THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 505/19

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, NORTHERN CAPE	**APPELLANT**
and	
ASHLEY MARK BROOKS	**FIRST RESPONDENT**
PATRICK JOHN MASON	**SECOND RESPONDENT**
MANOJKUMAR DAYABHAI DETROJA	**THIRD RESPONDENT**
KOMALIN PACKIRISAMY	**FOURTH RESPONDENT**
AHMED ISHABHAI KHORANI	**FIFTH RESPONDENT**
ANTONELLA NATASCIA FLORIO-POONE	**SIXTH RESPONDENT**
KENYADITSWE MCDONALD VISSER	**SEVENTH RESPONDENT**
WILLEM JANK WEENINK	**EIGHTH RESPONDENT**
JOSEPH SAREL VAN GRAAF	**NINTH RESPONDENT**
CARL STEVE VAN GRAAF	**TENTH RESPONDENT**
KEVIN TREVOR URRY	**ELEVENTH RESPONDENT**
TREVOR PIKWANE	**TWELFTH RESPONDENT**
FRANK SAMUEL PERRIDGE	**THIRTEENTH RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Northern Cape v Brooks and Others* (Case no 505/19) [2020] ZASCA 80 (2 July 2020)

Coram: PETSE DP, MOCUMIE AND MOLEMELA JJA AND LEDWABA AND EKSTEEN AJJA

Heard: This appeal was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 2 July 2020.

Summary: Permanent stay of prosecution – recusal by trial judge before finalisation of trial – discretion of Director of Public Prosecutions in respect of proceedings *de novo* – application for stay of prosecution triggered by delay caused by recusal – reasonableness of delay – no trial prejudice established.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Daffue J sitting as court of first instance):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following: 'The application is dismissed.'

JUDGMENT

Eksteen AJA (Petse DP concurring)

[1] The appeal, which proceeded with leave granted by this court, is against an order by Daffue J in the High Court, Kimberley (the high court), that the prosecution against the thirteen respondents (collectively referred to as 'the respondents') instituted by the Director of Public Prosecutions (DPP) as set out in the indictment dated 5 August 2016, containing 139 counts, be permanently stayed. The parties agreed that the appeal be considered in terms of s 19*(a)* of the Superior Courts Act 10 of 2013, without an oral hearing. The question in the appeal is whether the order was correctly granted in accordance with the applicable legal principles.

[2] The application (the stay application) followed the recusal of Pakati J (the trial judge) at an advanced stage of the criminal proceedings. The

consequence of the recusal is that the proceedings before the trial judge had been rendered a nullity. If the DPP chose to proceed with a prosecution it would have had to start *de novo*. However, the respondents contended that their constitutional right to a fair trial within a reasonable time, guaranteed in s 35(3)*(d)* of the Constitution of 1996 (the Constitution), had been infringed by irregularities giving rise to delay, and eventually the recusal of the trial judge. The timeline of the events and the reasons for the various delays, postponements and the eventual recusal of the trial judge are therefore central to the determination of the appeal.

[3] The facts leading up to the application are as follows. The respondents had all been engaged in one way or another with the diamond industry. During February 2012 the Director for Priority Crimes Investigation Unit (DPCI) in the Northern Cape had commenced a covert operation under the name 'Project Darling' (the investigation) to investigate allegations of contraventions of the Diamonds Act.[1] The investigation proceeded in two phases. In the first phase an agent had been used to purchase unpolished diamonds from a number of identified targets. This phase of the operation had been conducted over a period of approximately a year terminating in February 2013. In the second phase of the operation, which spanned a further 12 months, an agent had sold State owned diamonds to identified targets. Where necessary, authorisation in terms of s 252A of the Criminal Procedure Act, 51 of 1977 (the CPA) had been obtained from the DPP for the use of the agents for entrapment. The operation was completed in February 2014.

[1] Act 56 of 1986.

[4] On 22 August 2014 nine persons were arrested and charged. They had appeared before the Magistrate's Court, Kimberley (the magistrate's court) and bail was fixed. A further thirteen persons had been arrested on 25 August 2014 and on the same day they appeared, together with the original nine arrestees (collectively referred to as the accused) in the magistrate's court where bail was fixed in respect of the new arrestees and the matter was postponed to 13 October 2014. Two further persons had subsequently been arrested and released bail.

[5] On 13 October 2014 the matter had been postponed to 28 January 2015 for further investigation. In consequence of the further investigation charges were withdrawn against one accused. The prosecution had indicated its intention to charge some of the accused, including the respondents, with racketeering and accordingly sought and obtained an order that their trial be separated from the remaining accused. In order to proceed with a charge of racketeering a certificate had to be obtained from the National Director of Public Prosecutions (NDPP) in terms of s 2(4)[2] of the Prevention of Organised Crime Act 121 of 1998 (POCA). It further transpired that certain of the alleged offences had been committed in Gauteng and others in the Northern Cape. The prosecutor recorded that he was awaiting input from the accused in respect of the intended centralisation of these charges, which the NDPP would have had to consider before issuing a s 2(4) certificate. He accordingly sought a further postponement of the trial.

[2] Section 2(1) of POCA defines the crime of racketeering and s 2(4) provides: 'A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director.'

[6] The defence had, however, objected to the postponement and urged the magistrate to invoke the provisions of s 342A(3)*(c)*[3] of the CPA, which was opposed by the State. The application had been refused and the matter postponed to 15 May 2015. The State was put to terms to obtain the necessary certificate in terms of s 2(4) of POCA before the next appearance. This, it had duly done.

[7] An agreement was reached on 28 January 2015 with the legal representatives of all the accused that the trial would be set down for 19-30 October 2015 and 9-20 November 2015. The dates had been agreed to suit the various legal representatives and, as the envisaged trial was complex, sufficient time had been required for preparation. I have alluded earlier to the duration of the investigation. The transactions involved in the charges amounted to approximately R28 million and the consolidated docket prepared in this matter encompassed 3 308 pages.[4] Notwithstanding the agreement in respect of the trial dates the matter had been postponed, provisionally, to 15 May 2015 in the magistrate's court.

[8] In the interim, during February 2015, a number of the accused had submitted representations to the office of the NDPP objecting to the centralisation of charges and claiming a misjoinder in the indictment. However, the NDPP had been satisfied, on a review of the dockets, that the

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[3] Section 342(3)*(c)* of the CPA provides: 'If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and prejudice arising from it or to prevent further delay or prejudice, including an order –

. . .

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the Attorney-General.'

[4] A number of separate dockets had been opened during the investigation. When the separation of trials was effected a consolidated docket was prepared in respect of the accused who would be charged of racketeering.

issue of a certificate in terms of s 2(4) of POCA authorising the prosecution on charges of racketeering and the centralisation of the charges was appropriate. The certificate had been handed in at the appearance on 15 May 2015 and the prosecution requested that the matter be postponed to 27 July in order to be transferred to the high court for trial on the agreed dates.

[9] The indictment had been provided to the accused on 15 June 2015 and the prosecution advised on 30 June 2015 that an electronic copy of the docket was ready (a copy thereof had been provided to the accused between 30 June 2015 and 9 July 2015). When the matter was transferred to the high court on 27 July 2015 there were 20 accused and they were instructed to appear on 8 September 2015 for pre-trial procedures. At that stage Mr L Hodes SC had then recently been briefed on behalf of certain of the respondents. The previously agreed dates were not suitable to him. The parties had agreed to approach the Judge President to arrange new dates.

[10] At the pre-trial procedure the accused had indicated that they would not be in a position to proceed to trial as they contended that they had not been furnished with full disclosure of the docket. In particular, they had contended that transcripts of audio and video images, copies of the original s 252A applications, the Part B and C sections of the docket and some of the statements contained in the docket had not been provided to them. The prosecution denied their entitlement to further disclosure. The parties agreed in the circumstances that any preliminary and *in limine* applications which any of the accused may have wished to bring would be heard in the week of 19-23 October 2015, being the first week of the previously agreed trial period. In order to accommodate Mr L Hodes the Judge President in Kimberley,

directed that the trial would proceed on the running roll from 18 April 2016 to 23 September 2016.

[11] On 19 October 2015 counsel on behalf of the various accused had brought applications for:

(i) the quashing of the charges and relief as envisaged in s 342A(3)*(c)*;

(ii) the disclosure of documentation which formed part of the s 252A applications[5] as well as Parts B and C of the case docket;

(iii) the disclosure of further statements allegedly contained in the dockets; and

(iv) further particulars.

All of these were opposed. Argument was not completed by 23 October 2015 and the matter was postponed to 4 and 5 February 2016. Again it was not completed and the applications were further postponed to 20 April 2016 when argument was finalised. In the course of argument Mr Roothman, on behalf of the State, had contended that the State had disclosed all witness statements.[6] In respect of the further documentation sought by the accused, Mr Roothman had argued that some were protected from disclosure by the Police Act and others were privileged and that counsel for the accused were accordingly not entitled to them. Mr Roothman had asserted that he had provided more than what he was required to do.

[12] On 16 May 2016 the trial judge had ruled on the applications and ordered the DPP to provide further particulars on certain limited points and to

[5] In particular, the respondents sought information relating to all the informers utilised in the investigation, including those alluded to in the authorisation.

[6] There is no evidence to suggest that he, or the DPP, was in possession of any further witness statements at the time which had not been disclosed.

update the summary of substantial facts. The remainder of the applications had been dismissed. In consequence of these applications the agreed trial date had come and gone. Two of the respondents had indicated their intention to bring further applications to compel further particulars and the trial dates were rearranged for 27 July-12 August 2016, with certain days excluded.

[13] Another application for further particulars was heard on 17 June 2016. It had been prompted by a newspaper article which had appeared on 7 April 2016 stating that Mr Linton Jephta (Jephta), a crucial State witness and one of the agents who had been used in the entrapment during the investigation, would refuse to testify unless the Hawks paid him R4 million before the trial commenced. The article recorded that he had already received an amount of R1 million[7] and that a spokesperson on behalf of the Hawks had indicated that Jephta would only receive the further R4 million after he had testified and the case had been finalised. The documentation upon which the article relied had apparently been sourced from Mr Korff (Korff).

[14] This application too, had been opposed. The papers do not reveal the particularity which the accused had sought to compel, but it is evident that the documentation provided by Korff was central to the argument. Roothman had protested that the trial court ought not to rely on newspaper articles and he had asserted that documentation provided by Korff was fraudulent. He had contended that Korff would not testify on behalf of the State and that the documents provided by him were privileged and covered by a non-disclosure agreement. Thus, he had argued that the documents were inadmissible

[7] The evidence later established that the information relating to this payment was correct.

fraudulent documents. One of the assertions which Korff had made was that Warrant Office Potgieter, the erstwhile investigating officer, had received various payments into his personal bank account in relation to the matter.[8] The trial judge ruled that these documents could only be dealt with during the trial and that it would have been premature to deal with them at that stage.

[15] At an undisclosed stage the parties were advised that the trial would only commence on 1 August 2016. The circumstances giving rise to this change do not appear from the papers. On 1 August 2016, however, the legal representatives on behalf of seven of the accused had approached the trial judge to request time as they intended to negotiate with the prosecution in respect of a possible plea in terms of s 105A of the CPA. The matter had accordingly stood down. On 2 August 2016 they had reached an agreement with the State and charges had accordingly been withdrawn against those seven accused. Their trial proceeded in another court. The papers do not reveal what the agreement entailed or what offences these accused had pleaded guilty to. The respondents were then the remaining accused in the trial.

[16] These developments had caused the respondents to seek the recusal of the trial judge (the first recusal application) based on the fact that she had learnt that charges had been withdrawn against certain accused who had agreed to plead guilty to certain offences. This, they contended, created the perception that they were also guilty. They further insisted that the indictment had to be amended to remove any reference to the seven accused against whom the charges had been withdrawn.

[8] Potgieter had been removed as investigating officer from the case during May 2015 and been replaced by a new investigating officer. He remained an essential witness for the State as he had been Jephta's handler for purposes of the entrapment.

[17] The first recusal application had been opposed and dismissed and the State was ordered to amend the indictment as requested. The revised indictment was dated and delivered on 5 August 2016. It is this document which was referred to in the order of Daffue J.

[18] The trial had commenced on 10 August 2016 and on 11 August the State called Mr Dreyer (Dreyer). During cross-examination of Dreyer both Mr M M Hodes SC (for third and eighth respondents) and Mr L M Hodes SC had wanted the witness to bring an audit report of the diamonds kept in the custody of the State Diamond Evaluator. Neither the witness nor the prosecuting authority had been in possession of such an audit and the matter accordingly stood down for the witness to procure the document from his office. The following day Dreyer brought the said audit for the year 2016, presumably the most recent audit available. Mr M M Hodes, however, indicated that he had wanted the report for 2013-2014, which neither the witness nor the prosecuting authority had in their possession. Dreyer had accordingly been requested to procure the document at the next hearing and the matter was then postponed to 19 September 2016.

[19] On 19 September 2016 Dreyer had returned to the witness box and handed the document to the court. Mr M M Hodes, inexplicably, had no questions on the document. He indicated, instead, that he required the audit report for 2010-2011. This request was later abandoned.

[20] On 21 September 2016 the State had indicated its intention to call Mr Lochner, who had downloaded video and audio recordings from the recording machine allegedly used by Jephta in the investigation. The defence

objected to the admissibility of the evidence and on 23 September 2016 the trial court ordered that a trial-within-a-trial be held to determine the admissibility of this evidence. The trial had then been postponed to 30 January 2017. The agreement with the Judge President, referred to earlier, was that the trial could run until 23 September and the postponement at this stage had therefore been inevitable.

[21] At the resumption on 30 January 2017 the State had been ready to commence with the trial-within-a-trial. However, Mr T Price SC, on behalf of some of the respondents sought a postponement in order to consult. The matter had accordingly stood down to 31 January 2017. On 31 January Mr Price brought a formal application for a postponement to 13 February 2017 as he needed further consultations which he contended, 'will bring the trial to an end'. There were no objections.

[22] On 13 February 2017 Mr Price was still not ready and a further postponement ensued to 15 February 2017. Still Mr Price was not in a position to proceed and the matter stood down to 11h30 that morning. The trial-within-a-trial then commenced and Korff was called on behalf of the respondents represented by Mr Price. For reasons which were not disclosed Mr Roothman had not been advised of the intention to call Korff until the morning of 15 February. Korff proceeded to testify until 17 February 2017, when he fell ill and the matter had to be postponed to 28 February. On resumption, the cross-examination of Korff commenced.

[23] During the course of Korff's evidence a substantial volume of documentation which the State had previously not been favoured with had

been handed in. Accordingly, on 8 March 2017 Mr Roothman requested a postponement in order to study the numerous exhibits handed in by Korff. The respondents objected. The trial court ruled, however, that by virtue of the complexity of the matter and the numerous documents handed in by Korff in the course of his evidence the interest of justice demanded that the State be afforded an opportunity to study the documents and to consult with its witnesses in respect thereof. The matter had accordingly been postponed to 27 March 2017 when Korff continued.

[24] In accordance with a ruling made by the trial judge in respect of the procedure for the trial-within-a-trial the State then proceeded to call its witnesses. An adjournment followed on 31 March 2017 to 8 May 2017. No reason for the postponement is apparent from the papers nor was any blame attributed to any party for the adjournment.

[25] On 8 May 2017 the matter recommenced and counsel on behalf of certain of the respondents renewed argument in respect of the disclosure of the s 252A application. On this occasion the trial judge had ordered that a redacted version of the application be furnished deleting the names of any informers where they appeared in the applications.[9] The State complied and the trial proceeded to Thursday 17 May 2017 when it was postponed to 6 November 2017, apparently as the State had not been ready to proceed with its next witness on that day. No reason was advanced for the duration of the postponement nor was any blame attributed to any of the parties. On

[9] The information relating to the informers, which had been sought in the earlier application in October 2015 was specifically excluded.

9 November 2017 the trial had again been postponed, by agreement between the parties, to 29 January 2018.

[26] When the trial court reconvened Warrant Office Potgieter (Potgieter), the original investigating officer and the handler of the agent Jephta was called only in respect of the trial-within-a-trial which, as I have said, related to the admissibility of the audio and video recordings made. On 31 January 2018, however, Potgieter fell ill. He sought medical attention and a medical certificate verifying his indisposition was handed in. The medical opinion expressed that he was unfit for service until 5 February 2019. The matter accordingly stood down to enable the State to prepare another witness.

[27] Mr Botha (Botha), the Acting DPP in the Northern Cape, who had authorised the applications for s 252A authorisation took to the witness stand on 1 February 2018 and his testimony continued to 9 February 2018, when the State requested a postponement for two weeks as Mr Roothman's wife had fallen ill and had been hospitalised. Notwithstanding the objections by the respondents a postponement was granted and the matter recommenced on 19 February 2018.

[28] Potgieter returned to the witness box and Mr Roothman attempted to lead his evidence on the content of the video material. To this an objection was again raised and argument presented. The court ruled against the State holding that the content of the video material could only be considered during the evidence of Jephta, who still had to be called by the State. As Potgieter's evidence continued he again complained of illness and said he was suffering severe headaches. Notwithstanding objections from the respondents the

matter was adjourned to the following day when medical opinion again recommended that Potgieter was not fit to continue. Whilst Mr Roothman had diligently prepared a standby witness this too had been to no avail as the standby witness fell ill and a medical certificate in this regard was tendered.

[29] In these circumstances Mr Roothman was compelled yet again to seek an indulgence. The respondents again protested and they applied for a ruling that the delay in finalising the matter was unreasonable and that, in terms of s 342A(3)*(d)* of the CPA, the proceedings should continue and be disposed of as if the case for the prosecution had been closed.[10] Their application in this regard was unsuccessful as the trial court ruled that the delay had not been foreseeable. The matter was accordingly postponed to 12 March 2018.

[30] At the resumption, Mr Roothman called Colonel Serfontein (Serfontein) who had conducted cellphone data analyses. Counsel for the respondents objected to his evidence on the basis that a statement prepared by Serfontein had been presented to them at the eleventh hour. Mr Roothman acknowledged this to be so. The statement, however, was not a statement which had been contained in the docket and was an additional statement which had subsequently been prepared.[11] The matter accordingly stood down to the following day when the trial proceeded to 16 March 2018, which had been the

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[10] Section 342A(3)*(d)* provides:
'If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order –
. . .
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed.'

[11] The statement had been prepared in consequence of his consultation with Mr Roothman and it was not in existence in February 2016 when Mr Roothman assured the court that he had disclosed all the witness statements in his possession.

end of that session. Trial dates could not be arranged for the second term in 2018 as the trial judge was on long leave.

[31] The trial reconvened on 31 July 2018 and the prosecution had fully consulted and was ready to present the evidence of Jephta when they were informed that some of the respondents intended to bring an application for the recusal (the second recusal application) of the trial judge. The second recusal application had a history of its own. On 14 August 2016, shortly after the commencement of the evidence, the trial judge had been approached by Mr Gugu (Gugu), a Captain in the South African Police Service stationed at Kimberley. Gugu who was described by the trial judge as 'my home boy' had been well-known to her. He reported an approach by one Khaya, a diamond dealer in Kimberley, who had advised that he was aware of the close association between the trial judge and Gugu. Gugu said that Khaya had requested him to speak to her to find out what she would want from the respondents for their problem to go away. She rejected the offer whereupon Gugu had told her that he was concerned for what could happen to her if he were to inform Khaya that she did not want anything from them. He had advised that Khaya was aware that she drives a black Jeep with a GP registration number and Gugu suggested that she refrain from using the vehicle for her own safety and that of her children.

[32] The trial judge had duly reported the matter to the Director of Security at the Office of the Chief Justice. The Office of the Chief Justice in turn, had requested the DPP on 16 August 2016 to request the police to investigate the matter. An investigation docket had been opened and investigated and on

12 June 2018 the DPP had addressed a letter to the legal representatives of the respondents. The letter recorded:

'THE STATE VERSUS: KHAYALETU CHARLES TUBANE WITH REGARD TO THE STATE VERSUS BROOKS AND OTHERS ENQUIRY NC DPCI CAS 04/08/2016 (DEFEATING THE ENDS OF JUSTICE/CORRUPTION)

1. This office received information from the Assistant Director, Security, attached to the Office of the Chief Justice, that there was an attempt to unduly influence or bribe the Honourable Judge Pakati in relation to the Brooks matter and that her safety might have been endangered.
2. An Enquiry docket with reference number NC DPCI CAS 04/08/2016 was opened and investigated by the Serious Corruption Investigations Unit, South African Police Service.
3. According to the information, the suspect in this matter was a person by the name of Khayaletu Charles Tubane.
4. After a protracted investigation, the Enquiry docket was finally submitted to this office for a decision. The office declined to prosecute on 21 May 2018, based on the available evidence.
5. In the interests of justice and transparency you are accordingly informed.'

[33] The respondents had immediately requested a copy of the docket relating to the matter which had been provided on 23 July 2018. On 31 July 2018 however, Mr Roothman provided four additional statements by Jeptha which had not previously been provided and which appear to have been the subject of a separate enquiry. These statements bear the dates 27 June 2016, 26 August 2016 and 6 March 2018, whilst one statement was undated. In these statements Jeptha related how he had been approached by and met with persons, including one Eddy Poone, previously a co-accused and the husband of the sixth respondent, and offered substantial amounts of money

not to testify. Self-evidently these events may have impacted on the evidence of Jephta and were relevant to his cross-examination.

[34] Furthermore, on 20 July 2018 the DPP had provided the respondents with two compact discs (CDs) containing audio and video material of two conversations which had allegedly taken place between Mr Ashley Brooks, the first respondent (Brooks) and Jephta. These had not previously been provided and Mr Barnard, for the DPP, has explained that they were not previously in possession of the DPP. These CDs, he explained, had been discovered on a laptop computer which had previously been used by Potgieter while he had been the investigating officer.

[35] All of this had triggered the second recusal application. Pakati J obliged. At the time of her recusal the trial-within-a-trial relating to the admissibility of video and audio material of the entrapment had remained incomplete. Potgieter's evidence had been incomplete and Jephta, the agent, was yet to testify. Not all the respondents supported the second recusal application and some of them actively opposed it. The consequence of the recusal by the trial judge, as I have said, is that all the proceedings before her were nullified. The application for the stay of prosecution had followed just two weeks after the recusal.

[36] In the stay application the parties provided separate timelines which reflected certain factual disputes relating to the reasons for the various postponements and delays. The stay application sought final relief by way of application proceedings which, generally, could only have been granted if those facts averred by the applicants (respondents in the appeal) in their

affidavits, which had been admitted by the respondent (appellant), together with the facts alleged by the appellant, justified such an order.[12] In narrating the facts giving rise to the recusal of the trial judge I have adopted this approach.

[37] In the stay application Brooks attested to a founding affidavit. All the respondents have aligned themselves with the averments made in the affidavit of Brooks. They relied on an alleged infringement upon their right to a fair trial and the right to have their trial commence and conclude without unreasonable delay. Brooks blamed the State, and particularly its legal representatives, for the delays and launched an attack on the professionalism and integrity of Mr Roothman and Botha. He alleged:

'I have been advised . . . that it can never be said that the State has clean hands in the prosecution. Over and above all the irregularities alluded to in the applications concerning the provision of equipment and money by the Complainant and the payments made to the Investigating Officer into his personal bank account, coupled with his failure to return to continue his testimony and be cross-examined for an indefinite period, the withholding of documents taints this prosecution and renders it unfair.'

The alleged 'irregularities alluded to in the applications concerning the provision of equipment and money by the complainant' were not explained in the stay application and to the extent that this may have referred to the evidence of Korff, the trial judge had not ruled on these issues yet. Similarly, Potgieter had not completed his evidence; his version of events and his explanations of his alleged conduct had not been heard. These are matters which must be considered in the trial.

[12] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A).

[38] Brooks concluded: 'The State's conduct in this matter is inexplicable and deserving of censure. It is unacceptable for Office(r)s of the Director of Public Prosecutions to conduct themselves in this manner. They ought to know better than to withhold crucial statements that are vital to the preparation of a defence . . . .'

[39] Brooks reserved his most scathing criticism of the representatives of the State for Botha. He alleged:

'[80] One of the most significant aspects pertaining to the application for the Presiding Judge's recusal was that Adv Botha had received the complaint from the Presiding Judge prior to him testifying under oath in this matter. He made no mention of this when he testified and did not provide any of the documentation that he had been aware of since August 2016.

[81] This information was crucial and would have in my respectful submission influenced the Presiding Judge in relation to her acceptance or rejection of his testimony and more importantly that of Linton Jeptha.

[82] Most significantly, Adv Botha expressly stated at page 3131 on 2 February 2018 under oath in open court as an officer of this Honourable Court, that he had no other information or documentation relating to this matter. This was a blatant lie.'

[40] In respect of the delay Brooks alleged:

'By virtue of the Presiding Judge having recused herself, the trial that had commenced on 5 August 2016 and run until 1 August 2018 becomes a nullity and must start *de novo*. The blame for this falls squarely upon the State and its legal representatives.'

[41] I revert to the merits of the application. The respondents approached the court in terms of s 38 of the Constitution.[13] The right which they assert is set out in s 35(3)*(d)* of the Constitution which provides:

'Every accused person has the right to a fair trial, which includes the right:

. . .

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

[42] The remedy of a permanent stay of prosecution has been described as 'extraordinary'.[14] A permanent stay of prosecution will not be granted unless the court is satisfied that there exists an unreasonable delay.[15] Whether a delay is unreasonable depends upon the circumstances of each individual case. In order to determine whether a particular lapse of time is reasonable the court will perform a 'balancing act' in which the conduct of both the prosecution and the accused, the length of the delay, the reason which the State assigns to justify the delay and the prejudice to the accused are weighed. The most important factors bearing upon the enquiry relate to the nature of the offence, the length of the delay and the reasons given therefor and the prejudice, actual or potential, to the accused.[16]

[43] The charges against the respondents included racketeering, corruption and illegal dealing in uncut diamonds. These are serious offences. Racketeering may attract a sentence of life imprisonment[17] and corruption,

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[13] The material portion of s 38 of the Constitution provides: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

[14] See *Wild and Another v Hoffert NO and Others* 1998 (2) SACR 1 (CC); 1998 (6) BCLR 656 (CC) para 11. See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1998 (1) SACR 227 (CC) para 38 where the court considered the right to a speedy trial under s 25(3)*(a)* of the Interim Constitution of the Republic of South Africa, 1993 (which although worded differently, has the same object).

[15] *Wild* para 8, 9 and 28.

[16] *Sanderson* para 25 and 31–35.

[17] Section 3 of the Prevention of Organised Crime Act 121 of 1998.

which is disturbingly prevalent in South Africa, undermines the moral fibre of our society. In *Zanner v Director of Public Prosecutions*[18] this court noted that the right of an accused to a fair trial requires fairness not only to him, but fairness also to the public as represented by the State. It must instil public confidence in the criminal justice system and in cases involving serious crime the interest of society demands that the State bring an accused to trial.[19]

[44] However, the high court was critical of the charges, particularly, of racketeering. Daffue J remarked:

'. . . The State attempted to show that the alleged illicit dealing in diamonds and further action by the applicants resorted within the ambit of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") as is apparent from the indictment. In order to do so, it came up with a novel, outrageous argument – bordering on fiction – that an enterprise has been established by the agent, the Boss and Erasmus (the s 204 witness), as the members of the criminal association so formed . . . Although I raised my eyebrows in disbelief when I read this in the summary of substantial facts I was not addressed on the issue and will not say much more, save for some final remarks . . . .'

[45] These unfortunate remarks create the regrettable perception of an unjustified bias. The judge *a quo* had not heard argument on the matter neither had he heard the evidence. Neither the agent nor Erasmus had testified and Potgieter (the Boss) had not completed his evidence. The criticism of the charges, instituted on the authority of a certificate issued by the NDPP, was premature. What is important for purposes of the inquiry is the gravity of the charges.

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[18] *Ibid* fn 18.

[19] *Zanner v Director Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA) para 21.

[46] Reverting to the question of delay, in *Sanderson* Kriegler J stated:

'. . . The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial related interests that concern us. Of the three forms of prejudice, the trial related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative, generalisation that the lapse of time heightens the various kinds of prejudice that s 25(3)*(a)* seeks to diminish.'[20]

[47] Kriegler J noted too that if an accused has been the primary agent of delay he should not be able to rely on it in vindicating his right to a trial within a reasonable time. He should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal.[21] Kriegler J noted that systemic delays caused by court congestion are probably more excusable than cases of individual dereliction of duty.[22]

[48] The respondents complain both of delays which occurred during the trial which has now become a nullity and the delay which is occasioned by the recusal of the trial judge.

[49] In respect of the former the high court remarked, as a point of departure, in assessing delay:

'Bearing in mind the planned operation, one would have expected the State to have its ducks in a row and ready to proceed with the trial without delay, but alas, the record shows

[20] *Sanderson* para 30.
[21] *Sanderson* para 33; see also *Van Heerden and Another v National Director of Public Prosecutions and Others* [2017] ZASCA 105 (SCA); 2017 (2) SACR 696 (SCA).
[22] *Sanderson* para 35.

that the first witness in the criminal trial testified only two years later, *i.e.* on 10 August 2016 . . . .'

[50] These remarks do not do justice to the facts of the case. All the respondents had been granted bail on their first appearance in August 2014. Some of the respondents had been unable to pay the initial amount fixed and the amounts had been decreased to allow them not to be detained and further accused had been arrested after 25 August. The matter was postponed to 13 October 2014 when, on the very first joint appearance an application was brought in terms of s 342A(3)*(c)* to investigate the delay on the part of the State. The application was correctly dismissed. The matter was complex, as I have said, and substantial evidence was involved. Whilst the papers did not expressly deal with the events after the first postponement warning statements had to have been obtained from the various accused which, no doubt, required further investigation. In my view it would have been remiss of the State to proceed with charges without first investigating explanations given or averments made in the warning statements. There was nothing in the papers which could support a conclusion that the request on 13 October 2014 for a postponement for purposes of further investigation was not well justified. Criticism thereof by the high court was, in my view, ill-founded.

[51] On 25 January 2015 the accused were separated into various groupings. In respect of one accused, probably as a result of the further investigation, the charges were withdrawn. Some accused were charged only of dealing in diamonds whilst others were earmarked for prosecution under s 2 of POCA. At this early stage trial dates were already agreed with all the representatives for November 2015. There was no suggestion that the State had not been ready

to proceed. At that stage there were 20 accused; the papers do not reveal how many different legal representatives were to be accommodated in the agreement on the trial dates and the papers did not suggest that this delay was attributable to dilatoriness of the prosecution.

[52] Things changed in July 2015 when Mr Hodes was briefed on behalf of some of the respondents. The trial dates were not suitable to him and new trial dates had to be obtained from the Judge President for April 2016. The availability of Mr Hodes accordingly delayed the commencement of the trial at this stage by nearly five months. This delay cannot be ascribed to the State.

[53] At the pre-trial procedure in September 2015 agreement was reached that the initial days of the originally agreed trial dates, when Mr Hodes was available, would be utilised for purposes of any preliminary applications. Various applications were brought as set out earlier, including an application in terms of s 342A(3). Argument could not be completed during the allocated period and the preliminary applications were postponed on two occasions to finalise argument. These postponements again delayed the commencement of trial beyond the dates allocated by the Judge President. The trial judge ruled on the applications on 16 May 2016. The preliminary applications were predominantly unsuccessful. However, the State was ordered, as I have said, to provide some further particulars. Its earlier resistance to the disclosure thereof was not due to any dilatory or indecisive conduct, nor has it been suggested that the State had been unable to provide these promptly. The delays which occurred as a result hereof cannot be blamed on the State. The State did indeed have ‘its ducks in a row’ and had been in a position to proceed. It was not improper for Mr Roothman to defend his right not to provide further

particulars or disclose certain documents and the ruling by the trial judge largely vindicated his decision.

[54] The affidavit of Brooks reflects a thinly veiled suggestion that Mr Roothman had misled the court in suggesting that he had no further documents to discover. In fact, on Brooks' own version, what Mr Roothman contended was that he had no other witness statements in his possession. The very essence of the opposition to the application, as set out earlier, had been that he was not required to disclose the further documentation in his possession. The scurrilous attack on Mr Roothman in this respect was unwarranted.

[55] In consequence of the delay occasioned by these applications new dates had been allocated for the trial which had to commence on 1 August 2016. On the morning of trial, however, a number of the accused approached the State to negotiate a plea in terms of s 105A of the CPA. This could not have been foreseen by Mr Roothman and the delay which ensued thereafter is attributable to the decision of some of the accused at that stage. In all the circumstances the evidence indicates that the State proceeded with due haste to commence the proceedings. The delays which occurred after 25 January 2015 to the commencement of trial can predominantly be attributed to delays incurred at the instance of the respondents or their erstwhile co-accused.

[56] The delays which occurred between 11 and 13 August 2016 could likewise not be attributed to the State. These delays could have been averted had the specific documentation been requested before Dreyer had testified.

[57] On 23 September 2016 the trial-within-a-trial was ordered. The State was unprepared to proceed immediately and sought an indulgence to prepare. The trial was accordingly postponed at this stage as the period allocated for the trial on the running roll had expired. The delay attributable to Mr Roothman's unpreparedness was therefore minimal. The trial-within-a-trial was scheduled to commence on 30 January 2017 and the State was ready to proceed. It was then delayed for more than two weeks due to the unpreparedness of Mr Price. Once the trial-within-a-trial did proceed Korff testified at some length and handed in a considerable volume of documents which had not been provided to the State prior to his testimony. This necessitated a postponement in order for Mr Roothman to consult with various witnesses and study the documentation. These delays too could have been avoided had Mr Price provided the documentation to Mr Roothman prior to calling Korff. The blame cannot be laid at the door of the State.

[58] The State was plagued on various occasions by the illness of Mr Roothman's wife and of witnesses, predominately Potgieter. Brooks, in his founding affidavit, did not accept that Potgieter was indeed ill and, as set out earlier, criticised him for his failure to return to continue his testimony and cross-examination for an indefinite period. The criticism was not justified. The evidence established that on each occasion medical opinion supported his illness and that he had been booked off. There is no evidence that the respondents challenged the validity of the medical opinion at that time. The suggestion that Potgieter had failed to return to the witness box for an indefinite period to continue with his testimony is also unfounded. The trial-within-a-trial was incomplete when the second recusal application was moved and there is no evidence that Potgieter was at that time unable or unwilling to

complete his testimony. It was within the discretion of Mr Roothman to decide at what stage he wished to recall Potgieter. Delays which occur due to unforeseen illness of witnesses are not uncommon in litigation.

[59] So, although a substantial period of time may have lapsed before the second recusal application was made it is predominately attributable to one or more of the respondents, the illness of witnesses, or, in some instances systemic difficulties, such as the long leave of the presiding judge and the exigencies of the court roll.

[60] I turn to consider the events giving rise to the second recusal application. The respondents who supported the application relied primarily on two grounds. Firstly, the failure to advise them of the attempt to bribe the trial judge, and, secondly the non-disclosure of Jephta's statements of the attempt to bribe him. In this regard the high court observed:

'I do not wish to criticise my colleague for not informing the legal representatives of the conversation with Captain Gugu . . . However, I believe that I would probably have acted differently.

. . .

This does not support the State in casu. The DPP in Kimberley was well aware of the situation and even instituted investigations. I personally believe that the trial judge should have informed the parties immediately in order to obtain assurances that none of the applicants were responsible for the alleged threat/or attempt to bribe.

In my view the prosecution team was under an ethical duty to take their colleagues for the defence in their confidence and inform them of the alleged threats and attempts to bribe the trial judge and a crucial witness. If the matter was openly discussed there and then, that is in August 2016, the trial would in all probably not have become a nullity in August 2018, two years down the line and after numerous witnesses have testified . . . .'

[61] The approach to the trial judge by Gugu occurred in August 2016. There were at that stage 13 accused before her. Prima facie, the logical inference at the time would have been that the approach to her had in all probability, been prompted by or on behalf of one or more of the respondents. No indication was provided to her of the identity of the persons who might have instigated the approach and it is inconceivable, in my view, that anyone could have perceived her to hold a bias against any particular respondents as a result of the event. I do not consider in these circumstances that any duty rested upon her to advise the accused of the approach by Gugu. In the event that one or more of the respondents had initiated the approach it is naive to suggest that those responsible would have admitted it to the trial judge. The conduct of the trial judge after the unsolicited approach to her cannot be faulted.

[62] The office of the Chief Justice had requested the DPP to have the matter investigated. The attempted bribery of a high court judge presiding in a criminal trial, coupled with a threat to her safety, is a serious matter. An investigation docket was opened in order to probe these allegations. To alert the respondents, who as a matter of logic, as I have said, were suspects, could only have served to prejudice the entire investigation and with it the administration of justice. Assurances from the respondents of their innocence would have been predictable, but of no assistance. The caution expressed by Harms JA in *National Director of Public Prosecutions v King*[23] is appropriate in this regard where he observed:

'Courts should . . . be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and, "any new procedure can offer opportunities capable of exploitation to

[23] *National Director of Public Prosecutions v King* [2010] ZASCA 8*;* 2010 (2) SACR 146 (SCA) para 5.

obstruct and delay." One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.'

[63] These remarks are particularly apposite to this case. None of the respondents have expressly distanced themselves from the approach to the trial judge, instead, they have launched a scathing attack on the State for its failure to advise of its knowledge of the investigation. For the same reasons that it would have been inappropriate for the trial judge to advise the defence of the approach I do not consider that there was any ethical duty on the State to reveal the existence of a separate, and sensitive, investigation unrelated to the events forming the subject matter of the criminal trial, prior to its completion. Once the investigation was complete the DPP did advise the respondents and provided a copy of the docket.

[64] The approach by Gugu to the trial judge, and the content of the docket, could have had no bearing on the issues in the trial before her. Again, the observations by Harms JA in *King* are instructive where he said:

'There is no such thing as perfect justice – a system where an accused person should be shown every scintilla of information that might be useful to his defence – and discovery in criminal cases must always be a compromise. Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impractical to conduct a prosecution . . . .'[24]

[24] *King* para 5.

[65] In respect of Jeptha's statements the trial judge in the second recusal ruling held:

'It raises a question though as to why the State decided to hold onto the agent's statements for so long and not discover them when the defence asked for further particulars. The State instead told the court that there was nothing to discover.'

Neither her ruling nor the affidavit of Brooks identified the occasion where Mr Roothman assured the court that there was nothing to discover.

[66] The first application to compel the discovery of further documentation and further particulars commenced on 9 October 2015 and argument was completed on 20 April 2016. In the course thereof Mr Roothman contended, allegedly in February 2016, that the State had disclosed all witness statements and that there was nothing more to discover. The contentious statements of Jephta were not in existence at the time, the first thereof having been taken on 16 June 2016. Similarly, the additional affidavit by Serfontein did not exist at the time and, as explained by Mr Barnard, the prosecution was not in possession of the two CDs which were provided in June 2018. It is moreover apparent from the ruling of the trial judge in the recusal judgement that no reliance was placed on the late discovery of the CDs in the second recusal application.

[67] On 17 June 2016 a further application was brought by the third applicant for the delivery of further particulars. This application was prompted by a newspaper article relating to allegations made by Korff. As I have said, Mr Roothman contended that the documents provided to the State by Korff were privileged and covered by a non-disclosure agreement. This was a legal argument which he was entitled to raise. There is no averment that

Mr Roothman on this occasion contended that the State was not in possession of further documentation unrelated to the further particulars requested.

[68] Botha was the acting DPP and had authorised the s 252A application on behalf of the DPP. He was called to testify in a trial-within-a-trial in respect of the authorisations which he granted. At an early stage in cross-examination he was requested by counsel for certain of the appellants to confine himself to issues about the admissibility of the trap evidence. The issue of the attempt to bribe the trial judge or Jephta had been irrelevant to his testimony in respect of the s 252A authorisations. There was no reason for Botha to have referred to these allegations or the statements in respect thereof.

[69] As for the accusation of perjury, credibility findings are best left to the trial judge. There was no transcript of the trial proceedings annexed to the stay application and the alleged portion of Botha's evidence had not been placed in any proper context to enable the high court to assess it. There was accordingly no factual basis laid for the allegation that Botha had deliberately lied under oath. The allegation is a serious one, made, as it was, against an officer of the court. Where litigants seek to attack the integrity of officers of the court a firm factual basis must be laid for the conclusion contended for. This was not done. I shall revert to this issue below in consideration of an appropriate order for costs. Suffice it to say that the criticism by the trial judge of Mr Roothman and the unsubstantiated attack by Brooks upon Botha on this aspect was, in my view, not justified.

[70] The statements of Jephta had been the subject of a separate enquiry. It dealt with allegations of corruption and defeating the ends of justice, which

are events extraneous to those which form the subject matter of the prosecution and the investigation thereof remained incomplete at the time of the stay application. The only relevance which the statements may have had to the prosecution relates to the cross-examination of Jephta. They could have had no bearing on the substance of the defence raised by any of the respondents and it has not been suggested that any of the respondents would have conducted their defence differently had they had knowledge of Jephta's statements. Jephta had not yet testified and to the extent that these statements may have had a bearing on the preparation of the cross-examination of Jephta they were timeously provided. No prejudice could accordingly arise from the fact that these statements, originating from a separate inquiry were provided at a late stage. It follows that the finding of the high court that the prosecution was under an ethical obligation to disclose the approach made to the trial judge and the additional statements of Jeptha at an earlier stage cannot be sustained.

[71] In respect of the prejudice, or potential prejudice, each of the respondents have also set out the personal prejudice which they have suffered. Their arrest enjoyed considerable publicity, each was required to pay substantial amount for bail and they personally were exposed to negative publicity which affected not only their persons but also their business interests. Their children have been subjected to ridicule at school and their finance houses have shown greater reluctance in assisting them.

[72] Each have engaged counsel of varying seniority but in every case at considerable expense. However, a permanent stay of prosecution will generally only be granted where trial related prejudice has been suffered, unless there are circumstances rendering the case so extraordinary that a

permanent stay of prosecution is the only appropriate remedy.[25] A party seeking a permanent stay of prosecution is required to show 'definite and not speculative prejudice in order for it to be considered irreparable trial prejudice'.[26]

[73] In this instance, by virtue of the recusal of the trial judge, all proceedings before her have been nullified. Proceedings would accordingly be required to start *de novo*. It is, however, for the prosecution to decide whether proceedings would be instituted afresh, and if so, in respect of which offences.[27] The DPP is not bound by the indictment dated 5 August 2016. Much reliance was placed by the respondents on the strength of the State's case, the reliability of the evidence of Potgieter and that of Jephta and the admissibility of audio and video evidence. It is premature at this stage to draw any conclusion on any of these aspects. Suffice it to say that the DPP would have to give careful consideration to these issues prior to taking a decision as to whether it wishes to proceed with a new prosecution. In doing so they would give consideration to evidence led before Pakati J. They may decide to proceed on lessor charges, or against only some of the respondents, but they should have the opportunity to do so. As I have said, the stay application was launched just 14 days after the recusal. This is not a case where the DPP has shown any dilatoriness in this respect and there is no evidence that they have been put to terms to take such a decision.

[25] *Wild* para 27. See also *Sanderson* para 38.
[26] See *Bothma v Els* [2009] ZACC 27; 2010 (1) SACR 184 (CC) para 68.
[27] See *S v Gumbi and Others* [2018] ZASCA 125; 2018 (2) SACR 676 (SCA) para 9.

[74] The trial prejudice which the respondents were required to establish relates to prejudice in a new trial. In this regard it was alleged that it is doubtful whether Korff and Potgieter would ever return to court to testify. This assertion was purely speculative in nature and no facts were alleged to support the conclusion. The significant payments made to Jeptha and the promise for a further exorbitant payment were raised to attack the fairness of the trial, if it were to proceed. These considerations may potentially have an impact upon the reliability, and perhaps credibility, of the evidence of Jephta. The admissibility thereof would have to be determined in the new trial. The presiding judge would have to hear the witness, give due consideration to all the factors raised, including the criticisms of the investigation and the payments made, and then to assess the credibility and the reliability of the witness in conjunction with all the admissible evidence placed before him or her.

[75] The payments allegedly made to Potgieter are on a similar footing. Potgieter has not been cross-examined in the trial-within-a-trial. These alleged payments would have to be canvassed with him; his version of events heard; and his explanations tested for the presiding judge to consider his credibility and reliability. An allegation of impropriety on the part of a State witness, even the investigating officer cannot, of itself, render the trial unfair.

[76] I have dealt earlier with the additional statements received from Jephta and, as I have said, in my view, they can have bearing only on the credibility or reliability of Jephta's evidence. The respondents did not allege that any of them would have conducted their defence differently had they been in possession of the statements at an earlier stage. Jephta has not testified yet and

the defence are in possession of these statements. No basis has been laid for a conclusion of prejudice in a future trial relating to the late delivery of these statements.

[77] In the final analysis the court is required to exercise a value judgment in assessing the reasonableness of the delay.[28] On due consideration of the nature of the offences in issue, the delays in the course of the prosecution, the circumstances which gave rise to the recusal as well as the prejudice occasioned to the respondents, I do not consider that the delay, in the context of this case can be said to be unreasonable. Nor, in my view, have the respondent shown actual trial prejudice if the trial were to commence *de novo.*

[78] The case is not so extraordinary that a stay of prosecution is the only appropriate remedy. However, objectively, the delay has been substantial, even though it is not due to the dilatoriness or misconduct of the State. In these circumstances the State would be well advised to proceed without delay, and to expedite the process wherever possible, if it does choose to proceed *de novo* against the respondents.

Costs

[79] The application for a permanent stay of prosecution raises important constitutional issues and generally a court would be disinclined to make a costs order against such applicants. This is so as litigants should not be discouraged by the threat of an adverse costs order from approaching a court to vindicate their constitutional rights. What distinguishes this case from the

[28] *Van Heerden* para 54.

general rule is the manner in which it has been conducted. The unwarranted and unsubstantiated attacks upon the professionalism and integrity of officers of the court, who are not even parties to the litigation, in the performance of their professional duties was ill-advised and unjustified. Whilst not all of the respondents supported the application for the recusal of the trial judge they have all aligned themselves with the averments made by Brooks in this regard. For these reasons I would uphold the appeal with costs, including the costs of two counsel.

J W EKSTEEN
ACTING JUDGE OF APPEAL

Molemela JA (Mocumie JA and Ledwaba AJA concurring)

[80] I have read the judgment of my brother, Eksteen AJA (the first judgment). Although I agree that the appeal ought to succeed, I am, for the reasons indicated hereafter, unable to agree with the costs order proposed in the first judgment.

[81] It is trite that, at the end of the day, each case must be decided on its own peculiar facts. A fact that cannot be disregarded in this matter is that the charges in this matter emanated from an entrapment that was duly authorised in terms of s 252 of the CPA. This means that the state, as *dominus litis*, is the party that determined when the covert operation had to stop and when

consequent arrests had to be effected. Despite this, subsequent to the arrests of the respondents, it was the State that applied for a postponement of the matter, purportedly for further investigations.[29] The inevitable postponement of the matter, for a period of three months, was at the instance of the prosecution. At the next appearance, the State again applied for a postponement, which was opposed by the defence. The matter was nevertheless postponed to enable the State to file a certificate from the NDPP.

[82] In *Sanderson*, the Constitutional Court cautioned as follows:

'. . . [J]udges must bring their own experiences to bear in determining whether a delay seems over-lengthy. This is not simply a matter of contrasting intrinsically simple and complex cases. Certainly, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than one which does not. But the prosecution should also be aware of these inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in a complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay. . . .'[30]

[83] I tend to agree with the high court's postulation that given the fact that this was an entrapment case, one would have expected the State to have had all its ducks in a row. Indeed, based on this aspect, one would have expected the prosecution to be in a state of readiness regarding any information within its possession, and to swiftly make the information sought by the respondents available. This is especially because Adv Botha, having authorised the

[29] See para 5 and 6 of this judgment.
[30] *Sanderson* para 34.

entrapment, was involved in the operation from its inception.[31] Alas, there were numerous postponements for purposes of furnishing further particulars.

[84] It is noteworthy that as late as 16 May 2016, the trial Judge still had to compel the State to furnish further particulars requested approximately six months before that date.[32] Given this late submission of further particulars, the trial could not have commenced on the first trial date that had been agreed upon. The late commencement of the trial is therefore not solely attributable to Mr Hodes only coming on the scene on behalf of some of the respondents in July 2015.

[85] Moreover, despite the various interlocutory applications requesting further particulars, it turned out that certain CD recordings[33] that were stored in Warrant Officer Potgieter's computer were never made available to the respondents[34] until 20 July 2018. Warrant Officer Potgieter, as the erstwhile investigating officer and Jephta's handler, played an integral role in the investigation and prosecution of this matter. His failure to disclose the CD has not been explained.

[86] The CD's in question were apparently discovered when the new investigating officer, Col Botha, took over as the investigating officer. The date on which Col Botha disclosed the existence of these CDs to Mr Roothman has not been disclosed in Mr Barnard's affidavit. In my view, the two year delay in disclosing the existence of the CD recordings does not

[31] See para 27 of this judgment.
[32] See para 12 of this judgment.
[33] See para 34 of this judgment.
[34] Ibid.

fall within the category of systemic delays; rather, it is an inexcusable dereliction of duty on the part of a key member of the prosecution team: the investigating officer.[35] That conduct is undoubtedly at odds with the following dictum in *Wild*: 'Endemic blemishes in our criminal justice system . . . must be addressed conscientiously by investigating officers, prosecutors, judicial officers and administrators'.[36] Taking into account the principles of accountability, the State should shoulder the blame for Warrant Officer's conduct.

[87] The first judgment correctly records that on 17 June 2016,[37] another interlocutory statement was made on behalf of some of the respondents, specifically in relation to Jephta having been paid a substantial amount of money to be an agent and in return for his testimony against the respondents. It is common cause that by that date, Jephta had already signed the first statement, with the investigating officer (Potgieter) signing as a commissioner of oaths. Notwithstanding the existence of the statement signed by Jephta, it was not disclosed to the defence on that date. This is not to suggest that Mr Roothman was aware of its existence.

[88] On 23 July 2018, it was Mr Roothman who volunteered all the statements previously made by Jeptha, to the defence. There is no record of him having advanced any reasons for the state's failure to disclose these statements at an earlier stage. Without ascribing any fault to Mr Roothman for the late disclosure of Jephta's statements, what is of importance is that

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[35] *Sanderson* para 35.
[36] *Wild* para 12.
[37] See para 67 of this judgment.

Mr Roothman considered it prudent to disclose these statements to the defence before adducing Jephta's evidence. That he considered it important to do so is a relevant consideration in this matter. In *Shabalala and others v Attorney General*,[38] the Constitutional Court observed that a late disclosure of a state witness may potentially result in the accused being unable to timeously identify witnesses who would have been able to contradict the assertions made by that state witnesses. I do not think that there is any need to speculate on whether that late disclosure is likely to have a bearing on the substance of the respondents' defence,[39] considering that the respondents expressly stated that the statements that were withheld were vital to the preparation of their defence.

[89] With regards to the recusal of the trial Judge, it is common cause that the State did not oppose the recusal application. I am mindful of the fact that an independent and impartial Judge is not expected to defer to opinion of others in coming to his or her decisions, including on an application for recusal. While the views of the respective parties in respect of the application for the recusal of the trial Judge could never be elevated to evidence, I do find it ironic that in this matter, active opposition to the recusal application came from some of the respondents' 'co-accused' and not from the State Advocate. To my mind, the views of the State in relation to that recusal application would have been a relevant consideration in the matter, especially in an application launched at such an advanced stage of the proceedings.

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[38] *Shabalala and Others v Attorney-General of the Transvaal and Another* 1996 (1) SA 725; 1995 (12) BCLR 1593 para 37.
[39] See para 70 and 76 of this judgment.

[90] As things turned out, the supine attitude adopted by the State in the recusal application had certain repercussions. As correctly mentioned in the first judgment, Jephta's statements were withheld from the defence. This non-disclosure triggered the recusal application. It is clear from the recusal judgment that no explanation for the late disclosure of Jephta's statements was given by the prosecution to the trial Judge despite several defence counsel having raised the late disclosure of Jephta's statements as an issue and also having identified it as one of the reasons for seeking the recusal of the trial Judge. All that was before the court was the letter from the prosecution which states, without any explanation, that 'it appears as though the contents hereof [have not yet been] submitted to you'.

[91] In the course of handing down her recusal judgment, the trial Judge stated as follows:

'It raises a question though as to why the state decided to hold onto the agent's statements for this long and not discover them when the defence asked for further particulars. The state instead told the court that there was nothing to discover. It is therefore mindboggling that the day the agent was supposed to testify on 31 July 2018, the state handed the statements to the defence. In my view the officers are the officers of the court and have an obligation to the court and also to see to it that justice is done all the time.'

I pause to mention that it is clear from this passage that some of the allegations made by the respondents against Mr Roothman merely constituted an echoing of the sentiments already expressed by the trial Judge, rightly or wrongly, in relation to the late disclosure of Jephta's statements.

[92] It is trite that the State is expected to respond somewhat comprehensively to the allegations made against it regarding its failure to

furnish documents.[40] The remark made by the Judge was not proven to have been misplaced. As correctly stated in para 68 of this judgment, we were not provided with the transcript of the trial proceedings and are therefore not privy to the discussions between Mr Roothman and the trial Judge in relation to the availability of further witness statements. What we do know, however, is that the trial Judge bemoaned the fact that she had been given an inaccurate assurance by the State. In the absence of any refutation, we are obliged to accept that the trial Judge would not have voiced a criticism if it was not justified by what transpired during the proceedings. Against this background, it seems to me to be unfair to take these statements into account when castigating the respondents for the allegations they made against some of the members of the prosecution team.

[93] Notably, Mr Barnard's explanation about the CDs and Jeptha's statements appears in Mr Barnard's answering affidavit, which was obviously filed after the deponents had already moved their application for the stay in prosecution. Significantly, Mr Barnard conceded that an explanation regarding the late disclosure of the CD recordings ought to have been given. The date on which Mr Roothman became aware of the existence of Mr Jephta's statements has not been mentioned in Mr Barnard's affidavit. All that was stated in relation to those statements was that the State had decided to provide them to the defence in anticipation of an application for recusal and also because the State intended canvassing the bribery allegations in Jephta's testimony.

[40] Compare *van Heerden v NDPP* paras 31 and 32.

[94] The allegations made by the respondents in relation to Mr Roothman must therefore be seen in a proper perspective: first, Mr Roothman was present when the late disclosure of Jephta's statements was criticised by the defence counsel but did not give the court the benefit of his explanation; second, the explanation about the circumstances in which the CDs were discovered had been unknown to the respondents and only came to light in Mr Barnard's affidavit filed in opposition of their application. It is against that light that the respondents' conduct in pursuing the application for the stay in prosecution must be seen. Consequently, I am unable to agree with the first judgment's finding that the conduct of the respondents warrants them being mulcted with costs despite having raised a constitutional issue.

[95] As I conclude, it bears mentioning that the first judgment correctly observed that the delay, objectively speaking, has been substantial, albeit not unreasonable.[41] An undeniable fact that cannot be disregarded is that a trial *de novo* is unquestionably going to cause a further delay in the finalisation of the matter. As observed by this court in *S v Suliman*,[42] a recusal, including one on objectively inadequate grounds, does not amount to an irregularity amounting to a failure of justice. This Court however, acknowledged that such recusals occasion expense and inconvenience to the accused persons concerned. This is the hardship that the respondents in this matter are inevitably faced with, unless the State decides not to pursue the criminal proceedings against them. This is a weighty factor that must surely count in favour of the respondents when an appropriate order of costs is considered.

[41] See para 77 of this judgment.
[42] *S v Suliman* 1969 (2) SA 385 (A) at 392.

[96] The foregoing paragraphs were intended to demonstrate that this is not a matter in which the State was blameless in relation to the numerous postponements that were occasioned during the course of the trial. The respondents can certainly not be regarded as the primary source of the delays.[43] Notably, some respondents did not, at any stage, participate in any of the interlocutory proceedings which delayed the finalisation of the proceedings. In my view, disentitling the State to an order of costs despite its success in this appeal would, under the circumstances, be the appropriate way of indicating this court's displeasure with the State's overall conduct in relation to this matter.

[97] It was stated in *Lawyers for Human Rights v Minister in the Presidency and others*[44] that the well-established test when considering whether to award a costs order against a private party in a constitutional litigation is whether the litigation in question was frivolous, vexatious or manifestly inappropriate. The court stated that 'to be subject to an adverse costs order, the litigant's conduct must be worthy of censure'. Given the peculiar circumstances highlighted above, I am unable to find that the respondents' conduct warrants an order mulcting them with costs.

[98] For all the reasons alluded to, above, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following: 'The application is dismissed.'

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[43] Compare *Sanderson* para 33.
[44] [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 7.

M B Molemela

Justice of Appeal

Appearances

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For 2nd & 5th Respondents:	Saleem Ebrahim Attorneys
For 3rd and 8th Respondents:	M M Hodes SC
For 4th and 6th Respondents:	L M Hodes SC
For 7th, 9th, 11th and 12th Respondents:	C F Van Heerden
For 10th and 13th Respondents:	J J Schreuder
Instructed by:	
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