IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA, BLOEMFONTEIN

In the matter between: **SCA Case No.: 2019/1186**
High Court 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 leave to appeal against the judgment and order granted by the Full Bench of the Gauteng Local Division of the High Court of South Africa, Johannesburg.

1.2 The application for leave to appeal and the appeal, if granted, are opposed by the respondents. These heads of argument deal with both the application

for leave to appeal and the merits of the appeal, if leave to appeal is granted.

2 PROCEEDINGS IN THE HIGH COURT

The context

2.1 In 2018, the applicant was charged with murder, defeating and or obstructing the administration of justice.

2.2 Insofar as the charge of murder is concerned, the State's case is that on 27 October 1971 and at John Vorster Square Police Station, the applicant and two others, unlawfully and intentionally killed Ahmed Essop Timol ("**Mr. Timol**"), who was then 29 years old.

2.3 As part of the summary of substantial facts upon which the State seeks to rely at the trial, it is alleged that:

> "*14 From the time of his detention on 22 October 1971, until his death on 27 October 1971, the deceased was still in police detention, in room 1026, and subjected to continuous interrogation and torture by the security branch.*
>
> …

16 *At the time of his death, the deceased was under the care of the accused and Captains Johannes Hendrik Gloy ("Gloy") and Johannes Zacharias van Niekerk ("van Niekerk") who each had a legal duty of care over detainees by virtue of the office they held and their appointment as police officers.*

...

19 *Subsequently, they thereafter either pushed him out of the window of room 1026 and/or threw the deceased down from and/or rolled the deceased from the room of John Foster Square Police Station on 27 October 1971.*

20 *The deceased died at the scene of the crime on 27 October 1971 ...*

21 *After the demise of the deceased, the accused and his cohorts alleged that the deceased committed suicide by jumping from the window of the 10th Floor (room 1026) of John Foster Square Police Station.*"

2.4 The State's case is that the applicant is guilty of murder in that he threw Mr. Timol through the window of Room 1026 of the John Vorster Square Police Station. It is common cause that Room 1026 is on the tenth floor of the police station building.

2.5 The death of Mr. Timol is one of those which happened during apartheid and according to the State, was caused by members of the South African Police Service in furtherance of the government's apartheid policy. Ever since Mr. Timol's death, the South African public has been made to believe that Mr. Timol flew from Room 1026 on his own and no doubt have engraved in their minds a painful picture of him flying from that room to his death. The relief which the applicant seeks is intended to ensure that the South African public continues to have that belief and that painful picture painfully engraved in their minds.

2.6 The State's case is that the aforesaid belief is factually wrong and the painful picture engraved in the minds of the South African public about Mr. Timol, on his own, flying out of Room 1026 must now be erased and replaced with the truth of what happened. This can only happen through a criminal trial which the applicant wants to avoid.

2.7 The applicant wants the South African public to continue to have engraved in their minds what the State says is a false belief and painful picture of Mr. Timol flying out of Room 1026 on his own. The South African public has suffered enough by carrying the picture of Mr. Timol flying out of Room 1026 to his death. There are no words to describe the pain and suffering of Mr. Timol's family, which is what led to these proceedings.

2.8 It is common cause that Mr. Timol was a political activist who fought against the apartheid government for the freedoms which the South African

public now enjoys. When the Constitution refers to recognizing the "*injustices of our past*" and honouring "*those who suffered for justice and freedom in our land*" and of respecting "*those who have worked to build and develop our country*" it is referring to people such as Mr. Timol.

2.9 The evidence on record shows that even the present government failed to take all the necessary steps to ensure that those who caused the "*injustices of our past*" were prosecuted, including those who caused injustice to Mr. Timol.

2.10 Whilst the applicant had an opportunity to meaningfully participate in the Truth and Reconciliation Commission processes, he did not do so and did not apply for amnesty for the crimes with which he is now charged.

2.11 The High Court has, in its judgment, correctly set out the background facts which are relevant for purposes of this application. It is accordingly not necessary to restate what is set out in the High Court judgment as far as background facts are concerned.

The institution of criminal proceedings

2.12 The applicant was charged after a second inquest conducted into the death of Mr. Timol found that Mr. Timol was in fact murdered. The second inquest was conducted as a result of the dissatisfaction with the conclusions reached by the first inquest into Mr. Timol's death.

2.13 In relevant parts, the Inquest Court summarized the applicant's evidence as follows:

"*186. Gloy asked him to stay with Timol while he and van Niekerk went out to check the information they had just received. He, Rodrigues, came around a table to sit opposite Timol. Not long after the two Captains had left the room, Timol requested him to go to the toilet and they both stood up, Timol started moving to his left around the table while Rodrigues was also moving to the left to push into the table the chair on which van Niekerk was sitting. As he was doing this, he witnessed at the corner of his eye Timol rushing to the window, opened the window and jumped through it.*

187. According to Rodrigues, before Timol could completely jump out of the window, he tried to stop him by moving in the direction where he was seated but stumbled on the chair on which he was sitting and fell on all fours. He could not stop Timol from jumping through the window. By the time he stood up Timol had jumped through the window and then he rushed and looked down below, he saw Timol's body on the ground. He then rushed onto the corridor screaming that someone jumped through the window…"

2.14 The applicant was the last person to see Mr. Timol alive and who saw him when he allegedly "*opened the window and jumped through it.*" On this version, there is no other person who could give evidence relating to the circumstances under which Mr. Timol allegedly "*opened the window and jumped through it*" than the applicant himself.

2.15 After having been charged, the applicant unsuccessfully sought an order for a permanent stay of his prosecution for the charge of murder.

The applicant's case

2.16 In the High Court, the applicant contended that:

2.16.1 his rights in terms of section 35(3) of the Constitution to have his trial begin and concluded without delay has been violated by the delay of 47 years in bringing him to trial. As a result of this alleged delay, he contended that he has been prejudiced and his right to a fair trial has been violated;

2.16.2 his prosecution is influenced by an improper motive because the second Inquest Court did not recommend that he be charged with murder but that he be charged as an accessory after the fact to murder.

2.17 Whilst it is correct that the Inquest Court did not conclude that the applicant did unlawfully and intentionally kill Mr. Timol, it is the function of the National Director of Public Prosecutions ("**the NDPP**"), and not the

Inquest Court, to decide, on the basis of available evidence, as to how the applicant must be charged. The mere fact that the NDPP has decided to charge the applicant with murder does not on its own mean that the prosecution is driven by an improper motive and that there is a basis for a permanent stay of prosecution.

2.18 In his founding affidavit, the applicant simply relied on an allegation that the delay in prosecuting him has violated his rights protected in section 35(3) of the Constitution and that his prosecution is unfair and that it is motivated by ulterior motives.

2.19 The background facts upon which the applicant relied in his founding affidavit are set out in paragraph 19 of his founding affidavit. The facts relied upon are those which the applicant says he obtained from the "*information made available to me by the First Respondent*."

2.20 In addition, and in support of his unfair and improper motive contention, the applicant further relied on an allegation that the NDPP "*had no further material evidential material, that was not presented to Court during the re-opened inquest proceedings, available when deciding to charge me on the count of murder. All the evidential material available was presented to the Court during the inquest proceedings and was available at the time that the decision to re-open the inquest proceedings was taken.*"

2.21 As far as political interference is concerned, the High Court[1] correctly concluded that it does not "*take the matter any further to seek the finer detail of how the political interference materialized.*"

2.22 In its judgment, the High Court correctly identified the factors which a Court must take into account in considering whether a prosecution would violate section 35(3) of the Constitution to justify a permanent stay of prosecution. Having considered each of those factors, the High Court correctly concluded that "*whilst it is accepted that there was a delay that would correctly be characterized as unreasonable in its duration and in respect of the justification advanced for it, there is no evidence that the delay will result in trial prejudice nor are there any exceptional circumstances present that would justify granting the radical and far reaching relief the Applicant seeks.*" As a result, the High Court correctly concluded that the interests of society to ensure accountability for the commission of crimes and the nature of the crime "*located in its historical context all militate against the grant of the relief sought.*"

2.23 The applicant has not made out a case that the Full Bench erred in any of its findings. The Full Bench made correct factual and legal findings and there is no reason to interfere with any of its findings.

[1] At paragraph 32 of the High Court judgment

3 LEAVE TO APPEAL

3.1 In order to be granted leave to appeal, an applicant must make out a case that an appeal would succeed. This is done by demonstrating that the Court *a quo* erred in its findings of fact and of law.

3.2 The applicant's heads of argument do not make out a case that the High Court erred in its findings of facts and of law. To a large extent, the applicant's heads of argument are focused on re-arguing the case which was argued in the High Court instead of demonstrating that the High Court erred in its findings. A small portion of the applicant's heads of argument deals with an evaluation of the High Court judgment but then goes on to list the[2] "*findings that this Honourable Court made in the judgment relating to the main application is not only relevant but important for purposes of this application*."

3.3 After listing the "*findings that this Honourable Court made in the judgment relating to the main application*" it is concluded that the "*conclusion by the Court a quo that despite the above findings that a proper case for a stay of proceedings had not been made out is, with respect, not supported by the facts of this case*." But with respect to the applicant, there are no "*facts of this case*" identified by him and, which the High Court got wrong, which support a permanent stay of criminal prosecution.

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[2] Paragraph 86 of the applicant's heads of argument.

3.4 None of the facts which are listed in paragraphs 86.1 to 86.7 of the applicant's heads of argument make out a case that a fair trial is no longer possible. Those facts exist, but that is as far as it goes.

4 PERMANENT STAY SHOULD BE REFUSED

4.1 An important consideration in an application such as the present is whether it is still possible for the applicant to have a fair criminal trial. A permanent stay is not competent if a fair trial is still possible and the trial Court is still able to guarantee such a trial and prevent an abuse of its processes.

4.2 The applicant has raised the following issues: infringement of his rights to a fair trial in section 35(3) of the Constitution; undue delay, right to adduce and challenge evidence; unfair and improper motive as the grounds upon which he seeks to leave to appeal and a permanent stay of prosecution. No case has been made, with reference to evidence, that the High Court got it wrong in respect of any of these issues and that this Court would come to a different conclusion.

No infringement of rights to a fair trial

4.3 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.

4.4 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**").

4.5 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 the applicant to have a fair trial as promised in section 35(3) of the Constitution.

4.6 Even if it may be found that the applicant's rights have been violated, which has not been established, there are other less drastic and less radical remedies available to the applicant than the permanent stay of prosecution which is an exceptional remedy of last resort.

4.7 The applicant ignores the fact that the function of a trial Court is not only to try and convict people and send them to jail. A trial 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 for a permanent stay of his criminal trial.

[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.

4.8 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*." It is for this reason that it must first be established that the trial Court is no longer able to "*ensure*" that a fair trial takes place before a permanent stay is granted.

4.9 When regard is had to the applicant's complaints, it is clear that the trial Court is still able to remedy his complaints and ensure that a fair criminal trial takes place. In addition, there is nothing exceptional in what is stated in the applicant's founding affidavit to justify the exceptional, radical and drastic remedy which he seeks.

4.10 Whilst it is accepted that the applicant could have been arrested and tried earlier, this on its own does not justify a permanent stay of criminal prosecution.

4.11 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.

4.12 In paragraph 19.16 of his founding affidavit, the applicant says that the NDPP has "*already made available to my legal team the case docket and all information relevant to the envisaged trial.*" The applicant has been in possession of "*all the information relevant to the envisaged trial*" and cannot complain about being constrained in his preparation for trial and his defence which complaint cannot be remedied by the trial Court.

4.13 The applicant has already established 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.*" The applicant knows what case he is called upon to meet at the trial. Despite this, the applicant has not made out a case that he is unable to procure his own expert evidence. But even if that were the case, it would not have been a basis for a permanent stay of criminal prosecution because the trial Court could still give him a reasonable opportunity to procure such evidence.

4.14 On the applicant's version, the State does not have evidence of murder against him. This assertion is based on the applicant's assessment of the evidence placed before him by the State. For this reason, the delay in prosecuting the applicant has not negatively and permanently affected his ability to defend himself and to challenge the State's evidence.

4.15 Whilst the applicant complains about the State's reply to his request for particulars, the applicant has not invoked any of the remedies available to him to compel the State to give him further and better answers and particulars. The applicant has not even suggested that the trial Court is no longer capable of remedying this complaint to safeguard his right to a fair trial.

4.16 The High Court correctly took into account the following factors into account in arriving at its decision and no case has been made that it applied itself incorrectly in relation to any of these factors:

4.16.1 the length of the delay and its impact;

4.16.2 the reasons advanced by the State for the delay;

4.16.3 the assertion of the applicant's right to a speedy trial;

4.16.4 prejudice to the applicant;

4.16.5 the nature of the offence and the policy considerations attached to it; and

4.16.6 the interests of society (and Mr. Timol's family) to ensure accountability for the commission of serious crimes such as murder.

4.17 When consideration is given to all of the above listed factors, there is no basis to find that it is no longer possible for the applicant to have a fair trial or that the interests of justice justify a permanent stay of prosecution.

Undue delay

4.18 The Court correctly divided the relevant times to be considered as far as the delay is concerned. Having done this, the Court correctly found that there was a lengthy delay after the end of the TRC process.

4.19 Having arrived at the aforesaid conclusion, the Court concluded that[4] "*this cannot be the end of the enquiry*." After taking the enquiry further, the Court correctly concluded that the delay is not of such a nature that it would irremediably taint the overall substantive fairness of the trial if it were to commence. This conclusion is not directly attacked by the applicant nor is it demonstrated to be wrong on the facts and in law. Even if it were attacked, it would lack merit because the Court's conclusion is supported by the facts and the correct legal position as restated in *Bothma*.

4.20 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:

[4] Paragraph 75 of the judgment.

4.20.1 After the conclusion of the TRC process the State 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 NDPP is not even called upon to defend it and does not defend it.

4.20.2 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.

4.20.3 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.

4.20.4 The correspondence attached to Advocate Chris MacAdam's affidavit 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

4.20.5 The then NDPP, 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. This is an important consideration because it demonstrates that the NDPP wanted to prosecute but was frustrated by the executive.

4.20.6 An analysis of the NDPP's supplementary answering affidavit, the affidavits of Advocates Vusi Pikoli and Chris MacAdam shows that the NDPP was also 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.

4.21 A permanent stay of prosecution is not intended to punish the executive or the State for delaying the prosecution. It is intended to ensure that the Court process is not abused and that an accused person is not subjected to an unfair trial. It is for this reason that it is the Court's function, and not that of the executive to safeguard the right to a fair trial and its processes. In Reg v Jewitt (1985) 2 SCR 125 it was held that 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*." Accordingly, for as long as the trial Court is still able to see that "*the process of the law is not*

abused", as it is in this case, a permanent stay of prosecution is not competent.

4.22 In any event, the issue of political interference was not raised to justify the relief which the applicant seeks. It was raised to demonstrate how the government has betrayed the victims of crimes committed by the apartheid government. The fourth respondent correctly said that granting a permanent stay due to the political interference which happened would serve to validate and reward the political interference complained of and that[5].

4.23 In addition, granting a permanent stay on the basis of political interference would only serve to perpetuate the "*injustices of our past*" referred to in the preamble to the Constitution[6].

The right to adduce and challenge evidence

4.24 As far as this point is concerned, the applicant complains that:

4.24.1 The NDPP "*refused to answer any of these questions and only stated that their case is based on circumstantial evidence and that the issue of common purpose will be cleared by evidence*."

4.24.2 The result of the NDPP's refusal to answer questions and to provide further particulars is that he "*is confronted with the situation where*

[5] See paragraphs 92 and 93 of the fourth respondent's answering affidavit.

he, as an 81 year old person, hampered by a seriously fading memory, has to answer and defend himself against allegations of participating in assaults and torture of the deceased" more than 48 years ago.

4.25 The applicant's case is then that this Court must grant a permanent stay of his criminal prosecution because the State has not given him further particulars. The correct remedy for this complaint is not to permanently stay the criminal prosecution. The correct remedy which remains available to the applicant throughout the trial is for the trial Court to compel the State to answer the questions and to provide the further particulars sought by the applicant.

4.26 There is no basis to find that the applicant's right to adduce and challenge evidence in his defence has been irreparably damaged. The applicant's complaints on this point ought to be dismissed for the following additional reasons:

4.26.1 The applicant's founding affidavit does not identify the evidence which the applicant is going to require to lead and which he is not going to be able to adduce or challenge as a result of the State's conduct, which conduct cannot be remedied by the trial Court.

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[6] See paragraph 2.55 of the NDPP's supplementary answering affidavit.

4.26.2 No case has been made to suggest that there is not another less drastic remedy to address the applicant's complaints. The trial Court is still able to compel the State to remedy the applicant's complaints.

4.26.3 The applicant has already been provided with the docket and has already studied it and knows the State's evidence, or lack thereof, against him. The only new evidence is that collected for purposes of the second inquest and it is already contained in the docket and no case has been made that it would be impossible for the applicant to challenge it.

4.26.4 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.

4.26.5 The applicant's evidence at the Inquest Court was that he was at the scene of the events which led to Mr. Timol's death. His evidence as to how Mr. Timol ended up on the ground is already on record.

4.26.6 The applicant is already in possession of all the expert reports upon which the State is going to rely to show that Mr. Timol was in no physical condition to outrun him to open the window and jump to his death. This is the evidence which the applicant is called upon to challenge.

4.26.7 The fact that the State does not have the evidence which the applicant thinks it should have does not constitute a basis for a permanent stay. It is a basis for his acquittal. This is for the trial Court to assesses at the end of the State's case, not before evidence is led.

4.27 In view of the fact that the applicant has not made out a case that the criminal trial Court is no longer in a position to compel the State to remedy his complaints, the suggestion that a fair trial is no longer possible is not only premature, it is without any factual basis and ought to be rejected.

There is no unfair or improper motive

4.28 The applicant's case that his prosecution is unfair and influenced by an improper motive is based on the following facts:

4.28.1 The Inquest Court concluded that[7] the applicant "*was not involved in causing the death of the deceased*."

4.28.2 Despite the fact that the Inquest Court concluded that the applicant was not involved in causing Mr. Timol's death, the NDPP decided to charge the applicant with[8] "*premeditated murder, directly contrary to the findings by the Presiding Judge in the re-opened proceedings*."

4.29 The correct position is that:

4.29.1 It is not the function of the Inquest Court to prescribe charges which must be laid against an accused person. That function rests with the NDPP.

4.29.2 The fact that the NDPP has now charged the applicant with murder despite the fact that the Inquest Court did not find that he participated in the killing of Mr. Timol is not unfair and does not mean that the prosecution is driven by an improper motive.

4.29.3 The Inquest Court was only empowered to do what is recorded in paragraph 335(d) of its judgment, i.e. that the death of Mr. Timol "*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 an act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder*."

4.30 The contents of paragraphs 42 and 43 of the applicant's founding affidavit do not justify the suggestion that the prosecution is being conducted for an ulterior, unlawful or improper motive so as to move this Court to grant leave to appeal and to permanently stay the applicant's criminal prosecution.

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[7] Paragraph 76 of the applicant's heads of argument.

[8] Paragraph 77 of the applicant's heads of argument.

4.31 In National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 295, this Court correctly held that a prosecution is not wrongful merely because it is brought for an improper purpose and that "*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.*"

4.32 In addition, in *Zuma*, this Court said that "*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*." No case has been made that the State has no intention "*to obtain a conviction*." For this reason, the reliance on an alleged improper motive is bad in law.

4.33 The remedy for an improper or unlawful prosecution is in any event not a permanent stay. The correct remedy for the applicant's complaint is to institute malicious prosecution proceedings against the State. In Tsose v Minister of Justice And Others 1951 (3) SA 10 (A), relied upon in *Zuma*, Schreiner JA said the following which equally applies in alleged improper

prosecutions[9], that an arrest (and prosecution) is not unlawful if the intention is to bring the arrested person to prosecution. If that is not the case, the arrested person's remedy "*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 ...*"

4.34 There is no evidence placed before the Court to prove that the NDPP has no intention to successfully prosecute the applicant. Even if it may be found that there are no reasonable and probable grounds for prosecuting, (which can only be made by the trial Court) the remedy for that lies in an action for malicious prosecution.

4.35 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.

4.36 If the State does not have sufficient evidence to prove murder as alleged by the applicant, the applicant will be discharged in terms of section 174 of the CPA.

There is no agreement not to prosecute

4.37 The applicant seems to suggest that there is an agreement or an arrangement not to prosecute him and that the Minister of Justice "*was*

[9] At page 17E-F.

clearly a party to this agreement/arrangement" and that the Minister of Justice "*failed to disclose any facts in this regard*."

4.38 A litigant who relies on an agreement is in law required to prove its existence and the terms thereof[10]. The applicant has not done this.

4.39 There is no evidence of an agreement between the State and the applicant or any other person not to prosecute the applicant. Whilst the State may have entertained the possibility of granting amnesty to people such as the applicant, no such amnesty was given and no agreement not to prosecute them was ever concluded.

4.40 The applicant has had more than enough time to find evidence of the alleged agreement and would have produced it if such agreement was ever concluded.

5 THE LAW IS SETTLED

5.1 The law on the issues which are the subject of this application is settled and was correctly applied by the High Court[11]. It is not even suggested by the applicant that the High Court got the law wrong.

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[10] McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A). Pillay v Krishna 1946 AD 946 at 952.

[11] See also S v Zuma unreported judgment of the Full Bench of Kwazulu-Natal under case number: CCD30/2018 of 11 October 2019.

5.2 A permanent stay of criminal prosecution is a very drastic and radical remedy. It is a remedy which is granted in exceptional circumstances and it is a remedy of last resort.

5.3 In Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), where the applicant wanted a stay of prosecution, the Court said that "*the relief the appellant seeks is radical, both philosophically and socio-politically*" and that "*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.*" This is because "*it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct*." It is a remedy that "*will seldom be warranted in the absence of significant prejudice to the accused*" more so when there are less drastic and less radical remedies available to an accused person including remedies that are available after an acquittal.

5.4 It is clear from *Saunderson* that a permanent stay will only be granted "*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*." Such a case has not been made by the applicant in this application.

5.5 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, which has not been discharged in this case.

5.6 Where reliance is placed on delay in prosecuting, the prosecution must satisfy the Court that a fair trial was still possible. The State becomes obliged to do this if an applicant has established an unreasonably long delay and substantial prejudice which makes it impossible to have a fair trial. This is not the case here.

5.7 In *Bothma*, the Court said the following about delays in prosecuting accused persons:

"*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).

5.8 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.

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

5.9.1 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.

5.9.2 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 rights under s 35(3)(d) have been violated – clearly they have not*

[12] At page 635J-636A.

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).

5.10 In the premises, the question which this Court must answer is whether, "*in all the circumstances*" of this case, the delay complained of is of such a nature that it "*would inevitably and irremediably taint the overall substantive fairness of the trial*." The answer to this question is in the negative because:

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

5.10.2 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.

5.10.3 The policemen who interrogated Mr. Timol would not have given any evidence as to how Mr. Timol was pushed from Room 1026 as alleged by the State because the applicant says that they were not there when it happened.

5.10.4 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.

5.10.5 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.

5.10.6 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).

5.11 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."

5.12 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 that "*Those rights and the duty to devise appropriate remedial relief for their infringement will continue throughout the trial*."

5.13 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. 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. 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 ...*

[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*."

5.14 It is for the reasons which appear from the above quotation that an important consideration is whether a trial Court is still able to conduct a fair trial with all the safeguards to which the accused is entitled. If that is the case, a permanent stay ought to be refused.

5.15 A permanent stay is granted 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[13]. There is no evidence of an intention to abuse the Court process and to frustrate the administration of justice.

5.16 In this case:

5.16.1 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;

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

5.16.3 the manner in which Mr. Timol was killed is such that the applicant must stand trial;

5.16.4 the reason why the applicant was not prosecuted earlier is because of the apartheid government would not prosecute him. The new government did not take urgent steps to prosecute him because of the political interference which is now well-documented. This political interference made it difficult, if not impossible, to prosecute cases such as the present. In fact, Advocate Pikoli 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;

[13] See Dupas v The Queen (2010) 241 CLR 237 at paragraph 37 and Jago v District Court of New South Wales (1989) 168 CLA 23.

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

5.16.6 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.

5.17 There are many cases in this country and elsewhere where prosecutions commenced after decades of delays.

5.17.1 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.

5.17.2 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.

5.17.3 In Hermanus v R (2015) 44 VR 335 the Court held that there must be a fundamental defect which goes to the root of the trial which the trial Court cannot remedy to justify a permanent stay.

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

5.18.1 loss of evidence;

5.18.2 loss of witnesses;

5.18.3 the deteriorating physical health of the applicant;

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

5.19 The applicant's founding affidavit does not contain any evidence on the basis of which this Court could find for him on any of the above listed issues. His heads of argument also do not make out such a case.

5.20 In the circumstances, the application for leave to appeal ought to be dismissed with costs. In the event that leave to appeal were granted, the appeal also ought to be dismissed with costs.

Dated at Sandton on this 15th day of July 2020.

Kennedy Tsatsawane SC

Tiny Seboko

Counsel for the National Director of Public Prosecutions and the Minister of Police