CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/09
[2009] ZACC 27

In the matter between:

PTRUE BOTHMA	Applicant
and	
PETRUS ARNOLDUS ELS	First Respondent
C. BEZUIDENHOUT NO	Second Respondent
CLERK OF THE COURT, KIMBERLEY NO	Third Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

Heard on : 13 August 2009

Decided on : 8 October 2009

JUDGMENT

SACHS J:

[1] In 2007, the applicant, Mrs Bothma, instituted a private prosecution charging that thirty-nine years before, when she had been a thirteen year old schoolgirl, the first respondent, Mr Els, a wealthy family friend much older than herself, had taken her by car

to his farm and raped her. She alleged further that a similar pattern of sexual abuse had continued for more than two years. Mr Els vigorously denied the charge. He applied to the Northern Cape High Court in Kimberley (the High Court) in March this year for an order permanently staying the private prosecution. The High Court issued the stay of prosecution, holding that the unreasonable delay, for which it regarded Mrs Bothma as being fully culpable, would result in irreparable trial prejudice to Mr Els and deny him his constitutional right to a fair trial.

[2] Mrs Bothma applied to this Court for leave to appeal to have this decision set aside. She contends that the High Court paid insufficient attention to the specific nature of the alleged offence and the manner in which she claims it contributed towards the subsequent delay. She submits that the issues should have been left for the trial court to determine, and that any prejudice that Mr Els might suffer because of the delay would not have been insurmountable. Accordingly, it could not be said in advance that the trial court would be unable to ensure that Mr Els had a fair trial.

[3] I have considered the issues and come to the conclusion that despite her extremely long delay in reporting the matter, the High Court was wrong to stay permanently the prosecution she has instituted.

History of the litigation

[4] On 26 January 2006, Mr Els received a letter from Mrs Bothma's attorneys informing him of her intention to institute criminal charges for rapes that had occurred between 1968 and 1970. A month later Mrs Bothma laid a criminal charge of rape against Mr Els at Galeshewe police station in Kimberley. She was fifty-one years old and he seventy-four. In June 2007 she also instituted a civil claim against him in the High Court. This matter is still pending.[1]

[5] The Director of Public Prosecutions (DPP) initially declined to prosecute but was persuaded by Mrs Bothma to reconsider the matter. The case was accordingly revived by the Kimberley office of the South African Police Service, and on 18 July 2007 a statement was taken from Mr Els. He acknowledged that he had known and had been friendly with the family and that they had on occasion visited his farm, but emphatically denied that he had ever raped her or sexually molested her or had sexual intercourse with her. He also claimed that she had recently visited him and later on had asked him by telephone for a loan of R300 000, which request he had refused. After receiving this information, the DPP decided not to prosecute and on 27 September 2007, at the request of Mrs Bothma, issued a certificate *nolle prosequi* (refusal to prosecute).[2]

[1] Summons was issued on 6 June 2007 under case number 603/07. Mrs Bothma claimed an amount of R3,7 million from Mr Els in respect of sentimental and patrimonial damages and loss. Mr Els entered a plea denying the allegations as well as a special plea of prescription on 6 July 2007.

[2] In terms of section 7(2)(a) of the Criminal Procedure Act 51 of 1977, a DPP must, at the request of the person intending to prosecute, grant the certificate *nolle prosequi* in every case in which the DPP has declined to prosecute. The certificate confirms that the DPP has examined the statements on which the charge is based and that he or she declines to prosecute at the instance of the state.

[6] On 21 December 2007, Mrs Bothma initiated a private prosecution in the Magistrates' Court in Kimberley. This was done in terms of section 7 of the Criminal Procedure Act (the CPA),[3] which provides that in any case in which a DPP declines to prosecute an alleged offence, any private person who proves some substantial and peculiar interest in the issue arising out of some injury which he or she individually suffered, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

[7] Mr Els appeared in the Regional Court in Kimberley on 5 February 2008, when the matter was postponed to 12 March 2008 and then remanded for trial on 17 June 2008. Before it was heard, however, Mr Els brought an application in the High Court seeking a permanent stay of prosecution.[4] As a result, the trial was twice postponed, first pending the outcome of the High Court application, and then pending the outcome of this appeal. It is now on the Regional Court roll for 29 October 2009.

[8] The substance of Mrs Bothma's complaint has been that from March 1968 until December 1970, starting when she was thirteen and ending when she was sixteen, she had been subjected to repeated incidents of rape by Mr Els. The first incident, she

[3] 51 of 1977.

[4] He also sought an order declaring that section 7 of the CPA was unconstitutional. Furthermore, he asked the Court to review and set aside the issuing of the summons, on the ground that no proper procedure had been followed in respect of section 9(1)(b) of the CPA which deals with furnishing of security for the trial by the private prosecutor. It was agreed between the parties that these two issues should be separated from the question of the permanent stay of prosecution.

alleges, occurred on a weekend in March 1968, when she was thirteen years old. She describes herself at that time as having been dynamic, intelligent and a diligent scholar, a prefect at her school who enjoyed active participation in school life. Mr Els was a prominent businessman in the community and a wealthy family friend, twenty-three years older than herself. He had befriended her parents and, when visiting their home that Saturday afternoon, had invited her to his farm, Carter's Ridge, for the evening. During the evening Mr Els had contacted her parents and they had agreed that she could stay overnight. That night, Mrs Bothma alleges, Mr Els raped her.

[9] Thereafter, Mr Els would frequently arrange with her parents for her to come and visit him at his farm either during the school week or over a weekend. Her siblings confirm that Mr Els arrived regularly in expensive cars to pick her up from their home. While Mrs Bothma cannot recall the exact dates, she states that she was raped by Mr Els each and every time she visited his farm, from the weekend in March 1968 until the end of 1970. She kept silent about the rapes, telling no one. She explains that she believed Mr Els when he told her that her parents would lose their jobs should anyone find out about the rapes. She internalised the shame of the events, feeling guilt, betrayal and powerlessness. She feared stigmatisation should she confide in anyone. During this period, her schoolwork suffered, she fought a lot with her mother, and became withdrawn. As a result, she failed standard six and, after eventually managing to pass the year, had no further formal education.

[10] On 26 December 1970, at the age of sixteen, she ended contact with Mr Els by telling him over the telephone that she no longer wanted to see him. She acknowledged, and it was common cause, that after that time they had little, if any, contact.

[11] In 1975, she married her first husband Mr Bothma, with whom she had a son. Mrs Bothma told her husband about the rapes after he discovered that her hymen was torn. His reaction to this information was to avoid sexual contact with her and to withdraw emotionally. The marriage ended after seven years. She married twice again, first in 1983 and then in 2000.[5] Fearing a similar reaction to that of Mr Bothma, she decided in both cases not to say anything about the rapes, but both marriages ended in divorce, partly, she claims, because of the sexual abuse she had suffered as a child. In order to support herself and her son, she was involved in various entrepreneurial business ventures over the years, none of which appear to have provided any substantial or sustainable income. She paints a picture of a diminished person "haunted by feelings of guilt". During all these years, the only person to whom she had spoken about the rapes was Mr Bothma.

[12] In 2002, Mrs Bothma was convicted of fraud and sentenced to four years imprisonment. While at the Pretoria Central Correctional Centre she attended a life-skills course and counselling. She explains that during 2004, while under counselling, she was

[5] Mr Bothma is deceased. After the failure of her second and third marriages to Mr Wessels and Mr Stals respectively, she decided to resume the name "Bothma".

able to recognise that she was the victim of child rape, and that the responsibility for the sexual abuse lay not with her but solely with the man who had abused her, Mr Els. It was the counselling, she claims, that enabled her to develop a meaningful understanding of the wrong that had been done to her and to appreciate the common thread that underlay all the difficulties in her adult life.

[13] After she left prison, some months passed during which she engaged in the process of divorcing her third husband, before she felt free to seek legal advice. In 2005 she approached the Department of Public Prosecutions, and later the Legal Aid Board in Pretoria, with a view to taking criminal action against Mr Els. She was later advised of the possibility of instituting a private prosecution.

[14] In his response to these allegations, Mr Els does not dispute that he had been a friend of her family but states that he only came into contact with them in late 1969. In support of his emphatic denial of ever having sexually abused her in any way, he avers that his farm had in fact been undergoing renovation during the period when the rapes had allegedly taken place. Also, he maintains that he had only moved into the farmhouse in October 1969. Further, he states that at the time he had not owned the particular type of motor vehicles referred to by Mrs Bothma, and that he had been travelling extensively during that period.

[15] Turning to more recent events, he alleges that in early 2006, Mrs Bothma visited him in Kimberley. He regarded the visit as a social call, and they discussed some of her personal problems. At no time on that occasion did she mention the allegations of rape. At some stage,[6] the details of which are obscure on the record, she allegedly requested a loan from him of R300 000, which he turned down. Mrs Bothma denies these events in their entirety.

[16] Several months later Mr Els received an attorney's letter stating that Ptrue Stals would be instituting criminal charges against him for rape. He did not recognise the name and took no heed of the letter. In October 2006, he received another attorney's letter. This time he made some enquires and discovered that Ptrue Stals was in fact Ptrue Bothma, whom he had originally known as Petro du Plessis.[7] He consulted his attorney and replied to the letter, denying the allegations and stating that Mrs Bothma was free to take civil or criminal action should she so wish.

[17] Mr Els submitted that the long delay would inevitably cause him severe trial prejudice. He stated that he was unable to give full instructions to his legal representatives because it was impossible for him to find documentary proof or records of his precise whereabouts over the alleged periods, and, in particular, in March 1968. He

[6] There appears to be some inconsistency between his statement to the police and his application to the High Court. In the police statement he says that she phoned him two weeks after the visit to request the loan; in the affidavit he implies that she asked for the loan while visiting.

[7] He spelt her name this way in his statement to the police.

explained that his brother and sister-in-law, who could have testified as to the time periods of the renovations on the farmhouse, had both passed away. The same applied to his domestic worker who could have testified as to whether or not the young Mrs Bothma had stayed with him in the farmhouse. In addition, he no longer had the records relating to his ownership of various motor vehicles at that time.

In the High Court

[18] After considering the affidavits and hearing argument, the High Court granted the permanent stay of prosecution as requested. In doing so, it acknowledged that the stay was a drastic remedy, which would only be appropriate if the delay caused irreparable prejudice to the accused.[8] The High Court then went on to apply the balancing test referred to in *Sanderson v Attorney-General, Eastern Cape*[9] to determine whether the delay was unreasonable, considering the following factors: the length of delay; the reasons advanced by the prosecution for the delay; waiver of the right to a speedy trial by the accused; the prejudice to the accused; and generally, the interests of justice.[10]

[19] The High Court stated that Mrs Bothma's explanation for the delay, "i.e. that she had been haunted by feelings of guilt until 2002 about what had happened to her as a

[8] Citing *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC), the leading South African case on unreasonable delay in criminal prosecution, and *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA) at para 10.

[9] *Sanderson* above n 8.

[10] This Court in *Sanderson* endorsed the balancing approach in the United States Supreme Court decision *Barker v Wingo*, 407 U.S. 514 at 530 (1972). See *Sanderson* above n 8 at para 25. For a different approach, see *R v Askov* (1990) 2 SCR 1199 (SCC) at 1224-8.

teenager" was "rather unpersuasive" and "characterised by a paucity of detail" due to the lack of specific dates furnished.[11] It then went on to hold that—

> "full culpability can be ascribed to [Mrs Bothma] for the enormous delay in this case. There has not been any suggestion of any other extraneous factors which had contributed to the delay, nor has it been suggested that [Mr Els] had done anything to contribute to it."[12]

[20] Dealing with trial prejudice to Mr Els, the High Court stated:

> "[He] has referred to the fact that he could not have committed the rape offences in 1968 at his present residence, as [Mrs Bothma] alleges, since he was not occupying that residence at the time. He also alluded to the fact that both his brother and his sister-in-law . . . were now deceased. They could have attested to the fact that he had not been staying there . . . He furthermore alludes to the fact that his erstwhile domestic assistant, who would have been able to attest to the fact that [he] did not rape [Mrs Bothma as a child] over the weekends . . . is also now deceased. . . . Similarly, the lack of access to motor vehicle records dating back 40 years, to show that he did not possess a Mercedes or an E-type Jaguar at the time, as alleged by [Mrs Bothma], may also prejudice [him] in his trial. . . . In addition to those aspects there is of course the very real likelihood of fading memory, not only of [Mr Els], but also of any witnesses who may still be alive."[13]

[21] The High Court finally held that, although it was "mindful that this decision effectively shuts the doors of the courts as regards criminal prosecution, to

---

[11] *Els v Stals and Others*, Case No 812/2008, 13 March 2009, as yet unreported, at para 19.1. See para 18.5 where the High Court states:

> "As an example – she does not furnish any specific dates of the alleged rapes, she merely states that the first rape was allegedly perpetrated 'during March in 1968 . . . on a Saturday evening'."

[12] Id at para 19.3.

[13] Id at para 18.5.

[Mrs Bothma]" and "further cognisant of the fact that the true effect of the delay on the outcome of the case will never be determined, since it could appropriately only be determined at the trial," nevertheless this was an exceptional case where a permanent stay of prosecution should be ordered because the "evidence . . . overwhelmingly demonstrates that [Mr Els] would suffer irreparable trial-related prejudice due to the delay and that he would therefore not receive a fair trial."[14]

Submissions in this Court

[22] Counsel for Mrs Bothma argued that to bar a prosecution before it began was to foreclose the opportunity to ascertain the real effect of the delay on the outcome of the case. When determining whether the delay was unreasonable the Court should go beyond the factors mentioned in *Sanderson*[15] and look at:

a) the specific character of the offence;

b) its impact on the victim;

c) the gravity of child rape; and

d) the social policy that underpins the special need to prosecute the crime.

[23] Counsel argued that rape is a humiliating, degrading and brutal invasion of the privacy and dignity of the person of the victim. He quoted from judgments of the

[14] Id at para 31.

[15] See *Sanderson* above n 8 at para 25.

Supreme Court of Appeal where it was accepted that rape had the inherent effect of rendering child victims unable to report the crime, sometimes for several decades.[16] By ascribing "full culpability" for the delay to Mrs Bothma, the High Court had disregarded the magnitude of this type of offence. In view of the specific character of the offence it could not be said that the delay in bringing the prosecution was unreasonable.

[24] Counsel conceded that some amount of prejudice would be caused by the delay in bringing the prosecution after forty years. Counsel submitted however that the fading of memory over time, and the fact that some witnesses had passed away, would constitute prejudice that could apply to any trial and could be as harmful to the prosecutor as to the accused. Issues of fact, like memory loss, were to be decided with reference to oral testimony given in court, which should be weighed and evaluated in the light of all the evidence collectively. Actual prejudice had to be proved, not speculative prejudice. The controlling principle to ensure fairness at the trial is the presumption of innocence. Mr Els had failed to establish that the prejudice that he would suffer would be irreparable, and the stay of prosecution should be set aside.

[25] In response, counsel for Mr Els submitted that Mrs Bothma's explanation as to why she could not report the incident earlier did not "hold water". The control she claimed Mr Els had exerted over her was contradicted by her own evidence. On her own

[16] *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA); [2004] 4 All SA 427 (SCA) at paras 1 and 7; *S v Cornick and Another* 2007 (2) SACR 115 (SCA); [2007] 2 All SA 447 (SCA) at para 35.

version, she had at the age of sixteen told Mr Els that she did not want to see him again, and at this stage therefore had already possessed the power to stop the sexual abuse from recurring. Mr Els was not an authority figure such as a parent, and in any event, whatever authority he might have exerted, would have ended once the contact with her had ceased. They had in fact lived miles apart for several decades. In the circumstances, Mrs Bothma should have been expected to disclose the conduct within a reasonable time after the relationship had ceased.

[26] Counsel went on to urge that the fundamental rights of Mr Els that were at stake were the right to be presumed innocent until proven guilty, the right to adduce evidence and to challenge prosecution evidence, and the right to a speedy trial. The real question, counsel argued, was whether it would be fair to put Mr Els on trial when it was common cause that most of the material witnesses he wished to rely upon had died, and that the documentation to corroborate his defence was unavailable. The decades that had elapsed had forced Mr Els into a position where he was unable to adduce evidence and would not be in a position to challenge the version of the complainant. Counsel contended that the dearth of evidence would inevitably render the trial unfair, and created a high risk that an innocent man nearly eighty years old would find himself behind bars.

Leave to appeal

[27] I now proceed to discuss the constitutional setting in which the application for leave to appeal must be considered. Before doing so, I should mention that the matter

clearly raises constitutional issues of some complexity, and that it is manifestly in the interests of justice that the finality of the stay of proceedings be subjected to constitutional scrutiny.[17] Furthermore, the Supreme Court of Appeal has a well-developed approach towards matters of this kind.[18] Referring the case to that Court would involve yet further delay in relation to issues of deep emotional concern, and pile up the costs. It is accordingly in the interests of justice that the matter come directly to this Court, and that leave to appeal should be granted.

Is Mr Els protected by section 35(3) of the Bill of Rights?

[28] Section 35(3)(d) of the Constitution provides that:

> "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".

[29] This is a private prosecution. Mr Els has reserved his right, should the private prosecution proceed, to challenge the constitutional validity of section 7 of the CPA, under which Mrs Bothma has launched her prosecution. We do not reach that issue in these proceedings. What is clear is that section 35(3) entrenches the right to a fair trial for all accused persons. The obligations imposed by this section bind courts to ensure that criminal trials conducted before them are fair. Without now determining the validity

[17] See section 167 of the Constitution.

[18] Above n 16.

of section 7 of the CPA, it is therefore clear that Mr Els, a person who stands accused of rape, is protected by the broad fair trial requirements of section 35(3).

Delay in bringing proceedings

[30] It will be noted that section 35(3)(d) and a companion section dealing with the right to adduce and challenge evidence,[19] grant protection only to accused persons. Mr Els was not on any understanding of these provisions an accused person between 1968 and the initiation of Mrs Bothma's prosecution. If the definition of "accused person" were to be read narrowly, then Mr Els's challenge based on delay could well have failed immediately. The delay by Mrs Bothma between initiating the private prosecution and going ahead with the trial was relatively short. Mr Els was only charged in December 2007. He appeared in court in February 2008. The matter was then postponed by agreement for the application in the High Court to be heard. Having regard to these facts, any delay in beginning and concluding the trial itself could not easily have been regarded as so unreasonable as to justify aborting the prosecution.[20]

[31] The stay of prosecution in this matter, however, was based on a thirty-seven year long *pre-trial* delay, covering a period when Mr Els was not an accused person. This

[19] Section 35(3)(i) of the Constitution.

[20] Accordingly, to the extent that it is inconsistent with this approach, the minority view in *Zanner* (Nugent J) cannot be endorsed. See *Zanner* above n 8 at paras 31-2.

raises the question of what protection, if any, the Constitution gives in relation to pre-trial delay.[21]

[32] Major pre-trial abuses by the state are now firmly prohibited by the Constitution. It is no accident that section 35 of the Constitution, which deals with arrested, detained and accused persons, is by far the longest section in the Bill of Rights. It sets out precise protections against treating people in arbitrary ways after they have been placed under arrest. One that becomes operative as soon as someone becomes an accused person is the right to have the trial begin and conclude without unreasonable delay.

[33] Although section 35(3) does not deal expressly with pre-trial delay, it must be construed and understood in the light of the value accorded to human dignity and freedom in our Constitution.[22] Freedom is protected by section 12 of the Constitution. It

[21] The leading South African case on the question of unreasonable delay deals not with pre-trial delay but with the rights of accused persons to have their matters disposed of with reasonable dispatch. In this respect, it provides only indirect guidance to the issues pertinently raised in the present matter. See *Sanderson* above n 8, which is dealt with later in this judgment at [36].

[22] Section 1 of the Constitution states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 36 of the Constitution states:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

provides that everyone has the right to freedom and security of the person, and expressly includes both the right not to be deprived of freedom arbitrarily or without just cause, and the right not to be detained without trial. It also provides that no one should be tortured in any way or treated or punished in a cruel, inhuman or degrading way.[23] Section 35(3) also protects freedom in the context of the application of criminal law. Sections 12 and 35 should accordingly be viewed in seamless conjunction, providing carefully thought through procedural protections designed to prevent a repetition of the grievous abuses of

---

society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Section 39(1)(a) of the Constitution states:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

[23] Section 12 of the Constitution states:

"(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

people's rights and dignity experienced in the past. As United States Supreme Court Justice Frankfurter famously said, "[t]he history of liberty has largely been the history of observance of procedural safeguards."[24]

[34] The present case, of course, does not raise any suggestion of state abuse. On the contrary, the state refused to prosecute Mr Els. He does not suggest that he had a right to be put swiftly on trial.[25] Rather, his complaint is that the thirty-seven year long delay has had such a deleterious effect on his capacity to present a defence that any trial to which he might be subjected could not be fair. In other words, it is not so much the delay itself that has violated his rights, but the manner in which it has deprived him of the possibility of being tried fairly; not its length but its effect.

[35] The question before us, then, is not whether his rights under section 35(3)(d) have been violated – clearly they have not been. It is whether in a broader sense his right to a fair trial would be irreparably violated as a consequence of the extreme belatedness of the prosecution. In this respect I believe that the High Court correctly decided that the right

---

[24] *McNabb v United States*, 318 U.S. 332, 347 (1943).

[25] See the observations of Professor Hogg in *Constitutional Law of Canada* Vol 2, 5th Ed (Thomson Carswell, Toronto 2007) at 52.2, who notes that:

> "The Supreme Court of Canada has occasionally exhibited a tendency to draw a rather romantic picture of the eagerness of accused persons to be tried; Cory J., for example, has emphasized the 'exquisite agony' of an accused awaiting trial. It must be unpleasant to wait for a criminal trial, but for an accused who is not in custody the wait may be preferable to the trial, with its risk of conviction and sentence. Since the burden of proof . . . is high, even the risk that witnesses may disappear or forget is one that can sometimes be endured with fortitude. It is only realistic to accept that a speedy trial is not desired by many accused persons, and a court-ordered stay of proceedings by reason of delay is a highly attractive windfall." (Footnote omitted.)

to a fair trial should not be anchored exclusively in section 35(3)(d). As Kentridge AJ said in *S v Zuma*:[26]

> "The right to a fair trial conferred by [the fair trial provision of the interim Constitution] is broader than the list of specific rights set out in [the paragraphs dealing with the rights of the accused]. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force."

In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.

Balancing test

[36] As mentioned above,[27] *Sanderson* deals with the consequences of delay after a person has become an accused, and not with the effects of pre-trial delay.[28] Nevertheless,

---

[26] *S v Zuma and Others* [1995] ZACC 1; 1995 (4) BCLR 401 (SA) (CC); 1995 (2) SA 642 (CC) at para 16.

[27] Above n 21.

[28] At the end of October 1994, Mr Sanderson was accused of sexually molesting two girls who, at the time, had been standard five pupils at the school where he was employed as the deputy headmaster. On 1 December 1994, he attended the office of the investigating officer, who informed him that he was suspected of acting in contravention of the Sexual Offences Act 23 of 1957. After several postponements of the matter in court, the decision was made on 7 August 1995 to prosecute him on two charges under the Sexual Offences Act. However, no specific charges had yet been formulated. The matter was subsequently set down for hearing in December 1995, but the trial was once again postponed to 1 July 1996. After many requests, a charge-sheet was served on him only in May 1996. The defence then applied for a trial date in October 1996. As certain witnesses were unavailable, the prosecution once again postponed the matter to December 1996. In November 1996, Mr Sanderson applied for a permanent stay of prosecution. The stay was granted by the High Court, which held, after balancing the right of Mr Sanderson to a speedy trial against society's interest, that there had been an unreasonable delay and undue social prejudice. This Court upheld the state's appeal, finding no trial prejudice against Mr Sanderson had been established.

the balancing process it posits is the basis for deciding whether a stay should be granted as a result of trial prejudice flowing also from pre-trial delay. In *Sanderson*, this Court held that the critical question was how to determine whether a particular lapse of time was reasonable.[29] The Court endorsed what it referred to as the "seminal answer" in the United States case of *Barker v Wingo*,[30] holding there was a balancing test in which the conduct of both the prosecution and the accused were weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused.[31] In the present matter, the High Court based its decision on the manner in which it felt these factors had to be balanced.

[37] A word of caution: these four factors should not be dealt with as though they constitute a definitive checklist. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis.[32] The matter before us certainly resists talismanic use of the four-pronged test. In the first place, it was not the state that was responsible for the delay, but Mrs Bothma, a private prosecutor. So, as I have already stated, no question of abuse of state power arises. Nor, in the circumstances, could Mr Els be criticised for failure to assert his right to a speedy trial, when there was nothing to lead him to believe that he would become an accused person. This leaves us with the

[29] See *Sanderson* above n 8 at para 25.

[30] Id at para 25; *Barker* above n 10 at 530.

[31] *Sanderson* above n 8 at para 25.

[32] *Barker* above n 10 at 530.

following factors enumerated in *Sanderson*: the length of the delay, the reason given by Mrs Bothma to justify the delay, and prejudice to the accused.

[38] To the list set out in *Sanderson*, however, must be added a further factor, one not considered by the High Court. I refer to the nature of the offence. Jurisprudence in this country and abroad abounds with reference to the special consideration that needs to be given to the manner in which sexual abuse of children, especially if prolonged, can provoke delay in their later lodging complaints as adults about such abuse. This element speaks to both the reason proffered by Mrs Bothma for the delay, and the public policy dimensions that have to be taken into account in the balancing exercise. Without placing the specific nature of the offence in the scales, the balancing exercise is itself unbalanced.

[39] A perusal of the High Court judgment shows that consideration was given only to the three factors the Court felt had to be balanced against each other. The first was the length of the delay. The second was the reason for the delay. And the third was the trial prejudice caused to Mr Els by the delay. The specific nature of the offence was not placed in the scales, as I believe it should have been. I propose, therefore, to deal in turn with each of the three factors weighed by the High Court, but in a manner that gives appropriate weight to the nature of the offence.

The length of the delay

[40] The delay was extraordinarily long – thirty-seven years were to pass from the ending of the alleged acts of sexual violation to the making of a formal accusation. Yet as Kriegler J pointed out in *Sanderson*, the time involved is not a decisive factor in itself. Time is the triggering mechanism that initiates the enquiry, and also functions as an independent factor in the enquiry.

> "[T]ime has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation. . . . [One] should also remember that time is not really placed on the scale at all–it conditions all the factors, and they in turn diminish or intensify its significance."[33]

Kriegler J added:

> "I do not believe it would be helpful for our courts to impose . . . 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."[34] (Footnotes omitted.)

[41] The judgment in *Sanderson* points out that in determining reasonableness it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused.

[33] *Sanderson* above n 8 at para 28 and fn 41.

[34] Id at para 30.

When a permanent stay of prosecution is sought this societal interest will loom very large.[35] "The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum."[36] The judgment notes that "[w]e also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused."[37]

[42] Having underlined the societal dimension, however, the judgment goes on to state that these burdens—

> "are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the plaything of the State or of society."[38]

And, with reference to the present matter, I would add, of a private prosecutor. Indeed, it would be profoundly troublesome if people approaching their eighth decade of life could

[35] Id at para 36.

[36] Id.

[37] Id.

[38] Id.

suddenly, and without the most weighty justification, find themselves confronted with charges relating to events that had taken place forty years before.[39]

[43] With these considerations in mind, I turn to the question of the nature of the offence and its connection with responsibility for delay in lodging a charge.

Relevance of the nature of the offence

[44] In *Zanner v Director of Public Prosecutions, Johannesburg*,[40] the Supreme Court of Appeal had to deal with whether a ten year delay in instituting criminal proceedings for murder, called for a stay of prosecution. Writing for the majority, Maya AJA highlighted the importance of the nature of the crime in the balancing enquiry. She observed:

> "The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. . . . It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. . . .[41] Clearly, in a case involving a

[39] Appropriate justification has been found in the case of prosecutions for war crimes many decades after the event. See a recent decision from the Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v Kaing Guek Eav alias "DUCH,"* Decision on Request for Release, Case File/Dossier No 001/18-07-2007/ECCC/TC; Minow, *Between Vengeance and Forgiveness* (Beacon Press, Boston 1998) at 50, who emphasises the value of trials handling genocide and war-crimes such as those held in Nuremberg, and states that "[e]ven when marred by problems of retroactive application of norms, political influence, and selective prosecution . . . trials can air issues, create an aura of fairness, establish a public record, and produce some sense of accountability."

[40] *Zanner* above n 8.

[41] Section 18 of the CPA provides that:

> "The right to institute a prosecution for any offence, *other than* the offences of—
>
> (a) murder;

> serious offence such as [murder], the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."[42] (Footnote added.)

[45] Like murder, rape is one of the few crimes that the legislature has sought to exclude from the twenty year prescription period.[43] In *Masiya v Director of Public Prosecutions, Pretoria*,[44] Nkabinde J classified rape as "the most reprehensible form of sexual assault . . . a humiliating, degrading and brutal invasion of the dignity and the person of the survivor",[45] and observed that it was systematic, pervasive and overwhelmingly gender-specific, reflecting and reinforcing patriarchal domination.[46] She

---

> (b) treason committed when the Republic is in a state of war;
>
> (c) robbery, if aggravating circumstances were present;
>
> (d) kidnapping;
>
> (e) child-stealing;
>
> (f) rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
>
> (g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, or;
>
> (h) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
>
> (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,
>
> shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed." (My emphasis.)

[42] *Zanner* above n 8 at para 21.

[43] Section 18(f) of the CPA.

[44] *Masiya v Director of Public Prosecutions (Pretoria) and Others* [2007] ZACC 9; 2007 (8) BCLR 827 (CC); 2007 (5) SA 30 (CC).

[45] Id at para 36.

[46] Id at fn 78, Nkabinde J citing *S v Baloyi* [1999] ZACC 19; 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at para 12.

held that it was therefore imperative that courts strive to achieve the object of criminalisation of the act of rape, namely "to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights – a cornerstone of our democracy."[47] She further held that courts, when dealing with rape, should give due consideration to the fact that the crime "reflect[s] the unequal power relations between men and women in our society."[48]

[46] Rape often entails a sexualised act of humiliation and punishment that is meted out by a perpetrator who possesses a mistaken sense of sexual entitlement. The criminal justice system should send out a clear message through effective prosecution that no entitlement exists to perpetrate rape. When the legislature accepted that there should be no prescription period for prosecuting rape, it must have been aware of the difficulties of proof that would inevitably accompany prosecutions delayed for more than two decades. It would be particularly unfortunate, then, if the courts were in effect to usurp the legislative role and impose what amounted to a judicial statute of limitations by staying prosecutions simply because the effluxion of time had seen much evidence vanish.

[47] Child rape is an especially egregious form of personal violation. As law reports from other jurisdictions show, it is sadly found in all social classes in all parts of the

[47] Id at para 37.

[48] Id at para 28.

world. It is widespread, if under-reported, in South Africa.[49] By its nature it is frequently characterised by secrecy and denial. There is accordingly a special public interest in taking action to discourage and prevent the rape of children. Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eye-witness corroboration. Complainants should be encouraged rather than deterred when, breaking through feelings of fear and shame, they seek to bring to light past abuses against them.

[48] A notable feature of recent decades has been the manner in which adult women have through newly discovered insight found themselves suddenly empowered to come to grips with and denounce sexual abuse they had suffered as children. In *Van Zijl v Hoogenhout*, the appellant, at the age of forty-eight, sued her uncle for sexual abuse during eight years of her childhood. The issue to be determined was the date from which civil prescription would run. The appellant argued that the prescription period ran not from the dates of the commission of the crime, but rather from the date on which she

[49] See Seedat et al *Health in South Africa 5: Violence and injuries in South Africa: prioritising an agenda for prevention*, 25 August 2009, http://press.thelancet.com/saser5.pdf, accessed on 30 August 2009.

The following statistics are of relevance: Fifty-five thousand rapes of women and girls are reported to the police every year, which is estimated to be nine times lower than the actual number. Thirty-nine percent of girls report having undergone some form of sexual violence before they were eighteen. Eighty-four percent of rapes in the young age group are perpetrated by men who are known to the child, whether relatives, neighbours, friends, or acquaintances (compare the fact that 52% of adult rapes are perpetrated by a non-stranger). Exposure to trauma and violence during childhood can give rise to both re-victimisation and intergenerational cycling of violence. Id at 1-5. The report notes that "[r]evictimisation is a recognised occurrence in rape; girls exposed to sexual abuse as young children are at increased risk of being raped again in childhood, and of experiencing intimate partner violence as adults." Id at 3.

subjectively realised that a wrong had been done to her by her uncle. This contention was upheld in the Supreme Court of Appeal.[50]

[49] Deciding that a victim of childhood sexual abuse who acquired an appreciation of the criminal act during adulthood is able to sue the abuser within three years of gaining that appreciation, Heher JA observed:

> "Abused children have a right of recourse against their abusers. Until the 1980s the right was seldom invoked and, in South Africa, probably not at all. Major reasons were cultural or societal taboos (many abusers are close family members) and ignorance. Since then, the boundaries of understanding of the psyche of survivors of child abuse have been pushed back by expert studies of the problem and the true nature and extent of the effects of such abuse have . . . become better appreciated. As survivors have become more informed about their condition and rights and have received support from public interest groups, there has been an upsurge in claims, many by adults who initiated proceedings years after the actual incidents of abuse."[51]

[50] The Supreme Court of Appeal accepted that rape had the inherent effect of rendering child victims unable to report the crime, sometimes for several decades, and that the policy was not to penalise them for the consequences of their abuse by blaming them for the delay. Heher JA stated that the psychological studies that had been undertaken of the sexual abuse of children had revealed effects on the victims which were very different from those suffered by the usual plaintiff in a delictual action. He continued:

---

[50] *Van Zijl* above n 16 at paras 44-5.

[51] Id at para 1.

> "Of course, the prescription statutes in force in this country were drafted in ignorance of and without consideration for the special problems afflicting such survivors. Moreover, society as a whole was, during the period prior to 1980 (and certainly during the minority of the plaintiff) more conservative in matters involving sexual mores than it is now and considerably less willing to confront sexual matters. More people have become attuned, in the last fifteen years or so, to acknowledging the existence of child sexual abuse and to taking steps to eradicate it. The situation of a victim during the childhood of the plaintiff and a substantial part of her adult life was not conducive to disclosure. All these factors call for a peculiar sensitivity when applying statutory time limits to proceedings arising from sexual abuse committed against a child during the period in question."[52]

[51] The Supreme Court of Appeal went on to observe that the incidents in adulthood which counsel for the defendant had cited were consistent with the plaintiff's knowledge that the defendant had abused her. But they had been visceral reactions falling short of rational appreciation that he rather than herself had been the culpable party.

> "It [was] more likely that the plaintiff developed insight, and, with it, the meaningful knowledge of the wrong that sets the prescriptive process in motion, only when the

[52] Id at para 7. Evidence presented to the Court explained that sexual abuse in terms of four trauma-inducing factors – traumatic sexualisation, betrayal, powerlessness and stigmatisation – distorted a child's cognitive and emotional relationship with the world. At para 10, the Court stated:

> "Traumatic sexualisation is a process in which a child's sexuality is developed and shaped inappropriately and dysfunctionally at an interpersonal level. Betrayal involves the discovery by a child that someone on whom he or she is vitally dependent has caused the child harm. It can be experienced at the hands of an abuser or a family member who is unable or unwilling to protect or believe the child or who has a changed attitude to the child after disclosure of the abuse. Powerlessness develops through the repeated contravention of a child's will, desires and sense of efficacy. It is reinforced when children see their attempts to halt the abuse frustrated, and is increased by fear and an inability either to make adults understand or believe what is happening or to realise how conditions of dependency have trapped them in the situation. Stigmatisation referred to the negative connotations – badness, shame, guilt – that are communicated to the child and become incorporated into the child's self-image".

> progressive course of self-discovery [had] finally removed the blindfold she had worn since the malign influences which [had taken] over her psyche."[53]

[52] The judgment stated that expert evidence demonstrated that:

a) chronic child abuse was a crime of a very special kind, given the results that flow from it;
b) distancing of the victim from reality and transference of responsibility by the victim onto himself or herself were known psychological consequences; and
c) in the absence of some cathartic experience, such consequences could and often do persist into middle age despite the cessation of the abuse during childhood.[54]

[53] A similar approach was adopted by the Supreme Court of Appeal in *S v Cornick*.[55] In that matter the rapes for which the appellants had been convicted occurred in 1983, some nineteen years before the complainant laid charges against them. The complainant was then a child of fourteen and the appellants some four years older. The complainant testified that she did not realise until her mid-twenties that she had been raped. She attempted to bury the ordeal in the back of her mind, though she said that she had become

[53] Id at para 44.

[54] Id at para 14.

[55] Above n 16.

even more withdrawn a child than she had been before. She said that she had "lived a lie".[56]

[54] Upholding the convictions, Lewis JA stated that it was not improbable that a young woman who had tried to bury memories of a traumatic event for many years would not appreciate until her mid-twenties, at a time when discussion and publicity about rape had become common, the full extent of what had happened.[57] The Court went on to hold that the complainant's explanation for the delay in laying a charge was credible.

> "She did not appreciate the magnitude of what had happened to her. She did not realise that she had been raped. She knew only that something terrible had happened to her, and felt in some way responsible, complicit. She had let it happen and was therefore ashamed. The threat by Cornick the following day exacerbated her feelings of shame and humiliation. She was not in a position to discuss personal matters with her elderly and very conservative grandparents. She also felt she could not tell her mother. Sex was not openly spoken about in the community in which she lived. Rapes were not reported and discussed daily by the media as they are now."[58]

[55] The need for courts to give an effective response to rape, and especially the rape of young girls, has been emphasised throughout the world. Thus Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[56] Id at paras 12-3.

[57] Id at para 32.

[58] Id at para 35.

states that "[e]very woman shall be entitled to respect for her life and the integrity and security of her person."[59] Article 4(2) further states that:

> "State Parties shall take appropriate and effective measures to:
>
> (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
>
> (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women".[60]

[56] Similarly, the African Charter on the Rights and Welfare of the Child recognises in its Preamble—

> "that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security".

Article 16(1) goes on to provide that:

> "States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially . . . maltreatment including sexual abuse".

[59] Art. 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at http://www.achpr.org/english/women/protocolwomen.pdf.

[60] Id at art. 4(2).

[57] Courts in the Southern African region have been unequivocal in their denunciation of rape, more especially where children are involved. Thus the Namibian High Court, in *S v M*[61] endorsed the following statement:[62]

> "Brutality against the vulnerable in our society, especially women and children, has reached a crisis point. Small children have become the target of men who are unable to control their base sexual desires. What once may have been unthinkable had now become a quotidian occurrence – a fact which the learned magistrate, as he did, was entitled to take judicial notice of. These crimes against the vulnerable in our society evoke a sense of helplessness in the national character."

[58] Similarly, the Botswana Court of Appeal in *S v Montshwari*[63] underlined "the alarming increase in rape cases in Botswana and the gravity of the offence. Rape is a heinous offence. Apart from the violence invariably associated with it, the offence is a violation of the personality of the victim. Women require protection from such violations."[64] And the Zimbabwean High Court in *S v J*[65] observed that it had

---

[61] 2007 (2) NR 434 (HC).

[62] Id at para 16 citing *S v Kaayuka* 2005 NR 201 (HC) para 206F-I. See also *S v Rudath* [1999] NAHC 13 where the Namibian High Court stated that:

> "Rape is, by its nature, generally regarded as a vile and serious crime. The brutal sexual violation of a fellow being's physical integrity, human dignity, security of person and psychological well-being to satisfy the assailant's most primitive and bestial urges of lust, sexual domination and power should not be tolerated in any society – least in ours, which has constitutionally committed itself to the recognition and protection of the dignity, freedom and equality of all its members.
>
> Women, in general, have been the suffering prey of this crime for too long and too often. Those who have fallen victim to it have a legitimate expectation to seek just retribution against the offenders though our judicial system. Moreover, as a class of persons constituting a significant portion of society, women have the most immediate, compelling and direct interest that the courts of this country should impose deterrent sentences to discourage potential offenders. The Namibian society shares those sentiments. . . ."

[63] [2008] BWCA 67.

[64] Id at para 12.

"repeatedly stated that rape is the most heinous invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people."

[59] These decisions are consistent with the principles of the African charters referred to above. Law reports from further afield are replete with findings relating specifically to the question of lengthy delay in reporting sexual offences against young children. Thus in *R v L (W.K.)*[66] the Supreme Court of Canada held that a stay of prosecution should not have been issued by the trial court in a matter where a man was charged with having sexually assaulted his step-daughter and daughters over a period that had started thirty years before. A unanimous Court held:

> "It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse. The 1984 Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Report), vol. 1, explained at p. 187 that:
>
> > 'Most of these incidents were not reported by victims because they felt that these matters were too personal or sensitive to divulge to others, and because many of them were too ashamed of what had happened. . . . For three in four female victims and about nine in 10 male victims, these incidents had been kept as closely guarded personal secrets.'
>
> For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims

[65] [2004] ZWHHC 155; HH 155-2004.

[66] [1991] 1 R.C.S. at 1091.

would be required to report incidents before they were psychologically prepared for the consequences of that reporting."[67]

[60] In New Zealand the Court of Appeal in *W v Attorney-General*[68] observed:

"Approaching the question whether she made the connection between her sexual abuse and adult behaviour, or ought to have discovered that connection, as if it were an exercise akin to that of discovering cracks in a house foundation, does not demonstrate any great understanding of the subject or sensitivity to the psychological and emotional problems suffered by a woman in Ms W's position.[69]

. . . .

"Some women never complain. Others delay complaining for many years, if not decades. The reasons why women refrain from or delay in making a complaint may be subtle and difficult to comprehend, forming part of the rape trauma syndrome suffered by many women in the aftermath of rape or sexual assault.[70]

. . . .

"[W]hile there may be a public interest in granting certain classes of defendant statutory immunity from being sued after a defined time, there cannot be any public interest in protecting the perpetrators of sexual abuse from the consequences of their actions . . . the patent inequity of allowing these individuals to go on with life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose."[71]

[61] In *R v Smolinski*,[72] the Court of Appeal in England upheld an appeal on the facts against the conviction of a man who at the age of sixteen (twenty years earlier), had

[67] Id at 1100h-1101e.

[68] [1999] 2 NZLR 709.

[69] Id at para 37.

[70] Id at para 67.

[71] Id at para 79.

[72] [2004] EWCA Crim. 1270.

allegedly indecently touched two sisters aged six and seven when acting as their babysitter. Lord Chief Justice Woolf concluded:

> "We hope we have made clear two things in the course of hearing this appeal. One is that we discourage applications [for stay of prosecution] based on abuse [of process] in cases of this sort. Secondly, where evidence is given after so many years, the court should exercise very careful scrutiny at the end of the evidence to see whether or not the case is safe to be left to jury. If there is an appeal, then this court will scrutinise the situation with care. We are certainly not indicating that it is not right to bring prosecutions in the appropriate circumstances merely because of the period that has elapsed. As this Court appreciates, it is sometimes very difficult for young children to speak about these matters and therefore it is only many years later that they come to light. Justice must be done of course to a defendant, but the court must also be mindful of the position of the alleged victims."[73]

The nature of the offence

[62] A salient feature of the High Court's judgment in the present matter is that it gave insufficient weight to the nature of the offence, as highlighted in the above decisions. The allegations related to repeated acts of sexual violation of a schoolgirl over a couple of years by an admired and powerful friend of the family considerably older than herself.

[63] The special character of the offence has double significance. In the first place, if the findings and reasoning in *Van Zijl* and all the other cases referred to, are to be given any credence, her explanation for the delay would at least be plausible. In the absence of her credibility being tested through the normal trial processes of examination and cross-

[73] Id at para 13.

examination, the High Court was not in a position to make a definitive finding that she had been culpable for the delay. Nor is this Court. The fact is that if her account of what had happened is true, then the very conduct complained of could well have stifled her psychological and emotional capacity to declare openly what had happened. The main responsibility for the delay in laying the charge would then not have rested with her. It would have been attributable to the assaults that transformed her from a lively, successful young person into a deeply traumatised adult incapable for decades of comprehending the source of her woes.

[64] The crime as alleged in the present matter is of a peculiarly intimate and personally distressing character. According to Mrs Bothma, the sexual violations were repeated over a period of three years, starting when she was thirteen. Mr Els, a prominent businessman in the community, was a wealthy family friend and twenty-three years older than herself. He would arrange with her parents for her to come and visit him at his farm. He would arrive to pick her up in expensive cars and take her to the farm where they would stay alone (save for his domestic worker). If he had visitors, he would lock her in a room.

[65] Mrs Bothma submits that the nature of the offence is inextricably linked with the reason for the delay. She avers that she internalised the shame of the events, feeling guilt, betrayal and powerlessness, and fearing stigmatisation should she confide in anyone; she suppressed the memory of the rapes due to these feelings; her schoolwork

suffered and she became withdrawn; and the sense of "inner badness" persisted into her adult life where she endured three failed marriages, and was unable to find success in her business ventures. She adds that it was only after she received counselling during time spent in prison that she came to grips with and accepted the common thread underlying all the disasters in her adult life, namely, the treatment she had endured while still a child at the hands of Mr Els. It was then for the first time that she developed meaningful knowledge of the wrong that had been done to her.

[66] Without pronouncing on the veracity of her charges, it should be noted that there also exist strong public policy reasons for allowing the nature of the crime to weigh heavily in favour of allowing these charges to be aired in court. Adults who take advantage of their positions of authority over children to commit sexual depredations against them, should not be permitted to reinforce their sense of entitlement by overlaying it with a sense of impunity. On the contrary, the knowledge that one day the secret will out, acts as a major deterrent against sexual abuse of other similarly vulnerable children.

Trial prejudice

[67] I now repeat the High Court's findings on trial prejudice:

> "[Mr Els] has referred to the fact that he could not have committed the rape offences in 1968 at his present residence, as [Mrs Bothma] alleges, since he was not occupying that residence at the time. He also alluded to the fact that both his brother and his sister-in-

> law (i.e. his brother's wife) were now deceased. They could have attested to the fact that he had not been staying there, since his brother was busy renovating and refurbishing that residence for [him]. He furthermore alludes to the fact that his erstwhile domestic assistant, who would have been able to attest to the fact that [he] did not rape [Mrs Bothma as a child] over the weekends . . . is also now deceased. . . . Similarly, the lack of access to motor vehicle records dating back 40 years, to show that he did not possess a Mercedes or an E-type Jaguar at the time, as alleged by [Mrs Bothma], may also prejudice [him] in his trial. . . . In addition to those aspects there is of course the very real likelihood of fading memory, not only of [Mr Els], but also of any witnesses who may still be alive."[74]

On the basis of these observations the High Court held that it was of the view—

> "that [Mr Els] will undoubtedly be prejudiced and would not have a fair trial, given the considerable difficulties he faces in mounting a proper defence. . . . [T]hese obstacles are virtually insurmountable, given the irretrievable loss of documents and of witnesses who have since passed away."[75]

[68] These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice.[76] Irreparability should not be equated with irretrievability.

---

[74] *Els v Stals* above n 11 at para 18.5.

[75] Id at para 29.

[76] See *R v Carosella* [1997] 1 S.C.R. 80, where proceedings were brought against a teacher who had allegedly committed gross acts of indecency with the complainant when she had been in grades seven and eight, some twenty-seven years before. Notes taken by the Sexual Assault Crisis Centre during an interview with the complainant were shredded by the organisation as a general policy to prevent the Centre from being subpoenaed to produce such documents in criminal trials. This behaviour narrowly divided the Canadian Supreme Court. Stating that the shredding of the documents was the factor that distinguished the case, the majority upheld the stay of prosecution

Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained.

[69] Bearing these considerations in mind and before I evaluate the facts in this case, I will look at the manner in which South African courts have evaluated trial prejudice resulting from extensive delay.

---

ordered by the judge. Evaluating the shredding in a different way, L'Heureux-Dubé J for the minority observed at para 59:

> "The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person's guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases."

And at para 72:

> "While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial."

Later in para 72 she quoted the following passage from a judgment by McLachlin J:

> "[T]he Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair . . . What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice."

Trial prejudice in other matters

[70] In *Wild v Hoffert NO*[77] there had been a three-year delay between the applicants' initial arrest for drug trafficking and the trial because of repeated incidents of prosecutorial postponement. This Court held that while the delay had been unreasonable, no trial-related prejudice or exceptional circumstances existed, and a stay of prosecution was refused.[78]

[71] In *McCarthy v Additional Magistrate, Johannesburg*[79] the Supreme Court of Appeal per Farlam AJA, held that a permanent stay of prosecution is seldom granted in the absence of extraordinary circumstances or significant prejudice to the accused. In this case, the appellant was arrested three times over the course of three years for extradition to the United States to stand trial. The circumstances that presented handicaps to the appellant had not been proven, nor, conversely, was there proof that they would render the prosecution's task more difficult, in particular those handicaps relating to the availability of witnesses and their recollection of events. The Court held that the duty on the prosecution to prove its case beyond a reasonable doubt served as protection of the

[77] *Wild and Another v Hoffert NO and Others* [1998] ZACC 5; 1998 (6) BCLR 656 (CC); 1998 (3) SA 695 (CC).

[78] Id at paras 15-21 and 27-9. Kriegler J at para 6 pointed out that time was—

> "not merely a trigger to an enquiry as to prejudice. It remains the most important consideration throughout the enquiry, bearing on the other considerations and, in turn, being coloured by them. Furthermore, other than is the case in some comparable jurisdictions, no formal line is drawn in our law between particular time spans regarded as acceptable and those that do not pass muster. Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case, starting with the nature, gravity and extent of the prejudice suffered, or likely to be suffered, by the accused." (Footnotes omitted.)

[79] [2000] 4 All SA 561 (A).

fair trial rights of the accused and that any prejudice to the accused would be brought into this enquiry.[80]

[72] In *Naidoo v National Director Public Prosecutions*[81] the Cape High Court refused to grant a stay, holding that trial-related prejudice is not easy to establish and that it—

> "borders on the impossible for this Court [a court other than the trial court] to determine the impact of the loss of a witness, or the effect of the lapse of time on the reliability of the recall of events by witnesses. . . . The State faces the same prejudice and the extent of the prejudice can only be properly measured by the trial court hearing all the relevant evidence."[82]

[73] In *Zanner* the majority of the Supreme Court of Appeal per Maya AJA refused to grant a permanent stay of prosecution to a person accused of murder some ten years earlier.[83] The charge had been withdrawn, but when he was later accused of a second murder, the charge was reinstated along with the new charge. The accused applied for a permanent stay of prosecution on the grounds that the time delay had resulted in witnesses being unavailable and their memories of the events concerned having faded.[84] The Court held that although the time period was central to the enquiry of whether it was unreasonable, the fact of a long delay cannot of itself be regarded as an infringement of

[80] Id at paras 44 and 46.

[81] *Naidoo and Others v National Director of Public Prosecutions and Others* [2003] 4 All SA 380 (C).

[82] Id at 392H.

[83] Above n 8.

[84] Id at paras 7-8.

the right to a fair trial but must be considered in the circumstances of each case. The accused must show "definite and not speculative prejudice"[85] and in the absence of this, the trial court would have to consider any prejudice in adjudicating the case. The Court concluded that the accused had failed to demonstrate irreparable trial prejudice. The judgment then went on to highlight the importance of the nature of the crime.[86]

[74] One recent South African case where a stay was granted is *Broome v Director of Public Prosecutions, Western Cape.*[87] The applicants in that matter were accused of fraud allegedly committed between 1986 and 1994. In 1994, a governmental commission of enquiry seized audit files, documents, and records.[88] There was a seven-year delay between the conclusion of the investigation and the formal charge in 2004, which the Court found inexplicable and inexcusable. Most importantly, the state had been responsible for the loss of documents instrumental to the defence (the applicants had provided a detailed exposition of the material that was missing and a full explanation of the significance of the working papers), in addition to denying the applicants access to the documents. Because the case concerned an audit that had been conducted by many people, the applicants and any witnesses they might call could not be expected to remember everything that had occurred in the course of the audit. One of the accused

[85] Id at para 16.

[86] Id at para 21.

[87] *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town, and Others* 2008 (1) SACR 178 (C).

[88] The applicants were denied requested access to the documents in 1995 and 1996. In 1997, the investigative office in charge of the matter released a report disclosing the alleged offences and identifying the applicants as parties implicated in the fraudulent behaviour. Id at paras 10-6.

was old, and his memory was diminished. Witnesses had moved away or were untraceable, and those who remained could not remember the events clearly. In granting the permanent stay of prosecution, the Court concluded that—

> "[i]f, 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."[89]

[75] It is notable that in the only case where a stay was granted, it was the state that had been responsible for the loss of crucial documents.[90] 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. 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.

---

[89] Above n 87 at para 75.

[90] Id at para 71.

[76] In conclusion: the ordinary and expected effects of time-lapse are taken care of by prescription, which establishes an irrebuttable presumption of unfairness or impropriety in proceeding with a prosecution. That is not to say, however, that prescription is the only relevant factor in relation to the effects of pre-trial delay on the fairness of a trial. Each case would have to be looked at on its merits. The conduct of the prosecution could be highly relevant, particularly if it has led directly to the disappearance of crucial evidence. Loss of faculties to make a proper defence could be another factor. The dissipation of evidence through death of witnesses or disappearance of documents would also require consideration. Improper motives, such as a complainant having long delayed in initiating proceedings for purposes of blackmail or the making up of a stale misdemeanour purely to impede a competitor's career could impact so severely on the integrity of the administration of justice as to call for a stay of prosecution.

[77] Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shop-lifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay.

The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us "Molato ga o bole" (Setswana) or "ical'aliboli" (isiZulu) – there are some crimes that do not go away.

Balancing in the present case

[78] This is a poignant case with dark edges of tragedy. If Mrs Bothma's story is true, then she has spent her life as a deeply wounded person living with the consequences of her victimisation, only now in her late middle age being able to seek vindication and redress. If her story is not true, then an innocent man approaching his eightieth year has found himself wreathed in a cloud of possible disgrace, facing the agony of having to defend himself in public against grievously false accusations. At this stage we do not know where the truth lies. Indeed, the issue before us is not whether what she says is the truth or an invention. The question is whether she should be stopped from giving her account to enable a criminal court to decide. If her account is true, it indicates that she was subjected to predatory sexual violation over a long period of time in circumstances where she felt powerless and complicit in her own subjection. The implication of her averments is that it was the impact of the offence itself that was the underlying cause of the delay.

[79] There can be no doubt that the delay of almost four decades has created significant prejudice to Mr Els in making his defence. It is not that he claims that age has withered

or custom staled the vitality of his mind or memory. His argument is that the passage of time has robbed him of the ability to call witnesses and denied him the right to produce material evidence that would contradict the allegations made by Mrs Bothma.

[80] The first point to notice is that there has been no suggestion that Mrs Bothma herself has acted in any way to destroy evidence. Secondly, the lack of specificity in relation to the alleged rapes would be precisely the kind of information to be dealt with at the trial. Thirdly, no weight was given to the fact that Mrs Bothma also suffered prejudice, in particular, from being unable to call the domestic worker to corroborate her story.

[81] The key controlling element, as far as fairness of the trial is concerned, would be the presumption of innocence.[91] The gravity of the offence and the public interest in ensuring that perpetrators are brought to book can never in themselves justify a conviction if the evidence is insufficient.[92] In this respect, the contention by Mr Els's

[91] *McCarthy* above n 79 at para 46.

[92] See Sachs J in *S v Coetzee and Others* [1997] ZACC 2; 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC) at para 220:

> "There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be

counsel that the paucity of surviving evidence could result in an innocent man going to jail, cannot serve as a basis for stopping the proceedings in advance of the trial. The trial court will be obliged to give due weight to the evidential deficit facing Mr Els. In the words of L'Heureux-Dubé J in the Canadian Supreme Court:

> "Difficulty may well be experienced by an accused in gathering rebuttal evidence. [Yet] . . . the potential for such difficulty is likely one of the reasons why the prosecution bears the heavy onus of proving all aspects of guilt beyond a reasonable doubt. In that regard the criminal system has always taken into consideration that it will occasionally be difficult for an accused to demonstrate innocence, and has removed the need to do this, by putting a high onus of proof upon the Crown."[93] (Her emphasis.)

And should the trial court err, the court hearing an appeal should, in the circumstances of a case like the present, be especially attentive to ensuring that any doubt would favour the accused.[94]

[82] What this boils down to, however, will be that it is up to the trial court to ensure that Mr Els has a fair trial. It would be ill-advised at this stage to rehearse scenarios. The possibility exists that after Mrs Bothma has presented her evidence, an application could be made for a discharge on the ground that no prima facie case has been made out. It is not desirable to speculate on the different forensic permutations possible. What is sure is

---

> used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases." (Footnote omitted.)

[93] *Carosella* above n 76 at para 105.

[94] *Smolinski* above n 72.

that if the trial proceeds to its conclusion and all the available witnesses whom the parties wish to call are led, the trial court would be obliged to give due weight to all the difficulties that Mr Els would have had in presenting his evidence. If, bearing this in mind, his guilt is not proved beyond reasonable doubt, he must be acquitted.

[83] In summary then, the High Court erred in two major respects. In the first place, it failed to give appropriate weight to the nature of the offence. Had it done so, and had it paid sufficient attention to the import of decisions of the Supreme Court of Appeal, it could not have come to the firm conclusion that Mrs Bothma's explanations for the delay were unpersuasive and that she had been solely responsible for the lateness of her complaint. Given the nature of the alleged offence, it was simply not open to the High Court definitively to blame her for the delay in laying a charge, and use this finding as the basis for pre-empting the very trial that was to determine whether her delay had been reasonable; the conclusionary cart should not have been placed before the evidential horse.

[84] In the second place, it was incorrect of the High Court to assume that because some evidence had been irretrievably lost, the trial prejudice to which Mr Els would be subjected would be insurmountable.[95] In my view, the claim of delay-induced unavailability of evidence should have been seen not as establishing irrefutable proof of irremediable trial prejudice, but rather as constituting a significant factor that the trial

[95] See *Carosella* above n 76.

court will be obliged to take into account when considering the guilt or otherwise of Mr Els.

[85] The matter would have been different if Mrs Bothma had been responsible for the destruction of evidence. In these circumstances, the case for aborting the trial would have been powerful. Yet there is no suggestion on the record that she in any way contributed either to the demise of potential witnesses or to the loss of possible documentary exhibits. The fact is that the delay appears to have deprived both parties equally of supporting testimony. In the result, the High Court was faced with a classic case of bald allegation versus bald denial. One of the litigants was lying, the other telling the truth. The law has one time-honoured way of determining who should be believed, and that is through examination and cross-examination of oral evidence, and if after the evidence is tested in this way, the court has any reasonable doubt about where the truth lies, that doubt will entitle the accused to an acquittal.

[86] The High Court cannot be faulted for the manner in which it contextualised the issues, and within its frame of reference, it provided well-motivated reasons for coming to the conclusion it did. However, the frame it adopted was too narrow. First, it gave no scope for placing on the scale the nature of the offence and its significance in explaining the delay. Second, it provided too narrow a test for determining what would constitute irreparable trial prejudice. Moreover, the structure of the analysis directed the High Court towards deciding matters itself, which should have been left to the trial court.

[87] Accordingly, the appeal against the High Court order must succeed, and the stay of prosecution must be set aside.

Psychological reports

[88] As a result of this conclusion, it is not necessary to decide whether the psychological reports tendered on behalf of Mrs Bothma are admissible.[96] I have disregarded these reports in the preparation of this judgment.

Costs

[89] Mrs Bothma has asked that should her appeal succeed, costs be awarded in her favour in both the High Court and in this Court. In the event of her application being unsuccessful, however, she urges this Court to make no order as to costs. Mr Els, on the other hand, has requested that this Court make no order as to costs, whether he is successful or not. It is common cause that in the High Court proceedings Mrs Bothma

[96] In the High Court, Mrs Bothma submitted a report of a criminologist, Dr Sonnekus, which set out to explain that she had been inhibited through traumatic bonding with her assailant from making a complaint against him, and that only counselling in the protected environment of prison had enabled her to acknowledge the manner in which the repeated violations had affected her life and self-esteem. The High Court rejected the report in its entirety, regarding it as hearsay.

In this Court Mrs Bothma made two applications, first to admit a supplementary affidavit and then to submit a further supplementary affidavit. The first application was made on 25 June 2009 and the second on 28 July 2009. The supplementary affidavit sought to adduce facts regarding the reason for the time delay in instituting private prosecution. It dealt with the perceived culpability on the part of Mrs Bothma as found by the High Court, and also contended further that Mrs Bothma would also suffer trial prejudice due to the long delay.

The second supplementary affidavit included a report by, Mr Swanepoel, a psychiatrist, who gave his professional opinion that Mrs Bothma presented psychological conditions consistent with those suffered by victims of childhood sexual abuse, and that it was clinically well established that such victims may continue to hold themselves responsible for having been violated for many years afterwards.

was represented by a local firm of attorneys, and that in her application for leave to appeal to this Court she was represented by the Legal Resources Centre.[97]

[90] After upholding Mr Els's claim that the private prosecution should be permanently stayed, the High Court stated that ordinarily, where substantial constitutional issues were raised, an unsuccessful party ought not to be ordered to pay the costs of the successful party. It therefore made no order of costs against Mrs Bothma.[98] Now that the appeal against the stay of proceedings has succeeded, the question of costs in the High Court needs to be revisited, while the costs of the application for leave to appeal to this Court must also be considered.

[91] As with any award for costs, the award of costs in litigation between private parties where constitutional issues are raised is a matter which is within the discretion of the court considering the issue. It is a discretion which must be exercised judicially, having regard to all the relevant considerations.[99] The general principle as far as private litigation is concerned is that costs will ordinarily follow the result. This means that when parties initiate proceedings, they take the risk that if unsuccessful they will have to pay the costs of their opponents.

[97] The Legal Resources Centre is a not-for-profit organisation that specialises in constitutional litigation.

[98] Counsel stated from the bar that an order as to costs had been made against Mrs Bothma in relation to her unsuccessful attempt to have the evidence of Dr Sonnekus admitted, but that Mr Els had abandoned these costs.

[99] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 138.

[92] This general approach has been followed in a number of cases in this Court where constitutional issues had been raised in litigation between private parties. Usually these matters turned on the relationship between competing constitutional principles. The classic example was that of defamation, where the plaintiff would raise dignity and privacy interests, and the defendant would rely on free speech; see for example, *Khumalo v Holomisa*.[100] In *Laugh It Off Promotions CC v South African Breweries*[101] the issue was trademark property protection versus freedom of speech. In both these matters costs followed the result.

[93] There have, however, been exceptional cases where no order as to costs has been made. A factor that has loomed large in justifying this departure from the general rule has been the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order.

[94] In constitutional litigation between the state and private parties, this consideration is normally decisive. As we stated recently in *Biowatch Trust v Registrar, Genetic Resources*[102] the general rule in these cases is that successful private parties should receive their costs, while unsuccessful parties should not be ordered to pay the costs of the state. The rationale for this approach is three-fold:

---

[100] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (8) BCLR 771 (CC); 2002 (5) SA 401 (CC).

[101] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2005 (8) BCLR 743 (CC); 2006 (1) SA 144 (CC).

[102] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14, Case No 80/08, 3 June 2009, as yet unreported at para 23.

> "In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door." (Footnote omitted.)

[95] The first two factors could also have relevance to the determination of costs awards in private litigation involving constitutional issues. They are the chilling effect an adverse costs order might have; and the broader implications of most constitutional litigation. Taken together, they highlight the importance of considering the public interest dimension, and could influence a decision as to whether there should be an exception to the general rule set out above.

[96] The clearest example of what this Court regarded as an exceptional case is *Campus Law Clinic v Standard Bank of South Africa*,[103] where a public interest NGO sought unsuccessfully to intervene in a dispute between a bank and a mortgagor. The Court did not award costs as asked for by the bank, because the Campus Law Clinic sought in the public interest to raise important constitutional issues, albeit unsuccessfully.

[97] A similar approach was adopted in *Barkhuizen v Napier*.[104] In that matter, a private person had unsuccessfully sought to appeal against a decision of the Supreme Court of Appeal rejecting a challenge on constitutional grounds to a contractual time-bar which had prevented him from suing an insurance company. The challenge was to the constitutional validity of onerous provisions in small print in standard-form contracts. Ngcobo J, writing for the majority, overturned a costs award that had been made against the applicant in the Supreme Court of Appeal, and made no award for costs in this Court, even though the applicant had failed in both Courts. He stated that:

> "This is not a case where an order for costs should be made. The applicant has raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of these issues is beneficial not only to the parties in this case but to all those who are involved in contractual relationships. In these circumstances, justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling

[103] *Campus Law Clinic (University of KZN Durban) v Standard Bank of SA Ltd and Another* [2006] ZACC 5; 2006 (6) BCLR 669 (CC); 2006 (6) SA 103 (CC) at para 28.

[104] [2007] ZACC 5; 2007 (7) BCLR 691 (CC); 2007 (5) SA 323 (CC).

> effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs, both in this Court and in the courts below."[105]

[98] The circumstances in the present matter are different. Mr Els's application was made on an interlocutory basis with a view to interrupting proceedings and pre-empting a private prosecution. Criminal proceedings in the Regional Court were accordingly postponed, and a separate civil action was brought in the High Court to permanently stay the criminal proceedings. The proceedings in effect sought to deny Mrs Bothma the opportunity to establish at the trial a factual explanation for her long delay in laying a complaint. They were premature. It should be noted, too, that it was Mrs Bothma who, while fending off the application for a permanent stay, successfully raised the new constitutional issue upheld by this Court.

[99] Thus, while this matter has raised important constitutional issues and may be regarded as a borderline case insofar as costs are concerned, it is not one where the circumstances are so exceptional as to warrant a departure from the general rule. It is appropriate, therefore, that costs should follow the result. Costs in this Court are to include the costs of the employment of two counsel.

Order

[100] The following order is made:

[105] Id at para 90.

1. The application for leave to appeal directly to this Court is granted.

2. The appeal succeeds.

3. The order of the Northern Cape High Court, Kimberley, case number 812/2008, is set aside and replaced with the following order:

   "The application is dismissed with costs."

4. The first respondent is ordered to pay the applicant's costs in this Court, including the cost of two counsel.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J, and Van der Westhuizen J concur in the judgment of Sachs J.

Counsel for the Applicant:	Advocate JJ Gauntlett SC and Advocate F Pelser instructed by Towell & Groenewalt.
Counsel for the First Respondent:	Advocate JG Cilliers SC instructed by Engelsman Magabane Inc.