisms by which the trial Court (or even this Court) could safeguard the applicant's right to a fair trial.

3.39 In Jago v District Court of New South Wales (1989) 168 CLR 23 it was held that a permanent stay is a remedy of last resort, only to be used in the most exceptional circumstances, where it is impossible to have a fair trial. This makes it an extraordinary remedy for which the applicant bears a very heavy onus.

3.40 In *Jago*, the Court emphasized that the purpose of a stay of prosecution is to prevent an abuse of its processes. In this regard, it also considered what would constitute an abuse of its processes. The Court then said:

"*... The approach is best exemplified in the judgment of Richardson J., who stated:*

"It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by

State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the court is protecting its ability to function as a court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the court's processes may land themselves to oppression and injustice."

In essence then, the power to prevent an abuse of process in this context is derived from the public interest, first that trials and the processes preceding them are conducted fairly and, secondly, that so far as possible, persons charged with criminal offences are both tried and tried without unreasonable delay. In this sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed.

For the reasons given, I agree with the approach of Richardson J as I have explained it. Bearing in mind his Honours relatively broad view of what may amount to an "abuse of process", I agree also with his explanation of the rationale for the exercise of the power to stay a prosecution. His Honour stated:

"The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It

does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor … that the Court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the court."

…

To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial Judge can do in the conduct of the trial can relieve against its unfair consequences": Barton (76), per Wilson J. Where delay is the sole ground of complaint, an accused seeking a permanent stay must be "able to show that the lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute" …"

3.41 There is no authority in our law and elsewhere that says that the length of the delay is on its own determinative. There is, however, authority to the contrary – which says that delay of itself (and the length of the delay) is not on its own determinative of the success or failure of an application for a permanent stay. Actual and significant prejudice is what determines whether it is still possible to have a fair trial. If it is possible to have a fair trial, a permanent stay of prosecution is not competent.

3.42 In R v Birdsall there was a delay of 28 years between the alleged sexual offences and a complaint being made to the police. The Court held that in the absence of specific prejudice being shown, the permanent stay ought not to have been granted. As a result of this, an appeal against a permanent stay order was upheld.

3.43 In R v Austin 84 A Crim R 156 the accused was 87 years old and faced ten counts of sexual offences, the first of which was alleged to have taken place 48 years previously. The court refused a permanent stay because actual and substantial prejudice was not established. Of importance, the Court concluded that there were other mechanisms short of frustrating the prosecution entirely that could go a long way towards ensuring the fairness of the trial. In simple terms, the Court was not satisfied that it was no longer possible to have a fair trial – because there were other mechanisms which could be employed to ensure a fair trial.

3.44 Prejudicial matters which a Court takes into account in an application for a permanent stay include, but are not limited to the following:

3.44.1 loss of evidence;

3.44.2 loss of witnesses;

3.44.3 the deteriorating physical health of the applicant;

3.44.4 the mental capacity of the accused person to remember the circumstances of the crime with which he is charged.

3.45 The applicant has not made out any credible case on the basis of which the Court could find for him in respect of any of the above issues.

3.45.1 Whilst the applicant's founding affidavit makes reference to records which are no longer available, the applicant does not tell the Court as to what such records contained which is relevant to the charge of murder. In paragraph 59 of his founding affidavit, the applicant seems to be concerned about the records "*relating to my movements in order to corroborate my denial that I was at any stage present at John Vorster Square when these acts were allegedly committed.*" These records are irrelevant to the charge of murder the prosecution of which the applicant wants to be stayed permanently. In any event, the applicant himself has not demonstrated that such records would have assisted in his defence to the charge of murder or that he is actually

and seriously prejudiced in preparing for his defence by reason of the loss of such records.

3.45.2 The applicant does not complain much about the loss of witnesses. The applicant cannot complain about this because, on his own version, he is the only person who was with Mr. Timol when Mr. Timol, according to him, jumped out of the window of the building.

3.45.3 Whilst the applicant complains about health issues, there is no supporting medical evidence placed before the Court to prove, not only the existence, the nature and extent thereof, but also that they are of such a nature that a fair trial is not going to be possible or that there is nothing which could be done to alleviate them so that a fair trial could take place.

3.46 It must be remembered that a fair trial does not require the prosecution and even the accused to adduce all evidence that is relevant. It is for the trial Court to reconstruct the relevant events on the available evidence. With this in mind, there is no basis to grant a permanent stay of prosecution.

3.47 In the circumstances, the application ought to be dismissed with costs.

Dated at Sandton on this 18th day of February 2019.

Kennedy Tsatsawane SC

Tiny Seboko