Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case no. 2280/2022

Before: The Hon. Mr Justice Binns-Ward
Hearing: 15 November 2022, 20 January and 18 May 2023
Judgment: 31 July 2023

In the matter between:

MARC VAN VEEN	Applicant
and	
DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE FINANCIAL SECTOR CONDUCT AUTHORITY	Third Respondent

JUDGMENT
Delivered by email and listing on SAFLII

BINNS-WARD J:

[1] The applicant, as accused no. 2, together with 'Evercrest (Pty) Ltd' (properly named Evercrest Capital (Pty) Ltd), as accused no. 1, stand arraigned on a variety of charges in the Specialised Commercial Crime Court, Bellville. They are charged with fraud and, in the

alternative thereto, various other common law offences involving dishonesty, as well as with having contravened provisions of the Financial Institutions (Protection of Funds) Act 28 of 2001, the Financial Advisory and Intermediary Services Act 37 of 2002 and the Inspection of Financial Institutions Act 80 of 1998, respectively. The charges are related to losses that were suffered in 2007 by the Evercrest Aggressive Fund in the amount of approximately R146 million and to the investigation subsequently undertaken by the then existing Financial Service Board.

[2] The Fund was an investment vehicle - a hedge fund - that was managed by Evercrest Capital (Pty) Ltd. Its clientele was comprised exclusively of institutional investors. It is alleged in the summons in the criminal case that the applicant was the director and controlling mind of Evercrest Capital (Pty) Ltd. The applicant contends in the current proceedings that the losses incurred by the Fund were not occasioned by his doing, but rather as a result of the institutional investors' decision at an inopportune time to exercise their contractual right to sell off the stock held by it and thereafter to liquidate it. He alleges that had they not done so, they would eventually have realised a profit. He points out that none of the investors subsequently pursued him or Evercrest Capital (Pty) Ltd in civil proceedings.

[3] The allegations against the accused set out in the summons comprehend conduct described as having occurred at various times between the years 2005 and 2008. The summonses against the accused were issued out by the clerk of the court some 11 years later, during August 2019. They required the applicant, in his personal capacity and as also as the representative of 'Evercrest (Pty) Ltd', to appear for trial on 27 September 2019. The trial did not commence on that date, however. The proceedings in the criminal court have since been postponed from time to time, and currently await the outcome of the application to this court now under consideration.

[4] In this application, which was instituted on 8 February 2022,[1] the applicant seeks orders in the following terms:

1. That the prosecution of the applicant in any capacity in the Specialised Commercial Crime Court in Bellville under case number SH/7/45/19 in regard to the contents of the police docket Kirstenhof CAS 370/03/2014 is permanently stayed.
2. Further and/or alternative relief.
3. That the costs of this application be paid, jointly and severally, by any respondents who oppose the application.

The Director of Public Prosecutions, Western Cape, who was cited as the first respondent, is the only party to oppose the application. The Minister of Justice and Correctional Services and the Financial Sector Conduct Authority (which is the statutory successor to the late Financial Services Board), who were cited as the second and third respondents, respectively, did not participate in the proceedings.

[5] The founding affidavit in the application was deposed to by the applicant's attorney of record. The attorney's affidavit was supported by a short confirmatory affidavit by the applicant.

[6] The grounds upon which the applicant seeks a permanent stay of prosecution are summarised as follows at para 10-13 of the founding affidavit, under the subheading '*Legal Basis for the Relief Sought*':

[1] The first respondent points out that the case against the applicant had been on the court roll for two years and three months before the institution of the current application. During that time, and apparently when the applicant was differently represented, representations were made to the Directorate of Public Prosecutions for the criminal proceedings to be withdrawn. No reliance was made in those representations on the allegedly prejudicial effects of the delayed institution of the criminal proceedings. In the period up to the beginning of March 2021, there were formal plea negotiations with the state in terms of s 105A of the Criminal Procedure Act 51 of 1977.

'10. There has been an unreasonable and inexplicably long delay to prosecute the Applicant, in breach of his rights enshrined in Section 35 [of the] Constitution of the Republic of South Africa ("the Constitution") to a fair trial.

11. As a consequence of this delay in prosecuting the Applicant together with his medical condition, he will suffer irreparable and insurmountable trial prejudice if the prosecution proceeds.

12. The Applicant has been diagnosed with a brain tumour during the delay. He is accordingly not able to properly adduce and challenge evidence as a consequence of his loss of certain faculties, in terms of Section 35(3)(i) of the Constitution,[2] which infringes upon his right to a fair trial.

13. Furthermore the evidence against the Applicant was obtained in breach of his right against self-incrimination contained in Section 35(3)(j) of the Constitution[3] and can therefore not be used in his prosecution as per S35(5) of the Constitution.[4]'

[7] The application, which is founded on the apprehended infringement or threatened infringement of the applicant's fair trial rights in terms of s 35 of the Constitution, is accordingly brought on a three-pronged basis, namely, (i) unreasonable delay, (ii) mental or intellectual incapacitation due to the effects of a brain tumour and (iii) that the prosecution's case is reliant on unlawfully obtained self-incriminatory evidence.

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[2] Section 35(3)(i) provides '*Every accused person has a right to a fair trial, which includes the right – (i) to adduce and challenge evidence*.'

[3] Section 35(3)(j) provides '*Every accused person has a right to a fair trial, which includes the right – (j) not to be compelled to give self-incriminating evidence.*'

[4] Section 35(5) is quoted in paragraph [11] below.

[8] It is convenient to address the last-mentioned ground first because it can be disposed of quite shortly and, advisedly, was not pressed in argument. It is premised on the allegation that the state's case is reliant on self-incriminatory evidence obtained from the applicant in the course of an inspection into the business of Evercrest Capital (Pty) Ltd by the Financial Services Board in terms of the (since repealed) Inspection of Financial Institutions Act 80 of 1998. It is alleged that the investigation was unconstitutional '*as the Applicant was compelled to provide self-incriminating evidence*'; elsewhere in the founding affidavit the point is expressed in a more qualified way, namely that '[h]*e was forced to provide possibly incriminating evidence*'.

[9] The baldly stated contention in the founding papers that the state's case is entirely reliant on the applicant's self-incriminatory evidence is disputed by the first respondent. Having regard to the nature of the alleged offences as described in the summons, it seems to me that it is inherently improbable that objective evidence concerning the relevant subject matter would not exist and that the testimony of other witnesses would not be available to the prosecution. Indeed, in contradiction of the averment mentioned earlier that the state's case is entirely reliant on the applicant's (possibly) self-incriminatory evidence furnished under compulsion during the inspection, the deponent to the founding affidavit averred in a separate passage of his evidence that '[t]*h case against the Applicant is extremely complicated and it would be unfair on the witnesses as well as the Applicant to expect them to remember the complex events that occurred some 15 years ago*'. Elsewhere in the founding affidavit it is stated that the case involves '*numerous parties*'. One would expect that such parties should be in a position to give evidence independently of any self-incriminating admissions made by the applicant during the investigation by the regulatory authority.

[10] The deponent to the first respondent's answering affidavit described the gravamen of the non-statutory offences with which the applicant has been charged as follows: '*all* [the]

charges pertain to one clearly defined aspect, whether the Applicant executed trades and took certain positions that breached the risk parameters and trading limits agreed by the EA Fund on a continuous and material basis. This aspect is thus clearly delineated and forms the crux of the more serious charges against the Applicant.' I do not find it necessary to delve into the question in any detail, but matters that seem to be germane, such as the terms of the Fund's investment mandates and whether or not the applicant's conduct was in compliance with them, or that he misrepresented them, should be capable of proof by production of the relevant documentation and the evidence of the parties who furnished the mandates and executed the investment transactions that allegedly gave rise to the situation in which the Fund suffered its losses.

[11] However, insofar as the ground relied upon by the applicant might, despite my doubts, nevertheless be a real issue, some attention to the import s 35(5) of the Constitution is indicated. It provides that '[e]*vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice*'. The subsection has the dual effect of vesting the trial court with a discretion coupled with a duty.[5] The provision does not create an absolute bar against the admissibility of evidence that has been obtained in a manner that violates a basic right. The admissibility or non-admissibility of such evidence in a criminal trial is peculiarly a question for the trial court to determine. It must make the determination with reference to the factors expressly identified in s 35(5). Their manifestation will be very much case-specific.

[12] The question of how the balancing exercise posited by s 35(5) should be undertaken in any given case by a court seized of criminal proceedings is not one that appropriately falls to be anticipated in civil proceedings directed at prohibiting the prosecution from proceeding with

[5] Consider the discussion in PJ Schwikkard et al, *Principles of Evidence* 5 ed (Juta) (looseleaf) at §12.6.

the trial; cf. *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13 (31 July 2008); 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 62 and 65-66. In the current matter, the applicant's case as made out in his founding papers in any event fell far short of equipping this court to undertake the balancing exercise posited by s 35(5), even were the court, exceptionally, minded to tackle the question.

[13] Turning then to the issue of delay. The investigation by the Financial Services Board commenced in July 2007 and the inspection report was issued in final form in August 2008. As a result of the investigation, the applicant's licence to practice as a financial services provider was withdrawn and he was prohibited from applying for a new licence for five years. He was also required to pay for the costs of the investigation in the amount of over R366 000. He alleged that there was 'no engagement' with him on the matter thereafter until he received the charge sheet in August 2019.

[14] It was averred in the founding papers that the third respondent, as the relevant regulatory authority, laid a criminal complaint against the applicant only at the end of March 2014, nearly six years after the completion of the investigation undertaken by the Financial Services Board. The first respondent's evidence, however, is to the effect that the matter was referred to the police in 2009. The applicant's attorney averred that the police docket shows that no further substantive investigation was undertaken by the police after the lodging of the criminal complaint. He pointed out that no reasons had been provided for the delay, which on its face was unreasonably long.

[15] The state's explanation for the delay between 2009 and the end of 2018 in getting the case against the applicant trial ready is sadly redolent of the ineptitude and lack of diligence that media reports suggest were all too prevalent in many of our public institutions at the time. The deponent to the answering affidavit ascribed the delay to 'systemic failures'. A succession

of investigating officers failed to provide the prosecutors with the documentary evidence identified in the Financial Services Board investigation report. The answering papers do not give a satisfactory explanation for this failure or the prosecution's response to it. The most recently appointed investigating officer, who took over the matter at the end of 2018, reportedly approached her work '*with much more vigour and zest*' than her predecessors, which enabled the eventual enrolment of the matter for hearing in September 2019. The excuses offered by the first respondent for the delay are weak and perturbing.

[16] The delay was manifestly inordinate and palpably unreasonable. No nicely measured calibration exercise is needed to arrive at that conclusion. The unreasonableness of the delay is not, however, by itself, enough to bring the applicant's case home. He had to show that he suffered resultant material prejudice; cf. *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA) at para 16,[6] cited with apparent approval in *Bothma v Els and Others* [2009] ZACC 27 (8 October 2009); 2010 (2) SA 622 (CC); 2010 (1) SACR 184; 2010 (1) BCLR 1, at para 72. In Kriegler J's seminal judgment in point in *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18 (2 December 1997); 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC), it

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[6] '*I turn now to consider the question whether the delay has caused the appellant prejudice. It should be borne in mind that the enquiry does not concern the appellant's liberty or personal security. After the charge was withdrawn against him in January 1994 nothing happened in connection with the case until April 2004. Issues of restricted freedom, stress, anxiety or social ostracism do not therefore arise. The focus is solely on whether he has suffered significant trial-related prejudice. In establishing facts substantiating his claim, "vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice. [The accused] must show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense" (see US v Trammell 133 F 3d 1343* [10th Cir. (1998)] *at 1351, quoted with approval in the McCarthy case supra,* [*McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA)] *para 47).*' (Per Maya AJA.) (The wording in double quotation marks comes from the Opinion of Holloway J (Seymour and Kelly JJ concurring) in *United States v Jenkins* 701 F.2d 850 (10th Cir. 1983) at 855. It should be noted that, after quoting the passage from *Jenkins*, Farlam AJA proceeded, at para 48 of *McCarthy*, to say '*I am not sure that one need go so far as that in this case, but something more than the factors listed in Heher J's judgment, not backed by specific averments by the accused person in question, is in my view required before the far-reaching remedy of an indefinite stay can be granted in a case such as this*.' The factors listed in Heher J's judgment at first instance in *McCarthy* were that a delay of 13 years would involve an adverse effect on the fairness of the trial '… *in at least the following respects: the applicant's recollection of events, the tracking down of such witnesses for the defence as may survive, the willingness of witnesses to testify, the recollection of those witnesses and the procurement of real evidence*'.)

was observed that whilst time is '*obviously central to the enquiry*', it '*has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation*'.[7]

[17] The Constitutional Court has identified three types of delay related prejudice; viz. (i) trial-related, (ii) liberty-related and (iii) security or socially-related.[8] Only the first variety is engaged in the current case. It has been described as the type that is possibly the hardest to establish.[9]

[18] The only resultant prejudice identified with any particularity in the founding affidavit is the effect of the applicant's intervening medical condition. At paragraph 63 of the founding affidavit, the attorney averred '*The prejudice in casu relates to the significant deterioration in the medical condition of the Applicant which precludes him from having a fair trial*'. Apart from the effect of the applicant's medical condition, which I shall come to presently, there is a distinct lack of detail in the founding papers concerning the nature of the forensic prejudice that the applicant claims he will suffer on account of the delay if the trial proceeds at this stage. The effect of the passage of time on the ability of witnesses to clearly recollect relevant events is referred to in only general terms in the founding papers.

[19] Human experience teaches us that memories do fade over time, but also that some events make a greater impression, and are therefore better remembered, than others. We also know from experience that memory can be jogged by objective aids like contemporaneous records, the reliability of which can be independently assessed. Accordingly, without some substantiating detail, it is not illuminating to baldly claim as materially prejudicial the effect of

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[7] At para 28.

[8] Id., para 23. See also *Wild and Another v Hoffert NO and Others* [1998] ZACC 5 (12 May 1998; 1998 (3) SA 695; 1998 (6) BCLR 656 (CC) at para 4.

[9] Id., para 30, with reference to the concurring Opinion of Brennan J (with which Marshall J agreed) in *Dickey v Florida* 398 US 30, 41 (1970).

the passage of time on the ability of the witnesses to reliably recall what happened up to 18 years ago. The court has not been informed who the witnesses are, nor what it is precisely that they will be expected to remember, nor that there is no objective material on which they could rely to refresh their memories. The generalised observation by the applicant's attorney concerning the ordinary effects of delay are unhelpful. They call to mind, by way of response, the observations by Sachs J in *Bothma v Els* supra, '*Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal.*'; see also *McCarthy v Additional Magistrate, Johannesburg and Others* [2000] ZASCA 191 (29 September 2000); [2000] 4 All SA 561 (A) at para 46.

[20] The lack of substantiating detail concerning the nature and effect of the alleged trial-related prejudice attendant on the delay is a fatal defect in the trial-related prejudice based aspect of the applicant's case. That much is clearly implicit in the following observation in *Sanderson*: *'...the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused*'.[10] It is for the applicant in such a case to show '*whether he has actually suffered prejudice as a result of the lapse of time*'.[11]

[21] In *Sanderson*, at para 39, Kriegler J wrote '[o]*rdinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate" remedies less radical*

[10] In para 38.

[11] *Sanderson* supra, at para 32.

than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay.'

[22] The distinct absence of substantiating particularity concerning the applicant's alleged trial-related prejudice in the current case as a result of the delay falls to be contrasted with the position in *Broome v Director of Public Prosecutions, Western Cape and Others, Wiggins v Acting Regional Magistrate, Cape Town and Others* [2007] ZAWCHC 61 (31 October 2007); 2008 (1) SACR 178 (C), which for a long time stood as the only reported case in which an application for a permanent stay of prosecution was granted prior to the trial of the accused person concerned, and on which the applicant's counsel placed some reliance.[12] [13] In that case, the accused, Mr Broome, adduced detailed evidence to the effect that extensive documentation that was essential to his ability to properly conduct his defence against the charges which the

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[12] *Broome*'s case was heard as an appeal from the decision of the regional magistrate presiding in the criminal trial refusing an application by the accused for a permanent stay of prosecution. The magistrate's lack of jurisdiction to have entertained the application outside the ambit of s 342A of the Criminal Procedure Act 51 of 1977 was overlooked by the parties in that case and not considered by the appellate court *mero motu*; see *Naidoo v S* [2011] ZAWCHC 448 (6 December 2011); 2012 (2) SACR 126 (WCC), at para 4.

[13] The applicant's counsel referred in argument to the matter of *Director of Public Prosecutions and Minister of Justice and Constitutional Development v Phillips* [2012] ZASCA 140 (28 September 2012); [2012] 4 All SA 513 (SCA). That was a quite exceptional case, in which a permanent stay of prosecution was granted *after the applicant had been acquitted* on the charges on which he had been prosecuted in the regional magistrates' court. The stay was granted because of the prosecution's failure, in gross non-compliance with the rules of court, to prosecute an appeal it had noted in terms of s 310 of the Criminal Procedure Act. The circumstances in *Phillips* were quite different from those that typically present in a stay of prosecution application, where the object is to avoid a prosecution. *Bothma v Els* supra, was a case in which a permanent stay of prosecution granted in the High Court was reversed on appeal by the Constitutional Court. In *Van Heerden and Another v National Director of Public Prosecutions and Others* [2017] ZASCA 105 (11 September 2017); [2017] 4 All SA 322 (SCA); 2017 (2) SACR 696 (SCA), in which a permanent stay was granted on appeal to the SCA, the material prejudice suffered by the applicants due to unreasonable delay by the state was stark. The prosecution kept chopping and changing its case and was guilty at a critical point of making dishonest representations to the court concerning the conduct of the case. The criminal proceedings were twice struck off the roll. The very integrity of the criminal proceedings was undermined. The applicants in that matter also suffered severe social and financial prejudice related to the dragged-out proceedings and the effect of the restraint against their property while such proceedings remained pending. The SCA stressed (at para 70 of the judgment) that applications of this nature are 'fact specific'.

state sought to bring to trial against him more than a decade after the relevant events had gone missing. The documentation concerned had been seized from him by the state many years earlier. Mr Broome's request at the time to be allowed to photocopy and retain a set of the seized documentation was refused. When, many years later, he was eventually granted access to the documentation still in the state's possession, he discovered that a material part of it had been lost. He was able to draw up a detailed schedule of the missing documents and explain the prejudicial effect of their disappearance on his ability to properly defend himself.

[23] *Broome*'s case was distinguished by the Constitutional Court in *Bothma v Els* supra, at para 74, where Sachs J noted *'...* [in *Broome*] *it was the state that had been responsible for the loss of crucial documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the state to prosecute someone and then deliberately or through an unacceptable degree of negligence deprive that person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays*'.

[24] If an applicant does not sufficiently establish that the unreasonable delay in instituting the prosecution has caused him or her material trial-related prejudice, no basis is provided for the balancing exercise described in cases like *Sanderson* and *Bothma v Els* to be undertaken. The application will rarely get out of the starting blocks in such a situation.[14]

[14] Cf. *Wild v Hoffert* supra, at para 9, where Kriegler J remarked '*... in the ordinary course and absent irreparable trial-related prejudice, a stay would seldom be the appropriate remedy*'. See also *Rodrigues v National Director of Public Prosecutions and Others* [2021] ZASCA 87 (21 June 2021); [2021] 3 All SA 775 (SCA); 2021 (2) SACR 333 (SCA) at para 50, where Cachalia JA remarked '*... where there has been an unreasonable delay ... the central enquiry is whether the accused's trial-related interests have been prejudiced by the delay. For the courts have made clear that an unreasonable delay does not per se infringe the accused's right to a fair trial*.'

[25] As mentioned earlier, the only aspect of the applicant's alleged trial-related prejudice that is canvassed with any degree of particularity in the founding papers is his medical condition. The deponent to the founding affidavit averred that '[t]*he case is extremely complex and involves numerous parties involved with events that occurred 15 years ago. The Applicant, as a consequence of his medical condition does not have the faculties to either locate witnesses or put appropriate questions to the potential witnesses in order for him to properly mount his defence*.'

[26] It was not surprising in the circumstances that the argument advanced by counsel in support of the application was focussed on the adverse effect of the applicant's medical condition on his ability to conduct his defence. The founding affidavit can be read to link this aspect of the case to the issue of delay in the sense of suggesting that had the criminal proceedings been commenced earlier the applicant would not then have been in the disadvantageous position occasioned by his subsequently presenting medical condition. Whilst there might, on a purely chronological analysis, be some truth in that, it nevertheless seems to me that the delay is a matter that is in fact entirely incidental to the question of the applicant's mental or intellectual capacity to adequately conduct his defence. The latter is something that arises for consideration quite independently of the former in any enquiry into the applicant's right to a fair trial. The timing of the onset of the applicant's ill health was an accident of fate unrelated to his exposure to forensic measures against him by the state. Notionally, it could have intervened even if the state had commenced the criminal proceedings much earlier.

[27] The applicant's medical condition was described in a report submitted under a supporting affidavit by a psychiatrist who has been treating the applicant intermittently since 2007. The initial treatment, given between 2007 and 2011, had been for the anxiety and depression experienced by the applicant arising from the allegations originally made against him concerning the losses made by the Fund. The psychiatrist's report was supported by

confirmatory affidavits made by other specialists who had treated or assessed the applicant's condition. The first respondent was afforded the opportunity to have the applicant examined by its own medical experts but failed to make use of it. In the result, the medical evidence adduced by the applicant stands uncontroverted.

[28] It is not necessary to describe the medical evidence in detail. It is sufficient to record that it is to the effect that the applicant was diagnosed with a pituitary adenoma (a type of brain tumour) in April 2021 and underwent neurosurgery for the partial removal of the tumour. He consulted the psychiatrist in May 2021 in connection with his renewed depression and reported 'inability to function without guidance and assistance from his wife'. His attorneys informed the psychiatrist that the applicant was 'unable to follow logical thought patterns, and had not been able to explain himself'. The attorneys reported that the applicant 'fully understood the charges against him but could not cope with questions posed, especially when under pressure'.

[29] Testing administered by the psychiatrist found that the applicant exhibited symptoms associated with physical damage to the frontal part of his brain. These demonstrated that the applicant has deficits concerning his 'capacity to cope with emotional pressure or high cognitive demands'. He has associated deficits in memory functions, which entail an inability 'to recall information and deal with it logically, particularly in relation to his advising his legal team'. The psychiatrist noted that the applicant's 'capacity to recall events in 2007 and present them logically and coherently is markedly impaired'. His report concluded that the applicant's 'inability to retrieve or present information coherently prevents him from interacting with his legal team and in court would have a risk of making him appear evasive or dishonest, when in reality he is neurologically incapable of retrieving or presenting information'.

[30] The uncontroverted medical evidence suggests that the applicant's medical condition and its sequelae have resulted in him being intellectually disabled to the extent of not being able to participate in the criminal trial in a way so as to be able to make a proper defence. The

first respondent contended that the situation was one that fell to be dealt with in terms of s 77(1) of the Criminal Procedure Act 51 of 1977, and her counsel sought to persuade this court to direct that an enquiry be undertaken in terms of s 79 of that Act.

[31] Section 77(1) of the Criminal Procedure Act provides:

> 'If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'

[32] The applicant's counsel resisted the course contended for on behalf of the first respondent. He pointed out, correctly, that the current proceedings are civil in nature, whereas s 77(1) of the Criminal Procedure Act, according to its tenor, can arise for application only '*at any stage of criminal proceedings*'. It also appears, upon a proper construction, that '*the court*' referred to in the subsection is the court seized of such criminal proceedings.

[33] The attitude adopted by the first respondent does, however, beg the question whether it would be appropriate for this court, in civil proceedings, to grant the relief sought by the applicant, drawing directly on s 35(3) of the Constitution and the common law, when the legislature has specifically provided in the Criminal Procedure Act how the situation should be addressed within the context of the criminal proceedings in which he was involved prior to the institution of the current application. The question seems to me to require consideration of the principle of subsidiarity; a matter which the court is obliged to take into account *mero motu* if it is applicable, irrespective of the first respondent's contentions.

[34] In *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41 (30 November 2022); 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) at para 45, the Constitutional Court (per Theron J) gave the following synopsis of the principle of subsidiarity:

'This principle provides that where legislation is enacted in order to comprehensively give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or on the common law, without challenging the constitutional validity of that legislation. The principle has two foundational justifications: to mitigate against the development of "two parallel systems of law", one judge-made and the other crafted by Parliament, and to ensure "comity between the arms of government" by maintaining "a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights".'

(Footnotes omitted.)

[35] In *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 (16 February 2022); 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) at para 102-108, the Court (per Khampepe J) had previously explained the concept more expansively –

'[102] Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. In simple terms, the principle can be summarised thus:

> "Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role." Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.

[103] This principle has been pronounced upon by this court on numerous occasions. And, in *My Vote Counts*[15], Cameron J, noting how deeply entrenched in South African constitutional litigation the principle is, identified three categories of cases where the principle has been endorsed. Firstly, in a range of socio-economic-rights cases where the government is under a duty to take reasonable legislative and other measures, within its available resources, to progressively realise the rights, this court has affirmed the proposition that claimants must first impugn the legislation enacted to give effect to those rights before they may rely on the right itself in the Constitution.

[104] The second line of cases were those where this court had determined that there existed legislation which was "codifying a right afforded by the Bill of Rights". Cameron J noted that this principle was first affirmed in *New Clicks*,[16] and then expounded and endorsed in the context of labour rights in *SANDU*.[17] In that instance, the litigant had attempted to rely directly on their s 25(3) right to collective bargaining as enshrined in the Constitution, as opposed to what had been codified in the Labour Relations Act (LRA). This court held that, where legislation has been enacted to give effect to a constitutional right, "a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard". If the legislation is wanting in its protection of the right, then a frontal attack to the constitutionality of that legislation must be brought.

[105] Notably, ..., the principle of subsidiarity has also been recognised with approval in relation to the interaction between the Equality Act and s 9 of the Constitution. ...

[106] The third line of cases were those where 'the court has applied the principle of subsidiarity to those provisions of the Bill of Rights that specifically *oblige* Parliament to enact legislation: ss 9(4), 25(9), 33(3), and 32(2)'. In that case, it

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[15] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 (30 September 2015), 2015 (12) BCLR 1407 (CC), 2016 (1) SA 132 (CC).

[16] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14 (30 September 2005), 2006 (1) BCLR 1 (CC), 2006 (2) SA 3111 (CC).

[17] *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10 (30 May 2007), 2007 (8) BCLR 863 (CC), 2007 (5) SA 400 (CC).

would be plainly inappropriate for litigants to ignore legislation that Parliament had been required by the Constitution to enact.

[107] In *My Vote Counts*, the majority noted general reasons underpinning the principle:

> "First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law."

[108] On a conspectus of the above, it is perspicuous from this court's jurisprudence that subsidiarity as a principle serves important practical and normative purposes. It respects the separation of powers, as designed by the Constitution. Moreover, it promotes principled and consistent application of judicial reasoning to the hierarchical scheme of legal norms laid out in the Constitution.'

(Footnotes omitted.)

[36] It seems to me that s 77(1) of the Criminal Procedure Act is legislation that falls into the second of the categories of situation in which the principle of subsidiarity has been endorsed that were identified by Cameron J in *My Vote Counts* supra. [18] The provision is clearly directed at preventing the trial of accused persons who by reason or mental illness or intellectual disability are not able to properly defend themselves. An accused person's ability to properly defend him or herself is fundamental to a fair trial. An accused person who by reason of mental

[18] In para 55-56.

or intellectual disability is unable to do that cannot effectively exercise the right enshrined in s 35(3)(i) of the Constitution to adduce and challenge evidence.

[37] If an accused person is found, upon enquiry in terms of s 79 of the Criminal Procedure Act, to be incapable of making a proper defence, the court seized of the criminal proceedings may in a case like the applicant's – in which he does not stand charged with an offence involving serious violence – give any of the directions provided for in s 77(6)(ii) of the Act. Having regard to the psychiatrist's report and the nature of the charges, it seems to me that the direction that could well be given in the current case would be for the applicant to be released unconditionally. The effect of a finding of incapacity pursuant to an enquiry in terms of s 79 would be that criminal proceedings against the applicant could not be reinstituted or continued for so long as the incapacity endures. The evidence in this application suggests that the applicant's incapacity is permanent. If, however, the finding made in terms of s 79 should be disputed, the criminal court would try the issue of the applicant's capacity to stand trial in the manner contemplated by s 77(3)-(5) of the Criminal Procedure Act.

[38] In the context of the findings that a case based primarily on the trial-related prejudicial effect of delay has not been made out, and that the only cognisable basis for being able to hold that the applicant should not be tried is his reported medically related intellectual disability, it seems to me that application of the principle of subsidiarity dictates that his remedy lies in ss 77 and 79 of the Criminal Procedure Act, not in a civil application for a permanent stay of the prosecution. Entertaining a civil application for a stay of prosecution in such circumstances would be to encourage the undesirable development of an unnecessary parallel system of law.

[39] In my view, it is of no consequence for the application of the principle of subsidiarity that the Criminal Procedure Act predates the Constitution. Section 35(3) of the Constitution is a codification and entrenchment of fair trial rights long established in our law, and ss 77 and

79 of the Criminal Procedure Act give procedural and substantive effect in specified form to an incident of such rights.

[40] But even were I wrong about the application of the principle of subsidiarity, I would still not be willing to grant the relief sought by the applicant. An order staying a prosecution prohibits the prosecutor (ordinarily a representative of the office of the National Director of Public Prosecutions, but it could be a private person armed with a *nolle prosequi* certificate[19]) from exercising his or her power to institute and pursue criminal proceedings. An applicant seeking a permanent stay of prosecution is therefore, in essence, applying for a final prohibitory interdict. The requirements that an applicant must satisfy to obtain a final interdict are trite, viz. (a) a clear right, (b) an injury actually committed or reasonably apprehended and (c) the absence of an adequate alternative remedy; see *Setlogelo v Setlogelo* 1914 AD 221 at 227. In my judgment, availing of the procedures in terms of ss 77 and 79 of the Criminal Procedure Act would provide the applicant with an adequate alternative remedy. He has therefore in any event failed to satisfy the requirements for final relief of the interdictory character that is sought.

[41] For all these reasons the application will be dismissed.

[42] In *Sanderson* supra, the Constitutional Court, in comparable litigation, made the following remarks concerning the incidence of costs: '*Ordinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the state and in which costs orders are not competent; and the cause of action is that the state allegedly breached an accused's constitutional right to a fair trial. Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of*

[19] *Bothma v Els* supra, was concerned with an application for a permanent stay of prosecution in respect of a privately instituted prosecution.

substance and should therefore not have been visited with the sanction of a costs order.'[20] The considerations concerning costs reviewed in *Sanderson* seem to me to be pertinent in the current matter. The case raised important questions concerning the ability of an accused person whose fair trial rights might be adversely affected due to mental illness or intellectual disability to circumvent the provisions of ss 77 and 79 of the Criminal Procedure Act by bringing civil proceedings for a stay of prosecution. These questions do not appear to have previously been considered judicially. The application cannot fairly be stigmatised as having been frivolous, vexatious or manifestly inappropriate.[21] A costs order will therefore not be made.

[43] An order will issue in the following terms:

1. The application is dismissed.

2. No order is made as to costs.

A.G. BINNS-WARD
Judge of the High Court

[20] In para 44.

[21] Cf. *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 (1 December 2016); 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 7.

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