IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

Case No: 09/27346

In the matter between:

PHILLIPS, ANDREW LIONEL **Applicant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **First Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Second Respondent**

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This application seeks an order to stay an appeal brought by the prosecution against the decision of the Magistrates Court acquitting an accused.

2. The applicant, Andrew Lionel Phillips ('Phillips'), was arrested and detained on 2nd February 2000. Certain of his property was attached in terms of the Prevention of Organised Crime Act ('POCA') on 22nd December 2000[1]. Charges were put to him in the Regional Court at Johannesburg on 12 January 2004 when he pleaded not guilty. He was acquitted on 26th November 2008.

[1] Order of Labe J, case number 2000/27885.

3. On 5 December 2008, the first respondent, the Director of Public Prosecutions ('the DPP'), gave notice that it intended to appeal against Phillip's acquittal and called upon the Regional Magistrate to state a case in terms of section 310 (1) of the Criminal Procedure Act ('CPA'). The stated case was provided on 26th January 2009. The DPP lodged a notice of appeal with the Registrar of the High Court on 17th February 2009 appealing "against the decision of questions of law" in terms of section 310 (1) of CPA[2]. Such appeal essentially seeks to have Phillip's acquittal set aside and the matter remitted to the Regional Court for the trial to be re-opened.

4. Independently of the appeal noted by the DPP, this application was launched by Phillips on 3rd July 2009 seeking orders:–

> *"1. Striking from the roll the first respondents appeal against the judgment and order handed down by Mr S. P. Bezuidenhout in the Regional Magistrates Court for the Regional Division of Gauteng in Case No 41/1899/00 on 26 November 2008 in which the Learned Magistrate acquitted the applicant.*
>
> *In the event that this court holds that it is necessary for the purposes of the relief claimed in prayer 1 above,*
>
> *2. Declaring that Section 310 of the Criminal Procedure Act, 51 of 1997 ("the Act") is inconsistent with the Constitution and invalid.*
> *3. Directing that the first respondent, and in the event of opposition from second respondent, both respondents, jointly and severally pay the costs of the applicant."*

5. The application relies upon a number of grounds: the appeal has lapsed or been abandoned as a result of the failure of the DPP to advance or prosecute it within a reasonable time; to allow it to continue would violate Phillips' constitutional rights to a fair trial and particularly the right to be tried without unreasonable delay; an appeal by the DPP against the acquittal violates Phillip's constitutional rights to a fair trial and in particular the right against double jeopardy entrenched in section 35(3)(m) of the Constitution; to the

[2] ALP2

extent that section 310 of the CPA purports to authorize such an appeal, section 310 is unconstitutional and invalid.

6. By reason of the challenge to constitutionality, the second respondent, the Minister of Justice and Constitutional Development ('The Minister') was joined and, although his counsel advised the court that the Minister really occupied the position of "an amicus" in this matter, the Minister has filed opposing papers.

PROCEDURAL ISSUES

Condonation

7. The application was filed and served on 3rd July 2009. The DPP and the Minister filed notices of intention to oppose on 8th and 29th July 2009 respectively. The DPP filed a 'preliminary answering affidavit'[3] on 30th September 2010 and a 'supplementary answering affidavit' on 25th November 2010 (only served on 15th December 2010) and the Minister filed an answering affidavit on the 10th December 2010 (only served on 15th December 2010).

8. Phillips contends that the DPP and the Minister have filed their answering papers "*egregiously out of time and without a proper explanation for their delay"* since their answering affidavit, treated as an ordinary application, was required to be filed within a reasonable time, and so would have been due by 29th July 2009.[4]

9. Neither the DPP nor the Minister have brought an application for condonation of the late filing of their answering affidavits[5]. Both respondents have

[3] In which it purported to reserve the right to deal with the issues in full in due course.
[4] See Rule 6.
[5] In which application they would have had to comply with Rule 27(3) of the Uniform Rules of Court which provides that the Court may condone any non-compliance "on good cause shown" - where there is reasonable explanation for the delay, the delay has not been occasioned by disregard for the Rules, any prejudice suffered by the other party can be compensated by an appropriate costs award, the merits of the case of the party seeking condonation is not ill founded.

submitted that they were not out of time (by any great margin) in filing their papers. They take the view that the Record of the criminal trial was only made available on the 4th November 2010 and accordingly their Answering Affidavits only fell due 15 days after such record had been filed, i.e. on the 25th November 2010.

10. I am in agreement with Advocate Hellens, appearing for Phillips, that the DPP and the Minister have been delinquent in their approach to this application. There has been no attempt to meet any of the requirements for condonation of their non-compliance with the Rules (no matter how lengthy or how limited any delay might have been). In the ordinary course, I would have acceded to Mr Hellens request that this court refuse to grant condonation for the irregular filing of both sets of answering affidavits and disregard their contents.

11. However, this is not an ordinary application. It has ramifications far wider than this particular applicant/accused and this particular prosecution. To find that an appeal by a prosecution has lapsed or been abandoned; to find that particular delay is in breach of the accused's right to a fair trial; to find that the provisions of section 310 of the CPA are unconstitutional and invalid because it violates the right against double jeopardy – all of these findings would have significant implications for the criminal justice system.

12. I am of the view that the responses by the DPP and the Minister to those averments and submissions raised in Phillip's founding and supplementary founding affidavits and heads of argument must be given proper consideration. To do otherwise would result in my hearing only one side of an important debate and making findings which might not be appropriate. In the absence of the averments in the DPP and Ministers affidavits and the submissions in their (also late) heads of argument, I would not be doing justice to an important issue. One which, I might add, Phillips has treated as significant - in his employment of three counsel[6] and their careful work on this matter.

[6] Advocate M Hellens SC, Advocate M Chaskalson SC, Adv I Goodman

13. I am mindful of the need for the relevant State organ to be heard in matters of such importance – not only concerning the Constitutional challenge to an Act of Parliament (viz the CPA) but also where the relevant Ministry has overall responsibility for the administration of the criminal justice system and public policy issues which arise.[7]

Issue not before court – notice of motion not amended

14. In its answering affidavit, the DPP contended that Phillips had failed to comply with section 10A and 16A of the Rules which contention was disposed of by reference to the revised and expanded affidavit filed with the registrar on 8th September 2010.[8]

15. From this complaint, then emerged the submission that the *"so-called application for undue delay is not before this court"*[9] because the respondents never received an application for amendment of the notice of motion to incorporate same.

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[7] See Phillips and Another v Director of Public Prosecutions 2003 (3) SA 345 (WLD) at [35] per Madala J**:** 'It must always be remembered that in confirmation proceedings the issue is the constitutional validity of a parliamentary or provincial statute…It will often have wide and far-reaching repercussions for the whole country and the conduct of those who will be affected by the decision of the court.' See also Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC) at 241(7): 'On a number of occasions, this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned, the Minister responsible for its administration [in this instance the minster of Justice and Constitutional Development] must be party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the Constitutional validity of legislation in is issue, *considerations of public interest and separation of powers suffice*. Ordinarily Courts should not pronounce on the validity of the impugned legislation without the benefit of hearing the State organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application and justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity (own emphasis added).' See also Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) at 127C-E: 'The Minister of Justice, who is responsible for this legislation, has a direct interest in whether or not this legislation is found to be constitutional. He should be given an opportunity to defend the legislation should he wish to do so. Often the relevant organ of state is best positioned to provide the necessary arguments of justification should the issue of the provision's constitutionality come down to the question of the rights limitation.'

[8] See ALP21 and the notice in terms of section 16A.

[9] Paragraph 1 of Respondents Heads of Argument

16. However, Phillips' supplementary affidavit dated 8th September 2010[10], paragraph 4.2 stated "*I... introduce a new cause of action for the relief that I seek in prayer 1 of the notion of motion"* while paragraph 5 stated *"in this regard, I set out in this affidavit, facts upon which I rely for the submission that, the first respondents appeal should be struck from the roll because the appeal has now lapsed due to the first respondents failure to prosecute that appeal within a reasonable time"*.

17. On reading this supplementary affidavit in conjunction with the original (and un-amended notice of motion) it is clear that the relief sought in the notice of motion has never changed. All that has happened is that a new 'cause *of action'* has been included. No amendment was needed to the notice of motion since the same relief continued to be sought.

18. In argument, Advocate Mtshaulana appearing for both the DPP and the Minister, indicated that it appeared that the respondents had failed to read the supplementary founding affidavit properly, conceded that no new notice of motion was needed and rightly said that "*this is too important a matter to take a silly point"*.

Single Judge/ Appeal or application

19. I heard this application sitting as a single judge. At the hearing there was discussion whether this was an application to be dealt with in the ordinary course or whether, because it might dispose of an appeal, it should be heard by two judges sitting as an appeal court.

20. Advocate Mtshaulana pointed out that on the one hand this hearing might require two judges because if the application was successful, it would lead to striking off a criminal appeal while, on the other hand, this application was independent of the appeal and could have been brought in the ordinary course in the motion court. In the result, Advocate Mtshaulana argued that this was

[10] Filed and served some 15 months before the DPP and Minister filed their answering affidavits.

to be treated as an application in the civil court to which the rules of that court apply

21. It was agreed that I was not asked or expected to express any view on the merits of the criminal appeal itself.

22. Advocate Hellens referred to the Supreme Court Act and took the view that I was not hearing an appeal but that this was an interlocutory application to be disposed of prior to the hearing (or not) of an appeal.

23. It is my view that this application was brought independently of the appeal – in fact it is heard under case number 09/27346 whilst the appeal is enrolled under case number A531/2010. I note that the DPP "removed the appeal from the roll, pending the outcome of the motion application" on 17th February 2011. This matter could certainly have been set down by Phillips in the ordinary motion court. I am not required to give any consideration to the merits of the appeal itself and this application requires no findings whatsoever on the merits of the appeal itself. The decision of the learned magistrate in the trial court is not the subject of this application. This is a precursor to the setting down (or not) of an appeal. I am of the view that it is appropriate that this application be heard by a single judge sitting in motion court (a special motion court by reason of the time required for argument) and that this is not a matter to be heard by two judges sitting as an appeal court.

APPEAL NOT PROSECUTED TIMEOUSLY

Delay is First Issue

24. I am in agreement with both Advocates Hellens and Chaskalson for Phillips that first to be determined in this application is the issue of delay in prosecuting this appeal. This must be decided before I even turn to consideration of the constitutionality or otherwise of section 310 of the CPA.

This constitutional challenge will only be considered if Phillips fails on his other causes of action.[11]

25. The DPP lodged its notice of appeal with the Registrar of the High Court on 17 February 2009. As at the hearing of this application on 29th and 30th March 2011, the appeal had still not been heard.

26. In summary, Phillips seeks to have the DPP's appeal permanently struck from the roll by reason of the failure of the DPP to timeously prosecute this appeal and, by failing so to do, violating Phillips right to a fair trial.

27. It is pointed out that Phillips was arrested in February 2000, over eleven years ago. He stood trial over the period January 2004 to November 2006. He was acquitted on 26th November 2008 on the basis that various of the prosecutors lacked title to prosecute.

The Rules of Court

28. A criminal appeal must be noted within the time and in the manner prescribed by the Rules of Court[12].

29. Rule 67 of the Magistrates Court Rules provides that where the DPP contemplates an appeal under section 310 he shall, within 20 days after the conclusion of the criminal proceedings, in writing request the judicial officer to state a case. Upon receipt of such request the clerk of the court shall prepare a copy of the record of the case, including a transcript thereof, ('the record') before the judicial officer. The judicial officer shall then, within 15 days thereafter, furnish his stated case to the clerk of the court. The DPP may, within15 days after the receipt of the stated case, deliver notice of appeal against the decision on questions of law.

[11] See Zantsi v Council of State of Ciskei & Others 1995 (4) SA 615 CC
[12] See section 309(2) of the CPA read with section 310(3).

30. It is not in dispute that the DPP noted its appeal timeously[13] .

31. This appeal has not been finalized and cannot be finalized because there is, as yet, no complete record to be used in any appeal. It is common cause that the record is not yet, at date of hearing of this application, ready. Absent the record, the appeal cannot be heard.

Provision of the Record

32. Phillips has argued that, in terms of the Rules[14], the record ought to have been prepared and filed with Registrar within 10 days of the filing by the Regional Magistrate of his stated case and the filing by the DPP of its notice of appeal - i.e. by no later than 3rd March 2009.

33. I am not persuaded that this understanding is either correct or practicable. Firstly, it is known by all practitioners that it is not the clerk of the court who prepares the record. It is one of the private companies who operate in the many courts around the country which record the proceedings and then type same out in order to provide a transcript. This is done at cost to the appellant. The same or another private company then collates all documents (from charge sheet/indictment to evidence in the form of reports, photographs, maps and plans etc) and usually paginates and indexes and binds them for the benefit of the appeal court. For what it is worth, the clerk of the court certifies the record. Secondly, in the present case, both parties are in agreement that the record is voluminous. The record, as presently prepared, fills four cardboard boxes in my chambers[15]. A record of such length could not have been filed with the Registrar by 3rd March 2009.

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[13] It is should be noted that the Regional Magistrate prepared and furnished his 'stated case' without waiting for the record of the case to be prepared. This is of no moment. If he had not prepared his stated case, everyone would still be waiting for the record and the DPP would not yet have noted its appeal. The issue has never been whether the learned magistrate was precipitate in furnishing his stated case without the record. This issue has always been whether or not the DPP has pursued its appeal timeously, having regard to the constitutional rights of Phillips.

[14] See 67(15)(a)

[15] I have neither opened the boxes nor read the partial record

34. However, the date by when the record should or could have been made available is not of importance. The point is that the first time the record was made available was on 4th November 2010 and it was agreed at the hearing of this application that the record is still not complete.

The Saga of the Record

35. Phillips complains that the record, with which he has been provided, was only furnished in November 2010 and that what purports to be the record is a unilateral reconstruction by the DPP and therefore not in compliance with court procedure. In any event, it now turns out to be incomplete. The DPP details the many and various difficulties in procuring the record.

36. I would not choose to trawl though all the documentation pertaining to procurement or non-procurement of a complete record save that such chronology reveals what has transpired over the 2 years 2 months since the appeal was noted.

    a. On 23rd April 2009 the DPP received the record**.** On 4th May 2009, the DPP wrote to Phillips attorneys advising that it had received the final portion of the record from the clerk of the regional court only on 23 April 2009, that the chronological order and pagination was incorrect and accordingly indicated the intention of the DPP to remedy same. Once the record is *"remedied*" a copy would be sent to Phillips attorneys and the matter placed on the roll. [16]
    b. On 20th May 2009 Phillips attorneys responded that *"the rules do not make provision for either the State or the defence to interfere with, or amend, the record produced and certified by the clerk. Any direction from the parties relating to the duty of the C of the C to compile the appeal record, such as one of the litigants arrogating to itself, this function will constitute a fatal irregularity. Any errors in the record as compiled and certified by the Clerk are to be dealt with by the*

[16] ALP5

parties once the papers have been prepared in such as manner as deemed fit before the High Court."[17].

c. On 12th October 2009, Adv. Roberts SC prepared a lengthy email concerning the case, the appeal, the record and the funding required from the Department.

   i. The *"notorious accused*", Phillips, "*well known in prosecution circles*" who had instituted several applications against the state and the NPA which show *"the attitude and character of the accused*" had been discharged on a technical point.

   ii. The state was appealing and, as appellant, *"is responsible for a proper and complete record*".

   iii. However, the record received from the clerk of the court "*was not properly bound, not in sequence and not complete and in a total mess"*

   iv. The DPP had approached a private company for a quote to prepare the record. The state had already *"invested millions in this prosecution"* and it was recommended that the quote be "*favourably considered*".[18]

   v. Subsequently, a memorandum was prepared by the DPP concerning the quotes supplied and the rules of procurement of a record.[19]

d. On 5th March 2010 the DPP wrote again to Phillips attorneys advising

   i. *"This office is still in the process of reconstructing the voluminous record*." which was *"a time consuming exercise*".

   ii. The *DPP "was of the opinion that it is not necessary to place the entire record of approximately 6000 pages before the appeal court in order to address the legal issues of this appeal. Only a limited portion of the record will be applicable for the appeal as well as your motion application*". "*It will be in the interests of the administration of justice if, by way of consensus, the parties can agree on the relevant parts of the record for the purposes of adjudication this matter. This will*

[17] ALP6
[18] XJK1
[19] XJK3

also dramatically limit the volume reading to be done and will also prevent any further delays in this matter."[20]

e. The response of Phillips attorneys on 9th April 2010 was to:

i. Refer to earlier correspondence wherein they had indicated their disagreement with the procedure whereby the state sought to unilaterally reconstruct a record and reminding the DPP that *"the law with regard to reconstruction of a record is well known and set out in many decided cases. Certainly the one procedure not envisaged by the law is that the state on its own would set about a reconstruction of the record. There is no possible explanation in the fact of our objection to a unilateral reconstruction being undertaken by the state and in the face of decided cases as to the manner in which an appeal record is to be reconstructed"*

ii. Furthermore, *"We accept it is not uncommon for parties to limit voluminous record on appeal; and, if in the interest of justice to do, the parties can by way of consensus agree on the relevant parts of the record….[in any event we disagree with the contention that "only a limited portion of the record will be applicable for the appeal…". We place on record that it is essential that the entire record be produced for the appeal." "The judgment by the learned magistrates deals inter alia with the absence of title to prosecute of various prosecutors engaged by the State in the case. It was argued before the court a quo that the absence of the title to prosecute was exacerbated by aspects of prosecutorial misconduct throughout the trial. By way of example , these were manifested in inter alia :- Adv Wessels requesting the court to adjourn and consulting to a witness he was leading and who was manifestly having difficulty in providing the evidence Adv Wessels was attempting to led before the court and who after the consultation managed to provide the evidence to the court with no difficulty at all; the decision taken by the state to withdraw*

[20] XJK5/ALP7

Mr Hardeker a key state witness when he was about to be cross examined and in order to avoid the cross examination on the issues that had been raised by our client in his section 115 statement; the failure by the state to recall the witness Grove from the Dept of Home Affairs, who was to follow up on certain aspects and documents in her testimony relating to the issue of certain section 41 permits and to report back to the court; the fact that the prosecution was and is driven for asset forfeiture purposes and not for the purposes of prosecuting a crime".

iii. Finally, the attorneys advised that they did not accept that the *"inordinate delay of some 16 months in producing the record, which is yet to be completed*". The DPP had failed to set out the aspects in which the record was incomplete or the steps taken to reconstruct it. In any event, Advocate Wessels had offered a copy of the record to the magistrate before he delivered his ruling on the section 174 application.[21].

f. An email from the office of the Johannesburg DPP to the National DPP on 10th May 2010 reports that *"the problem appears to be with our procurement or finance. There is only one service provider which can prepare the record in the manner that the Supreme Court of Appeals want. They have already started working on the matter but have stopped due to non payment.*" *The process is stuck here".*[22]

g. By 28th June 2010 the Minister had accepted responsibility for payment of compilation of the record.[23]. On 29th June 2010 the DPP wrote to the state attorney advising "*finally the record"* would be referred to Appeal Document Services to commence with the record.

h. On 1st November 2010 the DPP wrote to Phillips attorneys advising that the record was now ready for filing. The record was filed on 4th November.

[21] XJK7/ALP8
[22] XJK8
[23] XJK12

37. At the hearing of this application – end March 2011 – I was informed that it is common cause that the record is still not complete[24]. There is no certificate from the clerk; certain days of the trial have not yet been transcribed (23rd Sept 2004, 30th November 2004, 24th April 2005, 28th November 2005, 31st January 2006, 14th November 2006, 28th March 2007, 29th March 2007, 19th July 2007, 20th July 2007, 26th November 2008), there are in each volume missing pages, portions of the record are listed as being "inaudible", certain pages (pages 955 to 1052 of Volume 12) have been unilaterally reconstructed and retyped at the instance of the DPP.

38. Advocate Mtshaulana conceded that the record was still not complete as at time of this hearing. He explained the process underway as provision of *"the initial document"* which would enable "*issues to be discussed*" and *"identification of what is missing"*. Now available to the parties was, he submitted, *"an initial record to which the applicant [Phillips] would still have the opportunity to make input*".

Delay and the Record

39. It is trite that the DPP is *dominus litis* in this appeal and has responsibility for ensuring that the appeal is heard sooner rather than later. That responsibility appears, to my mind, neither to have been diligently nor effectively undertaken.

40. Firstly, it appears that the DPP reached a decision to appeal on 5th December 2008 which was confirmed by the notice of appeal of 17th February 2009. Yet, it is only on 12th October 2009 that the request is made for funding to meet the quote from Appeal document Services. This is a lapse of some nearly 8 months. It appears the enthusiasm or zeal of the DPP to pursue an appeal overtook the realities of the situation and appropriate preparation.

[24] See pages 626 to 631 of Phillips' replying affidavit for details of the incomplete 'record' of November 2010.

41. Secondly, the 'record' which was received by the DPP at the end of April 2009 was apparently defective in a number of respects yet no details thereof were ever provided to Phillips attorneys in order to reassure them as to the difficulties confronted or the steps which were being taken.[25] It is unsurprising that Phillips attorneys were suspicious as to the *bona fides* of the DPP and sceptical as to the reasons for the delay in obtaining the record.

42. Third, the scepticism of Phillips attorneys was apparently well-founded when one learns that the service provider had ceased to prepare the record by reason of non-payment and that "*the process is stuck here*". For what period the service providers had been working on the record is unknown and for how long they had been unpaid is also unknown. Advocate Mtshaulana's heads of argument describes the advice of the Minister in June 2010 that the Ministry would pay for compilation of the record as a *"breakthrough*". Indeed so – after 17 months of logjam (February 2009 notice to appeal to this advice) - there was now about to be some progress.

43. Fourth, with that background it was disingenuous of the DPP to approach Phillips attorneys advising that the entire record was not necessary for purposes of the appeal and that the parties should try to agree that only portions of the record need be obtained. Quite clearly, the issue at this stage for the office of the DPP was funding and bureaurocratic and financial inability to procure a record. This was not disclosed as the cause of delay. Instead the DPP approached Phillips attorneys under the guise that certain portions only of the record were really required.

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[25] As Phillips heads of argument point out, the DPP failed to explain to the court what steps were taken for ensuring all copies, what steps were taken between 2 March 2009 and 23 April 2009 date on which final portion allegedly received, when it was first apparent that the chronological order and pagination incorrect, what the errors in pagination were, who was allocated responsibility for correcting same, what steps were taken to correct these problems, which particular portions were identified missing, when and by whom were the missing portions identified, what missing or defective portions have been reconstructed, which officials in the office of the DPP participated in the unilateral process of reconstruction etc etc.

44. Fifth, whilst the DPP was apparently unaware of the need to fund the procurement of the record, the DPP was blithely advising Phillips attorneys (over the period May 2009 to March 2010 and perhaps longer) that the office of the DPP was "*remedying the faults*" and "*reconstructing the record*". This continued to be the public and expressed approach to Phillips attorneys; notwithstanding those attorneys advice that it was impermissible for the DPP to unilaterally prepare a record and that there is authority as to the procedure to be followed.[26]

45. Sixth, the attention of the DPP to the appeal appears to have waxed and waned. The first 'record' arrived in April 2009 with a letter to Phillips attorneys in May 2009. The next communication from the DPP to Phillips attorneys is a year after the first intimation of problems with the record, in March 2010 when use of the partial record is suggested. In November 2010 the DPP writes of the good news of the forthcoming record. Two letters of moment over a period of 19 months is hardly reassurance that the DPP is carefully pursuing its appeal. Only in October 2009 is there an application for funds, by May 2010 there is still no progress, only in June 2010 is there a commitment to funding.

46. Seventh, when the next version of the 'record' is produced in November 2010, there is no advice as to whether this constitutes a supplemented or re-worked or remedied or reconstructed record – or not. Nor is there any proposal how the defects in the 'records' can be resolved in accordance with accepted procedures.

47. The DPP has failed to offer any explanation for what Phillips legal representatives called the "*egregious delays in prosecuting its appeal"*. The court was presented with no more than the above chronology.

48. It was left to Advocate Mtshaulana, appearing for both the DPP and the Minister, to urge me to have regard to the systemic problems apparently found in both the Magistrates Court and the office of the DPP. As he said *"the*

[26] See S v Joubert 1991 (1) SA 119 (AD); and S v Ntantiso and others [1997] 3 All SA 576 (E)

system is not functioning well". The Rules envisage that the clerk of the court would file the record which was not done. The DPP sought to have the record prepared by a third party but financial constraints of the DPP prevented that being done in time.

49. Such plea *ad misericordiam* must carry little weight.

    a. When it is argued that the NDPP had to *"examine case law which states that the appellant is responsible for the record*", then I despair of legal and procedural knowledge in the office of the DPP.
    b. When it is pointed out that the DPP *"tried to have the record reduced*", I wonder if anyone in that office ever read the correspondence from Phillips attorney. In any event that issue was disposed of by the office of the Deputy Judge President.
    c. When I am told that the Rules envisage that the clerk will file the record, I am concerned at the lack of appreciation of the office of the DPP that the clerk of the court does not himself or herself record evidence, type it out, paginate and index same and photocopy it all in multiple volumes – at no charge.
    d. When I am informed that financial constraints in the office of the DPP are the major source of these problems, I am perplexed because the papers disclose that the DPP has spent "*millions"* on this prosecution, employing no less than four advocates in private practice to prosecute Philips[27]. It was not absence of funds but misguided zeal which led the DPP to leap into an appeal without ensuring the availability of funds. It was not absence of funds but ineptitude which led the DPP to waste months and years on 'reconstruction' of the 'record', fail to pay the private service provider.

50. It is now some 17 years since the facts which gave rise to the judgment of the Constitutional Court in Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC). It is 14 years since the Constitutional Court indicated that

[27] Advocates Wallis SC, Advocate Cockerel, Advocate Vermeulen SC, Advocate Wesssels as well as Advocates Davidowitz, van Wyk and Wassermann from the office of the DPP

systemic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory [at para 35]".

51. Earlier generosity and leniency by our courts towards limitations in State resources and the resulting impact on the work of the South African Police Services, the National Prosecuting Authority and court management cannot endure indefinitely.

52. I cannot find other than that the DPP has been dilatory in attending to procurement of the record, naïve in failing to appreciate the need for funds to be made available in advance of contracting with service providers, stubborn in seeking to resolve the problems of an inadequate record by unilateral reconstruction thereof, disingenuous in advising that the DPP was still reconstructing alternatively that portion only of the record need be utilized.

53. I am in agreement with the view of the DPP[28] that there has been "*an inordinate delay*" in filing the record. The result has been an inordinate delay in pursuing the appeal. This delay can be laid at the door of the DPP and nowhere else.

Delay in Appeal and the Constitutional Rights of the Accused

54. The timing of the hearing of an appeal post conviction or acquittal is not and cannot be cast in stone. There are so many variables, ranging from procurement of a record to allocation of date for hearing, which are beyond the control of the litigants. However, what can be required of an appellant are diligence on the part of those managing the process, knowledge of both law and procedure on the part of legal representatives, mindfulness of and adherence to Constitutional principles on the part of litigant and legal representatives. Where the appellant is an organ of the State and where the State seeks to appeal an acquittal, then there standards should be more stringently demanded and more carefully observed.

[28] Expressed in the letter of 29th June 2010

55. Section 39(2) of the Constitution requires that all law, which includes Rule 67 which regulates appeals from the Magistrates Court, should be interpreted so as to promote the spirit, purport and object of the Bill of Rights. The object of the DPP's appeal is to have Phillips' acquittal set aside and to re-open the criminal proceedings against him. For as long as the appeal is pending, the charges against Phillips remain capable of prosecution and he continues to be at jeopardy of conviction. He remains an accused person and entitled to claim the protections of section 35 of the Constitution.

56. Until the appeal process is concluded, it cannot be said that a trial has reached finality. The standards of expedition to procure a 'fair trial' continue to apply to all appeals. Accordingly, in scrutinizing appeals from the Magistrates Court, one must be mindful that every accused person has the right *"to have their trial begin and conclude without unreasonable delay*".[29]

57. At the crux of this application is the question what constitutes 'reasonable' or 'unreasonable' delay?

58. This question must be answered against the background of the time already elapsed from arrest and the reasons therefore, the time elapsed from noting the appeal and the reason therefore, the time likely to pass before the appeal is finalized, the nature of the charges, the import of the appeal, the implications of delay upon trial proceedings, the impact upon the accused and broader considerations for the criminal justice system.

59. First, more than eleven years have elapsed since Phillips was arrested. Seven years have passed since he first pleaded. The trial concluded some four and a half years ago. There has been a hiatus of two and a half years since judgment was handed down. I have no knowledge that any delay has been irregularly or deliberately occasioned by Phillips in order to frustrate the conduct of the trial.

[29] See Section 35 (3) (d) of the Constitution.

60. Second, the State noted its appeal two years and five months ago on 17th February 2009. That appeal has not yet been heard which delay, as I have already discussed in this judgment, must be ascribed to the office of the DPP.

61. Third, absent a complete record, the epic continues without land in sight. There is no indication when or how the missing portions of the record will be reconstructed to the approval of an appeal court. Even if this task were completed in the course of 2011, it is unlikely that a date for the hearing of the appeal could be allocated before 2012 – twelve years after arrest, in the sixth year after acquittal, three years after noting an appeal. I repeat that such further delay would continue to fall upon the shoulders of the office of the DPP.

62. Fourth, Phillips was charged with four counts in terms of the Sexual Offences Act No 23 of 1957, one count in terms of the Aliens Control Act No 96 of 1991 and one count of perjury.

63. Fifth, this is not an appeal by a convicted accused but an appeal by the prosecution against the acquittal of Phillips. The purpose of the appeal is to have his acquittal set aside and have him referred back to trial. I leave, for this moment, the question of the Constitutionality or otherwise of section 310 of the CPA. Instead, I note that the clear intention and possible result of the appeal will be to once again place Phillips in jeopardy of conviction. I am mindful of section 35(3)(m) of the Constitution which prohibits that an accused person *"be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."* . Accordingly, if such an appeal is permitted, this would constitute an extraordinary process. At the very least, it would have to be prosecuted with greater diligence, knowledge of law and cognizance of Constitutional principles than required in ordinary appeals. Intrinsic to such requirements is promptitude.

64. Sixth, if Phillips' acquittal is overturned and the trial is reopened, then Phillips will have to mount his defence at least eleven to twelve years after he was

initially charged. The prejudice to Phillips is considerable: witnesses become unavailable and neither Phillips nor defence witnesses can be expected to remember events more than eleven years ago clearly or confidently[30]. *Au contraire*, the State has already led all its evidence and closed its case some five to seven years ago when events were less distant. There can be no doubt that the prosecution in this trial would have an unfair advantage over the defence.

65. Seventh, Phillips suffers ongoing prejudice as a result of the delays in pursuit of and finalizing this appeal. Some of these would be suffered by all accused persons in his position. Others are unusual and unique to himself.

    a. First, for over a decade he has been identified as an accused person with criminal charges pending against him. He is described in this application as the "*notorious accused*", whose frequently successful litigation against the NPA shows "t*he attitude and character of the accused*". The stigma in all circles in South Africa is considerable. There must have been and continues to be anxiety and stress in contemplating this apparently neverending saga**.** It is not inappropriate to describe this as the "*exquisite agony of the accused*"[31]. Where imposition of psychological stress and social stigma is unwarranted, such imposition would violate Phillips constitutional rights to dignity and personal security.

    b. Secondly, the financial burden cannot have been or continue to be inconsiderable. The State has disclosed it has spent "*millions*" on this litigation and so, I must assume, has Phillips.

    c. Thirdly, Phillips exercises no control over the future conduct of this process. He is precluded from finalizing the criminal proceedings against him. He is dependant upon the office of the DPP to finalise this matter and their endeavours, thus far, cannot inspire confidence that this ordeal will be expeditiously concluded.

    d. Fifth, certain of Phillips assets were restrained at the instance of the NPA in terms of Chapter 5 of POCA in December 2000. No judge of

[30] See Sanderson supra at para 22 ; S v Dzukuda 2000 (4) SA 1078 CC at para 51 and R v Askov (1990) 74 DLR (4th) at page 1220

[31] Per Cory J in R v Askov supra at 1219.

the South Gauteng Division can fail to have knowledge of this restraint and the differences of opinion between Phillips and the curator of these assets over the past eleven years[32]. Notwithstanding his acquittal by a court of competent jurisdiction, these assets have not been released from restraint and returned to Phillips unencumbered. For so long as the appeal is pending, these assets are not returned to Phillips. This is a most significant curtailment of Phillips use and enjoyment of his property.

66. Eighth, there are public policy considerations regarding the entitlement of the general population to believe that alleged criminal conduct will be prosecuted to the fullest extent and the importance of providing resources and support to the prosecutorial agencies. Of course "*there is a tension between …the public interest in bringing criminals to book and… the equally great public interest in ensuring that justice is done to all…*"[33] This application does not concern "*technical niceties and ingenious legal stratagems*"[34]. One is not asked to weigh up the interests of the general public in their safety and security and confidence in organs of the state as against maudlin sympathy for an accused person. This application goes to the very heart of the 'fair trial' provisions of the Constitution.

67. Phillips contends that a Constitutional interpretation demands that Rule 67 be interpreted to require that appeals by the State be pursued not just timeously but as "expeditiously as possible". I am in agreement. It could hardly be otherwise. No court could countenance appeals being pursued "as tardily one fancies". However, there is no agreement as to what is possible.

68. Advocate Mtshaulana has conceded that "*the complaint of the applicant [Phillips] is not out of place*" but urged that one should be mindful of the

[32] Numerous judgments have been handed down in this court - see reference to some of these in National Director of Public Prosecutions v Phillips and others [2001] JOL 9015 W; National Director of Public Prosecutions and others 2002(1) BCLR 41 (W); Phillips and another v Van Den Heever NO & others [2005] 2 All SA 417 W; Phillips and another v Van Den Heever NO & others [2007] 3 All SA 159 W.

[33] Per Kriegler J in Key v Attorney General, Cape Provincial Division and Another 1996 (2) SACR 113 CC at para 13.

[34] Key supra at para 13

systemic delays "*consistent with the development of the country*" but which will be incrementally remedied. I have already commented that organs of State entrusted with great power must now cease to claim indulgences. The South African Constitution leads the normative values of our society not bureaurocracy and red tape.

69. There has indeed been inordinate delay in finalizing this trial and this appeal, all of which delay must be laid at the door of the office of the DPP. Further delay is inevitable. Any prosecutorial appeal and any ensuing trial would place Phillips back in jeopardy of conviction – double jeopardy. Renewed trial proceedings will unfairly advantage the State which has already led all its evidence some seven years ago while Phillips has not. The personal impact of the litigation upon Phillips cannot be disregarded. The longevity and continuation of the POCA restraint order is without precedent. All these factors have apparently been disregarded by the DPP when exercising its prosecutorial powers. The interests of the general South African community and the integrity of the criminal justice system are not, in this case, antithetical to the interests of Phillips.

70. I am satisfied that the right of Phillips to a fair trial is and has been infringed by delay in finalising the appeal. The right to be protected against unreasonable delay is located in both the substantive right to a fair trial as well as section 35(3)(d) of the Constitution to which I have referred. I take the view that in this case, the delay in prosecuting the appeal serves *"inevitably and irremediably to taint the overall substantive fairness of the trial*"[35] (if it were to be reconvened) and hence the right to a fair trial would be infringed.

Remedy

71. Phillips has postulated three possible remedies in the present application – to deem the appeal to have lapsed or to have been abandoned or to permanently strike the appeal off the roll.

[35] Bothma v Else 2010 (2) SA 622 (CC) para 33

72. A court is entitled to treat an appeal as having lapsed when the appeal record has been lodged significantly out of time and where the appellant has failed to tender a satisfactory explanation for the delay. In these circumstances the court is entitled to strike the appeal from the roll[36]. Even if the appeal has not lapsed, a court is entitled to deem it abandoned if an appellant delays unreasonably in advancing its appeal[37].

73. In the present case I do not think it appropriate to find that this appeal has either lapsed or been abandoned. No specific time periods are +of application. There has been activity in the office of the DPP although dilatory, ill advised, ineffective and ultimately without satisfactory result.

74. An appeal may be struck off the roll in exceptional circumstances. This is an extraordinary remedy to be exercised with caution.[38] In the present case, I find the delay of the DPP inexcusable, the prejudice real and significant, that Constitutional rights have been infringed.

75. I take the view that the appropriate remedy is to order a permanent stay of the appeal noted by the DPP against the conviction of the Phillips. The appeal will therefore be permanently struck off the roll.

SECTION 310 OF THE CPA

76. By reason of the view I have taken of the delay in prosecuting this appeal and the implications for Phillips' constitutional rights, I do not need to deal with the challenge to section 310 of the CPA.

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[36] Mamabolo v Rustenburg Regional Local Council 2001(1) SA 135 SCA at para 7

[37] S v Carter 2007(2) SACR 415 (SCA) at para 10, "…Undue delay may in appropriate circumstances even amount to the abandonment of the appeal.'

[38] Wild v Hoffert 1998 (3) SA 695 (CC) at para 11-12 ; Broome v Director of Public Prosecutions, Western Cape and others 2008 (1) SACR 178 (CPD).

77. However, I must express my concern at the approach taken by both the DPP and the Minister to this aspect of the application. Neither the DPP nor the Minister in their answering affidavits address the Constitutional challenge to Section 310 of the CPA.

78. The DPP does no more than rely on that which is stated in the Ministers affidavit.

79. The Minister concedes that an appeal by the DPP against an acquittal which leads to an accused person being remitted to trial infringes the right against double jeopardy entrenched in section 35(3)(m) of the Constitution. However, the Minister makes no attempt, in terms of section 36 of the Constitution, to justify such limitation by setting out the legitimate government purpose that he seeks to achieve and establishing that it is proportionate to the limitation of the right Instead, the Minister simply referred the court to the work of the South African Law Commission which has found that such limitation is permitted in certain foreign jurisdictions. This takes the matter no further.

80. I am concerned that the Minister's office in preparation of the answering affidavit did not carefully and clearly seek to justify the opposition to this application and the Constitutional challenge to section 310 of the CPA. The Minister was not, as suggested by Advocate Mtshaulana, in the position of 'an amicus'. The Minister was not seeking to assist the court as an interested party. The Minister is a respondent who has chosen to oppose this application

COSTS

81. Costs must follow the result.

82. The orders sought by Phillips were, firstly, to have the appeal of the DPP struck from the roll and alternatively, a declaration that section 310 of the

CPA is inconsistent with the Constitution and invalid. The relief sought in the first prayer could only be against the DPP because the Minister is not party to the appeal.

83. The Minister has argued that, since he was not a party to the first prayer because he has no jurisdiction in respect of either the appeal or the delay; there can be no costs order against the Minister in respect of the first prayer. Insofar, as the second prayer is concerned, the Minister has perceived his role as that of an *amicus* who has come to assist the court in reaching a proper decision. There should be no costs order in respect of the second prayer.

84. However, the Minister is in court as a litigant, a cited party, who did not furnish an *amicus* notice. The Minister has adopted the attitude of a protagonist. The Minister did so notwithstanding prayer 3 asking that he be held liable for costs of Phillips if he opposed the relief sought.

85. I have determined this application on the question of delay alone. I have not dealt with the constitutional challenge to section 310 of the CPA. That might suggest that the Minister not be mulcted in costs.

86. However, the crux of, or perhaps the ultimate purpose of, this application has always been the challenge to constitutionality of Section 310 of the CPA. I do not think that Phillips could have brought this application on delay alone – it was always essential that the issues be joined – delay and the Constitution, double jeopardy and the Constitution, Section 310 and the Constitution.

87. I have learnt from this application of the extremely shallow, even denuded pockets, of the office of the DPP. At the end of the day it was the Minister to whom the DPP turned to be in a financial position to pursue the appeal. Whatever costs order I make, it will not be the budget of or the piggybank of the DPP which makes payment.

88. In the result the costs of this application will be paid by the State – whether the DPP or the Minister from taxpayer provided funds.

ORDER

89. An order is made as follows:

1. The appeal of the first respondent ('Director of Public Prosecutions') against the judgment and order handed down by Mr S. P. Bezuidenhout in the Regional Magistrates Court for the Regional Division of Gauteng in case No 41/1899/00 on 26 November 2008 in which the Learned Magistrate acquitted the applicant ('Andrew Lionel Phillips') is permanently struck from the roll of the South Gauteng High Court Division and thus the right of the first respondent to appeal such acquittal is permanently stayed.
2. Both Respondents shall pay the applicants costs in this application, jointly and severally, the one paying the other to be absolved.

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SATCHWELL J
Judge of the High Court

Date of hearing: 29-30 March 2011

Date of judgment: 10 June 2011

Applicant's counsel: MR Hellens SC, M Chaskalson SC, I Goodman

Applicant's attorneys: Shannon Little Attorneys

First and Second Respondent's counsel: PM Mtshaulana SC, TF Mathibedi

First and Second Respondent's attorneys: State Attorney