And
**9963/05**

In the matter between

**Coram: Traverso DJP et Le Grange J**

**RICHARD ERNEST BROOME** Applicant/Appellant

And

**THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE** First Respondent

**THE ACTING REGIONAL MAGISTRATE, CAPE TOWN** Second Respondent

**HENRY OWEN WIGGINS (SENIOR)** Third Respondent

**ANDRIES LUTHERUS MACLACHLAN** Fourth Respondent

**HENRY OWEN WIGGINS (JUNIOR)** Fifth Respondent

AND

In the matter between:

**HENRY OWEN WIGGINS (Senior)** First Applicant/Appellant
**HENRY OWEN WIGGINS (Junior)** Second Applicant/Appellant

And

**W/NMDE STREEKLANDDROS, CAPE TOWN** First Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS, CAPE TOWN** Second Respondent

**ANDRIES LUTHERUS MACLACHLAN** Third Respondent

**RICHARD ERNEST BROOME** Fourth Respondent

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JUDGMENT DELIVERED: 31 OCTOBER 2007

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**Le Grange J:**

Introduction:

[1] This case has a long and convoluted history. I have prepared one judgement covering both matters as the jurisdictional facts are the same, namely the refusal of the Court *a quo* to grant a stay of prosecution. The genesis of the case, in the Court *a quo,* is the alleged actions or omissions by the Applicant/Appellant (Broom), in the first matter, as auditor of the Owen

> Wiggins Trust Group of Companies ("OWT Group"), and the alleged offences which Wiggins senior and junior Applicants/Appellants in the second matter with (Maclachlan), a Respondent in both matters

committed as directors of the OWT Group. The OWT Group consisted of some 25 legal entities.

[2] Broome, Wiggins senior and junior and Maclachlan, (hereinafter referred to as ("The Accused"), were summonsed to appear before the Regional Court at Cape Town on 23 September 2004. The charge sheet alleges that the accused during the period 1986 to 1994 committed the following offences: fraud, contraventions of the Companies Act 61 of 1973, the Financial Institutions (Investment of Funds) Act 39 of 1984, the Participation Bonds Act 55 of 1981 and the Banks Act 94 of 1990. The relevant audits from 1987 to 1994 were carried out by employees of Valentine Sergeant, the appointed firm of auditors for the OWT Group. Broome initially became involved in the audit of the OWT Group as an audit clerk. In later years he became the partner in charge of the Group audit. It is undisputed that the audit was a time consuming and involved process and that the OWT Group consisted of numerous legal entities.

[3] In April 2005, an application was brought by all the accused for a permanent stay of the prosecution in the Regional Court before acting regional magistrate P.F. Nel. This application was premised on their right to a fair trial in terms of Section 35(3)(d) of the Constitution. It was argued that the unacceptable long delay, in

bringing the prosecution and the loss of audit records originally seized by the State from the possession of Valentine Sergeant, impaired the accuseds' ability to prepare and mount a proper defence, to the charges preferred against them, to such an extent that their fundamental rights to a fair trial had been infringed, that the only remedy was a permanent stay of the prosecution.

[4] In June 2005, the acting regional magistrate refused the application for a permanent stay of the prosecution. Pursuant to this finding, the acting regional magistrate also refused an application for leave to appeal against his finding.

[5] That gave rise to the present applications. These include the review of the acting regional magistrate's decision, the petition for leave to appeal and the appeal, in the event the petition for leave to appeal was granted, against the said decision. Broome abandoned his review application and only relied on his petition for leave to appeal and appeal against the finding of the magistrate. For reasons of efficacy, it was decided that the review application, the petition for leave to appeal and appeal be heard simultaneously.

[6] The relief sought by the accused is the setting aside of the order of the magistrate, and an order of permanent stay of the prosecution against them.

> The matter is opposed by the DPP only. The acting regional magistrate and Maclachlan, are abiding the decision of this Court.

The Background:

[7] The papers consisting of affidavits and annexures are voluminous and no good purpose would be served by an exhaustive analysis thereof. The factual background of these matters, which in essence is not in dispute between the parties, can be summarised as follows:

[8] The OWT Group consisted of numerous legal entities. On 15 August 1994 the OWT Group was provisionally placed under curatorship. Messrs Osburn and Hickling were appointed curators. On 27 September 1994 the provisional order was made final.

[9] In August 1994, Major R D Melnick, a member of the SA Police Service and an appointed official of the Nel Commission of Enquiry, was authorised by the chairman of the enquiry to seize all documents and records pertaining to the terms of reference of the commission of enquiry into the affairs of the Masterbond Group;

including correspondence files, records, documents and audit working papers pertaining to the OWT Group and associate legal entities as of 1 January 1990.

[10] Major Melnick, acting in terms of this authority, attended the premises of Valentine Sergeant in Cape Town and seized all files relating to the OWT Group, which included a complete set of all the audit working papers for the years 1990 to 1994 (*the audit documents)*. Prior to the removal of the audit documents from the premises of Valentine Sergeant, Broome made a request to photocopy it, but was not given the opportunity to do so. The audit documents were then made available to the Nel Commission, which included documents pertaining to the curators of certain companies in the OWT Group, the then Office for Serious Economic Offences ("OSEO"), Webber Wentzel Attorneys and KPMG. The latter parties as well as First Respondent were then called upon by the State to produce forensic reports. Since the seizure of these audit documents it has, at all times, been under the control of the State.

[11] In 1994, OSEO commenced an investigation into the affairs of the OWT Group. At that stage the audit documents were in possession of the curators and the Nel Commission.

[12] As stated previously, Broome initially became involved in the audit of the OWT Group as an audit clerk with Valentine Sergeant

and later acted as the partner in charge of the group audit. His association with the OWT Group in an auditing capacity extends over a period of more than 20 years.

[13] During December 1995 and March 1996, Broome again requested that he be placed in possession of copies of the relevant audit documents seized. Despite these requests the files were not returned to him.

[14] In April 1996, Broome was summonsed to appear at an enquiry in terms of Section 5 of the Investigation of Serious Economic Offences Act 117 of 1991, (which has subsequently been repealed) into the affairs of the OWT

> Group. He appeared in April 1996 at the enquiry and provided co-operation in the investigation.

[15] It is not in dispute that during the course of this investigation, OSEO interviewed and recorded statements from more than 120 witnesses. The first of these interviews was conducted during February 1995 and the last during November 1996.

[16] In October 1997 a detailed report, in excess of 100 pages, was finalised by OSEO. The report disclosed alleged offences and

identified persons, including the accused to be charged in respect thereof.

[17] In November 1997 the curator, Osburn, indicated the urgency of the matter to the DPP and requested that a decision be made regarding a prosecution. The DPP then mooted the possibility of appointing counsel from the Bar to conduct the prosecution. Nothing came of this.

[18] In October 1998, the DPP decided not to prosecute the matter.

[19] In June 1999, the DPP approached the Director of the Investigating Directorate: Serious Economic Offences (IDSEO) (which directorate had replaced OSEO) to ask for assistance by making one of their staff members available to conduct the prosecution.

[20] The director of IDSEO indicated in a written response dated 30 July 1999, that he was unable to assist in this regard and suggested that the National Director of Prosecutions be approached to appoint a member of the Bar to conduct the prosecution.

[21] The DPP in his report to Parliament for the year 1999, stated that a senior Advocate on his staff had been assigned to work exclusively on the OWT Group investigation and that good progress had been made.

[22] In July 2000, the DPP reported to the Commercial Crime Unit of the SAPS that a senior Advocate of his staff had been appointed to draft the indictment and prosecute the matter. The DPP also confirmed the necessity to appoint the firm of auditors Steve Osche and Partners, to do the necessary preparation for trial and to give evidence as they were responsible for the initial forensic audit.

[23] In the DPP's report to Parliament for the year 2000, it was reported that the Wiggins case had enjoyed the exclusive attention of a deputy-director of his office, had reached an advanced stage of preparation and that he expected positive developments in the coming year.

[24] In the DPP's report to Parliament for the year 2001, it was reported that a decision had been taken to prosecute certain individuals involved in the affairs of the Owen Wiggins Group and that a draft indictment had been drawn up. In 2002 the same report is made to Parliament.

[25] In March 2004, counsel in private practise, was appointed to conduct the prosecution.

[26] In September 2004, the accused appeared for the first time after having been summonsed to appear in Court. The matter was

then postponed by agreement between the parties and on 15 May 2005, a substantive application for the permanent stay of prosecution was launched by the accused.

The Application in the Court *a quo*:

[27] The substratum of the accused application in the Court a *quo* can be summarised as follows: In October 1997, when the OSEO report was completed, the investigation in this matter had been finalised. The completed OSEO report of October 1997 was made available to the DPP in November 1997. The DPP indicated that its office became involved in the investigation of the affairs of the OWT Group when the commercial branch of the South African Police Services (SAPS), had despatched a docket in November 1994 to his office for a decision in regard to an alleged contravention of the Banks Act, 94 of 1990. No further investigation was undertaken between the finalisation of the OSEO report in October 1997, and the accused being brought to Court during September 2004. The matrix of the evidential material which now forms the basis of the prosecution is substantially, if not exactly the same evidential material which was at hand in October 1997.

[28] In November 1997, the DPP was in possession of all the information which was required in order to make an informed decision regarding a prosecution in the matter. The matter was not

brought to Court until September 2004 when the accused were summonsed to appear before the Regional Court for the first time. The allegations in the charge sheet relate to events during 1986 to 1994, a period of almost 9 years. At the time of being summonsed to Court, a period of almost 18 years had elapsed from 1986 to 2004 and since October 1997 to September 2004, a period of approximately 7 years, no further investigations had taken place in the matter.

[29] In June 2003 it was necessary for Broome to gain access to the audit files which had been seized from his firm in August 1994, and upon which the other accused substantially relied to prepare a proper defence. Broome was guided to and inspected documents at the premises of Webber Wentzel Attorneys as well as documents in the possession of the DPP. He inspected the documents and found that a significant portion of the audit working papers originally seized from his firm, had gone missing whilst under control of the State. Broome then prepared a detailed schedule for the years 1989 through to 1993 and itemised the relevant audit records. When the State had taken possession of the audit files in August 1994, a full set of audit papers had been available and all the listed items had been on file in respect of each year. It now appears that in respect of the year 1994, which the accused avers is important to mount a proper defence, no audit files can be found. In respect of the other years under consideration, more than half of the

documents in each instance can no longer be found.

[30] Counsel for the accused argued that the facts of the matter are such that it is one of the most exceptional cases where the accused have suffered irreparable trial prejudice as a result of the delay in the prosecution, and the loss of the audit working papers seized by the State, warrants a permanent stay of the prosecution.

[31] Counsel for the State opposed the application and their main submission is that the trial Court will be the proper forum to ascertain and determine whether the accused had a fair trial.

The finding of the Court *a quo*:

[32] The magistrate, in his reasons for refusing the application for a stay of prosecution stated, *inter alia,* the following:

> "The first relevant factor to consider is the reasons given for the delay. The Respondent *(the DPP) has advanced detailed reasons, which are contained in Adv. De Kock's affidavit. From the background supplied by Mr De Kock, there appears to be no doubt that the delay in bringing the matter to Court from October 1997 to September 2004, was to a large extent caused by staff shortages and other systematic factors. These circumstances mitigate the duration of the delay to some extent, but this Court is nevertheless left in no doubt that the prosecuting authority has been responsible for an undue and excessive delay. This is especially so*

*in view of the DPP's decision not to prosecute on 30 October 1998. It is the duty of the state to make such means and resources available as to ensure that a prosecution is commenced in Court within a reasonable time, and this was not done in the instant matter. The discrepancy between the Annual Reports of the DPP and the affidavit of Mr De Kock (as dealt with quite fully in Mr Broome's replying affidavit) indicates that the delay is not adequately explained. Seven years is indeed an undue delay.*

*It would appear, then, that the constitutional right of the Applicants to a fair and speedy trial has been infringed. But this does not end the matter. The other relevant factors must still be considered.*

*Despite the unsatisfactory nature of the Respondent's reasons for the long delay, the systemic factors cited are of considerable importance. The nature of the case is obviously one involving great demands on the investigative and prosecutorial resources of the state. Although it has been argued that the charges are not especially complex, complexity arises not only from the nature of the charges, but also from the sheer scale of the matter. The scope of the prosecution (tentatively '* pencilled in' *for 100 days in the Regional Court, according to Mr De Kock's affidavit) is another factor with renders the delay on the part of the state somewhat less dilatory.*

*Thirdly, the extent to which the Applicants are actually prejudiced by the delay on the part of the state, rather than by the mere fact of being prosecuted, with the unavoidable consequences flowing from this fact, has not been established with sufficient clarity. It is accepted that the Applicants have suffered a certain degree of stress and social stigma (the '*security' *factors), but their own arguments do not emphasise these aspects very strongly. The prejudice arising specifically from the delay is to a substantial extent argumentative (a term used by Kriegler J in* Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) *).*

*Fourthly, there is a substantial degree of public interest in allowing the prosecution to run its natural course. A great many complainants and aggrieved parties have an interest in seeing their complaints properly ventilated by a Trial Court. According to Mr De Kock's affidavit, many of the investors in the Group were elderly or retired persons who lost their life savings (par. 21; also par. 5 and 6 of Mr Osburn's affidavit).*

> *Fifthly, a permanent stay of prosecution is not the only remedy available to the Applicants. Besides the measures mentioned in Sanderson at 245 g – h, section 342A has also specifically been inserted into the Criminal Procedure Act (51 of 1977) to ensure that criminal trials are expedited. This provision may well play a role at a later stage of the proceedings. There is also the possibility of a renewed application for a permanent stay of the prosecution at a later stage, should further developments involve still further delay."*

[33] The Court *a quo* in conclusion, stated that although there has been an undue delay occasioned by the failure of the State to bring the matter to trial expeditiously, the prejudice suffered by the accused that can specifically be related to this delay, is not of such severity that the interests of justice require that the State be barred from proceedings with the prosecution.

[34] In the Application for leave to appeal the magistrate dismissed the application on essentially two grounds. Firstly, that only an order of a Court flowing from a conviction and sentence is appealable and secondly, that the order he made is not one of the exceptional instances in which leave to appeal may be granted.

In *Casu*:

[35] The Applicants/Appellants in both matters petitioned the Judge-President for leave to appeal. It was then directed that the application for leave to appeal and the appeal be argued before two judges. See also Singa v The State; S v O'Connell 2007 SACR (2) 28 (CC). The Wiggins' *duo,* also relied on Rule 53 of the Uniforms Rules of this Court to review the decision of the magistrate.

[36] Mr Smith SC, who appeared on behalf of the Messrs Wiggins and Van Zyl, SC assisted by Mr C Webster, who appeared on behalf of Broome, addressed the Court extensively on the merits of the respective matters. On behalf of the Applicants it was argued that the decision by the magistrate is appealable and that this case is one of the exceptional instances in which an appeal may lie against a Court's interlocutory order. Mr Smith also argued that the said decision is reviewable.

[37] Mr Slabbert, SC assisted by Mr Vogel, who appeared for the DPP, contended that the decision of the magistrate is not appealable as his order did not follow from a conviction or sentence and the order is not one of the exceptional circumstances in which an appeal may lie against an interlocutory order of a Court. Furthermore, that his decision should not be set aside on review as the magistrate did not commit a gross irregularity or an error in law in making his order.

Is the order by the Court *a quo* Appealable?

[38] One of the primary questions in the present instance is whether the order of the Court *a quo,* which was made before conviction, is appealable.

[39] As a general rule, criminal trials should be continuous with no appeals or interlocutory approaches to a Court of Appeal before conviction. History and experience has taught that in general it is in the interest of justice that an appeal awaits the completion of a case as the resort to a Higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen, had the process been left to run its ordinary course. In this regard see S v Friedman (2) 1996 (1) SACR 196 (W) at 202 *e-f*.

[40] I am in agreement with the *dictum* of Marais J, in S v Rosslee 1994 (2) SACR 441 (C) at 445 f, that an alleged wrong decision made in the course of a criminal trial and which is capable of correction by way of an appeal or review, should be permitted to be challenged only after the trial has run its course, unless there are compelling reasons to allow an Appellant or Applicant
to do otherwise.

[41] But more importantly section 39(2) of the Constitution which provides, *inter alia,* that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. In S v Western Areas Ltd and Others 2005 (5) SA 214 SCA at 226 i –and 227 *a-b,* Howie P held that*, "...it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word 'decision' in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable...but one which the interest of justice require should nevertheless be subject to an appeal before termination of such proceedings."* Section 39(2) of the Constitution therefore enjoins this Court and impose an obligation to construe that a judicial pronouncement in any criminal proceedings may be subject to an appeal, even before plea, where the interest of justice so requires. This approach in my view is also applicable to criminal appeals from the Magistrate's Courts as contemplated in Rule 51 of the Uniform Rules of this Court.

[42] I consider, for the reasons that appear from the body of this judgment, that this Court should entertain the challenge of the acting regional magistrate's decision now, rather than at the end of the criminal trial. I, however, do not suggest that challenges to a *'stay of prosecution'* should always be regarded as deserving of this

special consideration, but this particular challenge does seem to fall within the rare category of cases which merits such consideration as it will be in the interest of justice that the order of the Court *a quo*, should be subject to an appeal despite the proceedings not being finalised.

[43] It follows that the petition for leave to appeal in both matters should be granted and I will consider both matters as an appeal.

The law:

[44] In terms of the provision of Section 35(3)(d) of the Constitution of the Republic of South Africa ("the Constitution"), every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.

[45] There can be no dispute that in South Africa's criminal justice system, a recognised norm and a touchstone for a fair trial of an accused person is the efficient and speedy conclusion of criminal proceedings. See Sanderson v Attorney General, Eastern Cape 1998(2) SA 38 (CC).

[46] The critical question as in this instance, is how our Courts determine whether a particular lapse of time is reasonable or

unreasonable and what the appropriate remedy is in the particular circumstances. In determining this question, our Courts have adopted the *'balancing test''*, as decided in Barker v Wingo, Warden 407 US 514 (1972) and followed in Moeketsi v Attorney-General, Bophuthatswana, and Another 1996 (1) SACR 675 (B); Coetzee and Others v Attorney-General, Kwazulu-Natal, and Others 1997 (1) SACR 546 (D); Du Preez v Attorney-General of the Eastern Cape 1997 (2) SACR 357 (E), in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay; the reasons the government assigns to justify the delay; the accused's assertion of his right to a speedy trial; and the prejudice to the accused.

[47] In Sanderson *supra,* the provisions of section 25(3)(a) of the interim Constitution, which is similar to section 35(3)(d) of the final Constitution, were considered by the Constitutional Court. Kriegler, J at 54 E -55 B held that:-

> "The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed – sometimes irrebuttably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose such semi-formal time constraints on the prosecuting authority. That would be a law-making function which it would be inappropriate for a court to exercise. 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 section 25(3)(a) seeks to diminish."

[48] The task of deciding whether a right to a fair trial has been limited by unreasonable delay, rests with the Court. The Appellants or the accused must satisfy the court of the facts upon which they rely for their contention that their right to a fair trial has been infringed.

The merits:

[49] The nub of the accuseds' case is the 'unreasonable and inexcusable' long delay in the prosecution of this matter and the irreparable trial-related prejudice it will suffer as a result of the loss of a substantial part of the audit working papers seized by the State from the audit firm of Broome.

[50] The appeal of Broome is based upon trial prejudice underpinned by the substantial loss of the audit working papers by the State. The appeal by Wiggins senior and junior is also based upon trial prejudice underpinned by the loss of the audit documents,

which forms an integral part of their defence. They also rely on the loss of potential witnesses for their defence, the diminishing state of their memories due to the unusually long delay caused by the State as the charges relating to the OWT business affairs preferred against the accused span over a period of almost 18 years. Reliance have also been placed on their individual personal circumstances in particular, Wiggins senior who had reached the age of 76 during 2004 and this coupled with his diminished memory, would severely prejudice his trial preparation.

> [51] Mr Slabbert on behalf of the DPP argued that the Court *a quo* in its judgment clearly shows that he applied his mind to the relevant issues; that merely because the accused consider the decision to be wrong, is no reason to set it aside; that it is trite law that the State *(and thus the victims)* are also entitled to a fair trial and it would be premature to rule, at this stage and on these papers, that the accused would not have a fair trial and that the relief sought, being a permanent stay of prosecution, should be dismissed and

the matter should go to trial.

[52] It is perhaps appropriate at this point to make some brief remarks about the remedy sought by the accused. The relief sought by them is both

philosophically and socio-politically, radical. To bar the prosecution before the trial begins is far-reaching. It indeed prevents the prosecution from presenting society's complaints against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.

[53] Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of 'appropriate' remedies less radical than barring the prosecution. These may include a mandamus requiring the prosecution to commence the case, refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay. See also Sanderson v Attorney-General, *supra* at 58 *g-h* and Wild and Another v Hoffert NO and Others 1998 (3) SA 695(CC) at 708 F - G.

[54] I now consider whether, the proven facts which are largely common cause between the parties, show that the delay in the pre-conviction stage of the trial has in fact caused the accused to suffer irreparable trial prejudice that warrants an order of stay of

prosecution.

[55] I consider the following factors relevant in determining whether the delay in this matter amounts to an unreasonable delay: the amount of time which has elapsed; the nature of the prejudice suffered by the accused; whether the accused has been the primary agent of the delay; the complexity of the case; the question of systemic delays caused by a limitation of prosecution resources and Court congestion. See also S v Dzukuda *(supra),* at 1106 H.

[56] The time lapse between the commencement of the investigation during 1994 and the filing of the OSEO report after completion of the investigation in 20 October 1997 is approximately 3 years. Given the relative complexity of the investigation, and the numerous legal entities involved in the structure of the OWT Group, it has been conceded by the accused that, although lengthy, a period of approximately 3 years for the investigation of a matter of this nature is not entirely unreasonable.

[57] The time lapse between completion of the investigation and referral of the matter to the office of the DPP in November 1997, and the accused first appearing in Court in September 2004, is a period of approximately 7 years. This delay remains by and large unexplained. The so-called systemic delays are also negated by the DPP's various reports to parliament.

[58] The time lapse between the OSEO investigation commencing during 1994 and the accused first appearing in Court in September 2004, is a period of approximately 10 years.

[59] It was submitted by counsel for the respective accused that the period of approximately 7 years between completion of the investigation and referral of the matter to the DDP in November 1997, and the bringing of the prosecution in 23 September 2004, is inordinately long.

[60] The DPP relies on systemic factors to explain or justify the delay in bringing the matter to Court. These include alleged staff shortages and an alleged unmanageable workload within the office of the DPP at the time.

[61] A closer scrutiny of the annual reports submitted by the DPP to Parliament reflects however a different picture. It is evident that, despite the alleged continued systemic factors and staff shortages since 1998, by 1999 a Deputy-DPP had been assigned to work exclusively on the matter in question and according to the annual report of 1999, good progress had been made during that year. By 2000 the matter continued to enjoy the exclusive attention of a Deputy-DPP and had reached an advanced stage of preparation. The failure to appoint a member from the Bar to continue with the

prosecution remains also unanswered.

[62] In the DPP's report to Parliament for 2001, it was stated that a draft indictment had been drawn up and that a decision had been taken to prosecute certain persons.

[63] Despite the undivided attention of a Deputy-DPP to the case for a period of at least 3 years, the matter was still not brought to Court until 23 September 2004.

[64] The Court *a quo* referred to the annual reports of the DPP to Parliament and the affidavit filed by the DPP in this matter, and found that the discrepancies between the two indicates that the delay in this case, is not adequately explained.

[65] I am in agreement with the finding of the magistrate in this regard. Moreover, I am in agreement with the contention of counsel for the respective accused that this delay is both inexplicable and inexcusable. The Court *a quo,* according to me, was correct in making the finding that the prosecuting authority had been responsible for an undue and excessive delay and that the fundamental rights of the accused to a speedy trial had been infringed. The Court *a quo* however, in my view, misdirected itself in coming to the conclusion that the delay in bringing the matter to Court from October 1997 to September 2004, was to a large extent

caused by staff shortages and other systemic factors in the office of the DPP and that these factors to some extent, mitigate the duration of the delay. The discrepancies in the two reports of the DPP, clearly demonstrates that the delay cannot reasonably and adequately be explained by them. There are little, if any, reasonable or substantial factors that mitigate the undue delay from October 1997 to September 2004 in bringing this matter to Court.

[66] The accused also relies on the irreparable trial-related prejudice they will suffer as a result of the loss of a substantial part of the audit working papers seized by the State from the audit firm of Broome. Broome in particular avers that as a result of the loss of a substantial part of the audit working papers seized from his firm by the State, his ability to prepare a defence to the charges brought against him is impaired to such an extent that his chances of a fair trial no longer exist. The charges against Broome and the other accused are mainly based upon the manner in which the annual audits of the OWT Group were done and the information contained in the financial statements which resulted from those audits.

[67] According to Broome, the audit working papers became most significant in assessing what had been detected by the audit clerk and the steps taken in regard thereto. In addition, the audit working papers were reviewed by an audit manager who was in a position to express an opinion thereon and when an auditor’s conduct is under

scrutiny, it is essential to have regard to the audit working papers in order to understand whether or not the auditor has carried out his work proficiently and correctly.

[68] Osburn, who also filed an affidavit in opposing the relief sought by the accused, states that the charges are founded upon records of the OWT Group which are in his possession and under his control as curator. He records in his statement that these records will consist of the usual internal records relating
to the running of a company and will include items such as ledgers for each company, debenture lists, participation bond lists, files for each debtor, files for each participation bond holder, files for each participant in the debenture scheme, chequebooks, deposit books, cashbooks and personnel files.

[69] Mr van Zyl, argued that the internal records might well, as Osburn suggests, constitute the basis upon which allegations have been formulated in the charge sheet. However, the internal records contain no record of what took place during the audit process, and do not record how the audit team performed its functions as auditors to the OWT Group. Hence, it is the audit files which are the memorial to the performance of the audit team and are the documents which reflect the manner in which the audit process was carried out.

[70] Mr Slabbert contended that the prejudice that the accused may suffer as a result of the loss of the audit documents can only be properly assessed by the trial Court, and that it will be in the interest of justice that the matter be referred to the trial Court.

[71] I cannot agree with the proposition of Mr Slabbert. It is common cause that the audit working papers have passed between various entities and the majority of the audit working papers have been lost or dissipated as a result of the passage of time. It is further common cause that these documents were under the control of the State and State authorised entities when it got lost. Moreover, in respect of the year 1994, the audit working papers in their entirety have been lost. Having regard to the formulation of the charges against the accused, it is clear that these documents are fundamental to the case the accused have to answer.

[72] Broome in his statement, records *inter alia* that he and other witnesses who might be called in his defence, are unable to refresh their memories from a set of working papers that does not present a full and coherent picture of the audit process; the actual audit work was in most instances also not carried out by himself but by an audit team; it thus becomes necessary to reconstruct what took place during the audit process to explain what was found; what was reported and what steps were taken pursuant to such finding or

report; over the relevant years the audit team would have consisted of almost 15 individuals and in many instances these persons have either left the country or can no longer be traced.

[73] The importance of the audit documents for the accused to mount a proper defence cannot be ignored. It is clear from a defence point of view that it is necessary to have regard to what was found and what took place during the audit process in order to justify the conduct of the auditors. It seems that it will also be necessary to investigate the audit working papers and examine the record of what was found when the audit was conducted and on which the annual financial statements would have been based. In the absence of the audit working papers, or a full record of audit working papers, this cannot be done.

[74] Broome has also furnished the DPP with a detailed exposition of what material was at hand and what was missing. He had also provided a full explanation of the significance of the audit working papers from his perspective, in answering to the allegations in the charge sheet. Moreover, he wanted to make photo-copies of these documents when it was initially seized by the State, but was denied the opportunity to do so.

[75] The loss of a significant portion of these documents, in particular the loss of the entire audit files for the year of 1994, in my

view, will have a critical prejudicial effect on the accused to mount a proper defence. It is glaringly obvious that the audit documents seized by the State, from Broome's audit firm, is important for all the accused to mount a proper defence and prepare for trial. If, on the facts, it is shown that an accused has been deprived of his right to prepare his defence to criminal charges, the interest of justice can never require such a person to stand trial – more particularly if the prosecution is solely to blame for this state of affairs.

[76] The Court *a quo,* in my view, erred in finding that the loss of witnesses, fading memories, and the loss of physical evidence are factors which affect the prosecution more adversely than they affect the defence. This, in my view, is an irrelevant consideration. The accused has a right to a fair trial, which includes the right to have their trial begin and concluded without unreasonable delay and to adduce and challenge evidence. See section 35(3)(d) and 35(3)(i) of the Constitution.

[77] The finding that if documents have been lost, such loss can only accrue to the advantage of the defence and not the State, is without merit. In reaching such a conclusion, the Court *a quo* materially misdirected itself in considering the role of working papers in the audit process and their significance in mounting a proper defence.

[78] It is evident, from the facts that it is only with access to the audit working papers that the accused would be able to discern what in fact was found during the audit process and what steps were taken in regard thereto. The accused cannot reasonably be expected to rely on memory after all this time, particularly given the complexity of the audit over a number of years and the number of different persons involved in the process as part of the various audit teams. The audit working papers can only constitute the essential material for the accused to use in rebuttal of the allegations against them. I must agree with the submission of Mr Van Zyl, that had the working audit papers been preserved in the form in which Broome had made them available to the State, the accused would have been in a more favourable position, notwithstanding faded memories, to respond sensibly and perhaps adequately to the allegations in the charge-sheet.

[79] The undue delay of almost 7 years, since 1997 to 2004 in bringing this case to Court and the consequential loss of the audit documents by the State, is in my view sufficient to find that the accused will suffer irreparable trial prejudice in preparing a proper defence in this case.

[80] The relief sought by the accused is however exceptional, drastic and radical. Our Courts have consistently and constantly sought not to bar the prosecution before the trial begins. It indeed

prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. Orders of this nature may also undermine public confidence in the criminal justice system and may adversely impact on the functions of democratic institutions in this Country.

[81] I am acutely aware of the serious nature of the charges against the accused in this case and the alleged impact it had on the ordinary citizen in civil society. A permanent stay of prosecution will result in alleged perpetrators that allegedly amassed their wealth in defrauding ordinary citizens of millions of rand, to walk free.

[82] The Prosecuting Authority in dealing with this matter, must have realized the complexity and the impact of this case on civil society. The infringements of the accused fundamental rights, as in this instance, were flagrant and the delay inexcusable. For approximately 7 years, this case idled in the office of the DPP with no further investigation taking place. The loss of the audit documents is also inexplicable. The charges relate to periods of up to 18 years ago.

[83] In this instance the prejudice is real, significant and trial related. The question thus remains if a permanent stay of prosecution, in this case, is the only appropriate remedy. I am

convinced on a conspectus of all the facts and in considering the nature and cause of the prejudice that the accused suffered, the circumstances render this case so extraordinary that a stay of prosecution does present itself as an obvious and only remedy.

[84] In the result I will make the following order.

1. The appeal succeeds. The order of the acting regional magistrate dated 25 June 2005, refusing a permanent stay of prosecution, of all the accused, is set aside and substituted with the following:

2. A permanent stay of prosecution is granted.

3. The Director of Public Prosecutions, Western Cape, cited as First and Second Respondent in the respective matters to pay the costs of the Applicants.

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Le Grange, J

I agree. It is so ordered.

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**Traverso,**

**DJP**