CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 232/17 and CCT 207/18

Case CCT 232/17

In the matter between:

TSHIDISO RAMABELE Applicant

and

THE STATE Respondent

Case CCT 207/18

In the matter between:

MCDONALD MSIMANGO First Applicant

SIBUSISO MSIMANGO Second Applicant

MESCHACK SITHOLE Third Applicant

MZALA SITHOLE Fourth Applicant

CHARLES SITHOLE Fifth Applicant

RISE MSIMANGO Sixth Applicant

CHRISTIAAN LUNGA Seventh Applicant

CLEMENT NKHI Eighth Applicant

and

THE STATE First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

Neutral citation: *Ramabele v The State; Msimango v The State* [2020] ZACC 22

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Majiedt J, Mhlantla J, Tshiqi J and Victor AJ

Judgments: Mhlantla J (unanimous)

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 September 2020

Summary: Fair trial rights — postponement for legal representation of choice — judicial bias — unreasonable delays — section 342A of the Criminal Procedure Act 51 of 1977

ORDER

On appeal from the High Court of South Africa, Free State Division, Bloemfontein. The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Majiedt J, Tshiqi J and Victor AJ concurring):

Introduction

[1] Two applications were lodged in this Court, comprising an application by Mr Tshidiso Ramabele (Mr Ramabele) and another one by Mr McDonald Msimango (Mr Msimango), as well as Messrs Sibusiso Msimango, Meshack Sithole, Mzala Sithole, Charles Sithole, Rise Msimango, Christiaan Lunga and Clement Nkhi (collectively referred to as the applicants or accused and, where necessary, the latter are the Msimango applicants). The applicants were tried together with others in a lengthy criminal trial[1] held at the High Court of South Africa, Free State Division, Bloemfontein.[2] The applicants now seek leave to appeal against the judgment and order of the High Court, in terms of which the High Court convicted them of various charges of racketeering, theft and the acquisition, possession or disposal of unwrought gold. The applicants are presently serving various sentences of imprisonment ranging from 10 to 15 years. They have approached this Court to seek an order setting aside their convictions in respect of these offences.

[2] Although the two applications in this Court were lodged separately, the applicants were co-accused and tried together in the trial Court. The grounds of appeal

[1] In the trial, the accused were Sibusiso Msimango (accused 1); Rise Msimango (accused 3); McDonald Msimango (accused 4); Meshack Sithole (accused 7); Mzala Sithole (accused 8); Christiaan Lunga (accused 11); Clement Nkhi (accused 12); Tshidiso Ramabele (accused 13); and Charles Sithole (accused 14).

[2] *Director: Public Prosecutions Free State v Msimango*, unreported judgment of the Free State High Court, Bloemfontein, Case No 100/2008 (15 October 2014) (High Court judgment).

are similar. Therefore, the applications were consolidated and considered at the same time.[3] This matter was determined without oral argument.

Background

[3] In February 2002, a South African Police Service directive established the National Investigating Task Team. The task team executed a project dubbed "Project Fat Cats". Four teams were established across South Africa in Welkom, Klerksdorp, Johannesburg, and Rustenburg. The main focus of the project was to identify the most prominent gold and platinum smugglers in mining areas. The applicants and their co-accused were identified by the Klerksdorp team led by the investigating officer, Officer Flynn, as having been part of a gold smuggling enterprise. It was alleged that some of them were in charge of operations and activities and were involved in the refining and selling of unwrought gold.

[4] The first applicant, Mr Msimango, was alleged to have been one of the prominent participants in the syndicate and to have concealed the true ownership of some assets. The others were alleged to have assisted the syndicate as smelters of unwrought gold that was alleged to have been stolen from a mine by mineworkers and transported by some of the accused to secret locations for sale. Another allegation concerned money laundering activities by this group. The gold refining and money laundering activities were conducted from 1998 to 2008. The applicants and their associates were eventually arrested on different dates between 2006 and 2010. Some were found at smelt houses and in possession of large amounts of cash and others had purchased immovable properties and motor vehicles in excess of R 3 million.

[5] The applicants, together with their co-accused, were charged with 133 counts, in particular, for contravening sections 2, 4, 5 and 6 of the Prevention of Organised Crime

[3] According to the directions issued by this Court, dated 22 October 2018, "the applications are to be treated as if consolidated".

Act (POCA),[4] sections 143 and 145 of the Mining Rights Act,[5] as well as section 4 of the Precious Metals Act.[6] The charges related to procuring, refining and disposing of unwrought precious metals (gold) for the benefit of the enterprise and its associates and laundering the benefits or profits into the financial system by purchasing motor vehicles, luxury items and immovable property through an enterprise. The charges also included predicate offences such as theft.

Litigation history

High Court

[6] At the commencement of the trial, all the accused pleaded not guilty and elected not to disclose the basis of their defence. The criminal proceedings, including the actual trial, spanned for a period of six years, from 2008 to 2014, and 82 state witnesses testified. The trial, which commenced in June 2012 was postponed numerous times, mostly at the instance of the accused. They repeatedly requested that the trial be postponed to enable them to obtain a legal representative of their choice or due to financial constraints. The accused were initially represented by Advocate Nel. In February 2014, Advocate Nel withdrew as their legal representative due to the applicants' failure to pay for his services. The High Court, per Daffue J, then made arrangements with the Bloemfontein Justice Centre to provide legal assistance to the accused.

[7] An advocate confusingly also called Advocate Nel, then began to act for the accused in March 2014. To avoid confusion, the High Court referred to the second Advocate Nel as Mr Pieter Nel and I will do the same. The accused, however, terminated Mr Pieter Nel's mandate in early June 2014 while he was cross-examining the last witness for the State, Officer Flynn. The accused stated that they were in the process of raising funds and wished to re-engage their previous legal counsel. The High

[4] 121 of 1998.

[5] 20 of 1967.

[6] 37 of 2005.

Court granted another postponement but when the applicants again appeared unrepresented, the High Court allowed evidence to be led and the State closed its case on 25 June 2014.

[8] The accused did not cross-examine the state witness and refused to testify in their defence. Instead, they sought a postponement for a period of eight months until February 2015 to allow them to raise funds to obtain a legal representative of their choice. This was refused. On 28 July 2014, the State requested the Court to invoke the provisions of section 342(A)(3)(d) of the Criminal Procedure Act[7] (CPA), and close the accused's cases on their behalf. The trial Court refused but postponed the trial for two weeks to allow the accused to consider their position. On 11 August 2014, and when the accused persisted with their application for a postponement of the trial, the trial Court held that the unreasonable delays constituted exceptional circumstances as required by section 342(A)(3)(d) and (4)(a) and accordingly, it issued an order that the accused's cases were deemed closed.

[9] As a result, the evidence adduced on behalf of the State was the only evidence that was before the High Court as the accused failed to testify. The High Court held that the accused's defence amounted to a bare denial. It evaluated evidence from the State witnesses, who for the most part were members of the task team, in relation to the following aspects, among others:

(a) eye-witness accounts of some of the accused being seen with packages containing pieces of unwrought gold on farms near the mine;
(b) eye-witness accounts and arrests following observations of illegal gold refining by the task team;
(c) notebooks belonging to the accused containing notes about the gold syndicate;
(d) the accused being in possession of large amounts of cash;

[7] 51 of 1977.

(e) large amounts of money deposited in the banking accounts of the accused, in spite of the fact that many of the accused were unemployed or employed in low-income jobs;
(f) the value and time of purchase of assets held by the accused; and
(g) the tax records of the accused.

[10] After evaluating the evidence, the High Court held that the applicants were involved in illegal activities at certain smelt houses where gold refining had been conducted, and in money laundering activities, in the course of which certain immovable properties and vehicles had been acquired. The High Court found the applicants guilty in respect of some of the charges. Mr Ramabele was found guilty on various counts including: racketeering; and unlawful acquisition, possession, or disposal of unwrought gold. On 17 October 2014, he was sentenced to an effective term of 10 years' imprisonment. Mr Msimango was found guilty on numerous counts including: racketeering; managing and participating in an enterprise; 15 counts of money laundering; various counts of theft; and unlawful acquisition, possession, and disposal of unwrought gold. A sentence of 15 years was imposed in respect of the conviction relating to racketeering. The sentences in respect of the other convictions were ordered to run concurrently with the 15-year term.

[11] The applicants and some of their co-accused, lodged an application for leave to appeal to a Full Court of the High Court. This was refused.[8] They then petitioned the Supreme Court of Appeal for leave to appeal.

[12] On 31 October 2014, the State applied to the High Court for leave to appeal against sentence. The High Court granted leave to appeal to the Supreme Court of Appeal.

[8] *Director: Public Prosecutions Free State v Msimango* unreported judgment of the Free State High Court Bloemfontein, Case No (100/2008) [2015] (27 March 2015) (High Court leave to appeal judgment).

Supreme Court of Appeal

[13] The applicants' petition for leave to appeal was dismissed. Mr Ramabele then lodged an application for the reconsideration of the order in terms of section 17(2)(f) of the Superior Courts Act.[9] That application was dismissed on 12 September 2016 on the basis that there were no exceptional circumstances that would justify leave to appeal being granted. Notably, the Supreme Court of Appeal did not have the benefit of perusing the record.

[14] On 3 November 2017, the Supreme Court of Appeal dismissed the State's appeal. The Minister of Justice and Correctional Services, the second respondent, applied to the Supreme Court of Appeal for leave to appeal and that application was similarly dismissed on 3 May 2016.

In this Court

[15] Initially in 2017, in CCT 232/17, when Mr Ramabele filed an application for direct access to this Court, he was unrepresented.[10] Consequently, this Court requested pro bono representation for him from the Free State Bar. Advocate Wright and Advocate Nkhahle were appointed. This Court is grateful for their assistance. Mr Ramabele's legal representatives were furnished with a copy of the record with the assistance of this Court. On 2 May 2018, we also issued directions inviting the parties to file supplementary affidavits and submissions should they so wish. Pursuant to the directions, the applicant filed a supplementary affidavit and written submissions. The respondent filed an answering affidavit and written submissions. The applicant's submissions echoed his founding affidavit in that they reiterated alleged problems regarding the trial proceedings in the High Court and reinforced the arguments made in the applications he had filed as an individual, and together with his co-accused.

[9] 10 of 2013.

[10] The application was couched as an application for direct access to this Court but was actually an application for leave to appeal.

[16] In CCT 207/18, when the Msimango applicants learnt that Mr Ramabele had already filed a similar application, they wrote to the Registrar of this Court on 27 February 2018 seeking the Court's direction on how to proceed with this matter. They sought to mitigate the cost and resources of providing a voluminous record for, and adjudicating, the two similar matters separately. They were advised by this Court that their application would be considered together with CCT 232/17 (the Ramabele application). The Msimango applicants had a legal advisor, Mr André Steenkamp, who agreed to assist them with their application to this Court on a pro bono basis. We thank him for his assistance.

Applicants' submissions

[17] Mr Ramabele submits that his right to a fair trial, in particular section 35(3) of the Constitution, has been infringed in various ways. First, he submits that there was insufficient evidence against him to warrant a conviction as there was no camera footage of him stealing the gold. Second, he submits that the trial Judge did not properly analyse or evaluate the evidence of several state witnesses who testified during the trial, and whose testimony supported his innocence. Third, the trial Judge was biased and this is demonstrated by his refusal to grant the applicant a postponement to allow him to prepare his defence, in spite of the fact that the High Court had granted numerous postponements to the State between 2008 and 2014. In this regard, the applicant also asserts that the trial Judge failed to explain the implications of section 342A of the CPA to him.

[18] Furthermore, Mr Ramabele submits that: (a) he was not allowed an opportunity to gather finances to pay a legal representative of his choice and to ensure continued representation to assist him in cross-examining the investigating officer, to guide him in his own testimony or to argue the merits of his case; (b) section 342A(3)(d) of the CPA was not explained to him so that he could properly oppose the State's case; and (c) he was denied an opportunity to appropriately present his case through leading evidence and to challenge the weight accorded to circumstantial evidence, the elements of various crimes, the burden of proof in terms of section 155 of the Precious Metals

Act and the intricacies of POCA. The applicant and his co-accused terminated their legal aid representative's mandate before cross-examining the witnesses. They were therefore unrepresented when the time came for them to cross-examine the witnesses and were thus unable to cross-examine those witnesses due to their lack of representation and understanding of legal principles. Finally, the applicants submit that the trial Judge was unhelpful in this regard which, in turn, was detrimental to their case.

[19] The Msimango applicants submit that that their right to a fair trial, including their right to appeal to a higher court, was compromised. Their argument is similar to the one raised by Mr Ramabele. They argue that the manner in which the provisions of section 342A(3)(d) of the CPA were applied was unfair and unjust. They also submit that the trial Judge did not properly explain the provisions of section 342A(3)(d) and the subsequent implications to the applicants. And that to this end, the trial Judge did not assist the unrepresented, indigent and lay accused persons, who did not understand the application and its implications of legal principles when they were required to address the High Court on section 342A. The State therefore gained an unfair advantage against the applicants that is contrary to the constitutional principle of "equality of arms".

[20] Moreover, the Msimango applicants submit that the High Court's refusal to allow them to consult and obtain the services of the legal representatives of their choice was not judicious and that the services of Mr Pieter Nel were forced on them in a bid to ensure that "the trial matter be finalised". The trial Judge did not consider the reasons why the applicants terminated Mr Pieter Nel's services. They contend that the trial Judge erred in finding that they had employed delaying tactics and were unconcerned with finalising the matter. The trial record was voluminous and the trial Judge was in a rush to finalise the matter which did not allow the applicants an opportunity to be properly represented. The applicants were unable to cross-examine the state witnesses in circumstances where the trial Judge knew that they were untrained, unschooled, unsophisticated people who could not defend themselves considering the complexity of the trial. As a result, they allege that they were deprived of an opportunity to put up an

effective defence, as envisaged by the Constitution which guarantees fair and just trial procedures.

[21] Together, the applicants submit that these instances reveal that their section 35 rights to a fair trial were infringed insofar as they did not have adequate time and facilities to prepare a defence; to choose and be represented by a legal practitioner of their choice, and to be informed of this right promptly; to adduce and challenge evidence; to be tried in a language they understood or if that was not practicable, to have the proceedings interpreted in their language; their right of appeal to, or review by, a higher court was compromised as per sections 35(3)(b), (f), (k), (i) and (o) respectively as well as section 35(4). Lastly, the applicants contend that their section 9(1) right to equality and equal benefit and protection of the law was infringed.

Respondent's submissions

[22] The respondent submits that the application should be dismissed as no constitutional issue was raised in the High Court and Supreme Court of Appeal, and the requirements for the grant of direct access in this Court have not been met. Alternatively, the respondent submits that, if this Court finds that a constitutional issue has been raised by the applicant, the following factors are relevant: (a) the same grounds of appeal were considered by the High Court and the Supreme Court of Appeal and leave to appeal was denied; (b) the applicants had a fair trial and were not prejudiced by the absence of a legal representative at the later stage of the trial, bearing in mind that they were granted several opportunities to obtain a legal representative; (c) they suffered no prejudice and their defence throughout the trial was merely one of denial; and (d) the High Court did not err on the law or facts by convicting the applicants.

[23] The respondent submits that the delay was entirely due to the fault of the applicants. Their first appearance was on 28 November 2008 and the trial was set to begin in March 2009. The applicants brought a separate application in the High Court for legal fees to be made available following an order of restraint against realisable

property. This application resulted in the trial only beginning in June 2012. The respondent contends that the applicants had sufficient time during this period to raise funds for litigation. Furthermore, the suggestion to conduct the trial in a "piecemeal fashion" was balanced against the rights of the erstwhile accused 5 and 9 who had been in custody for six years since 2008. The respondent claims that the right to a fair trial must be considered in light of the circumstances of the trial. It was in the interests of justice for the matter to be finalised, especially considering the long delays which had already occurred.

[24] Finally, the respondent submits that the applicants refused to make admissions in order to shorten the trial and lengthy cross-examinations on facts that later became common cause, and that this in effect lengthened the trial. The prosecutor served a notice in terms of section 212B of the CPA on the defence in relation to undisputed facts.[11] This was ignored by Advocate Nel but later accepted by Mr Pieter Nel after

[11] Section 212B provides:

> "Proof of undisputed facts:
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> (1) If an accused has appointed a legal adviser and, at any stage during the proceedings, it appears to a public prosecutor that a particular fact or facts which must be proved in a charge against an accused is or are not in issue or will not be placed in issue in criminal proceedings against the accused, he or she may, notwithstanding section 220, forward or hand a notice to the accused or his or her legal adviser setting out that fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact will be placed in issue.
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> (2) The first-mentioned notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused or his or her legal adviser personally at least 14 days before the commencement of the criminal proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon by the accused or his or her legal adviser and the prosecutor.
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> (3) If any fact mentioned in such notice is intended to be placed in issue at the proceedings, the accused or his or her legal representative shall at least five days before the commencement or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon with the prosecutor deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect in which case the registrar or the clerk of the court shall record such notice.
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> (4) If, after receipt of the first-mentioned notice contemplated in subsection (1), any fact mentioned in that notice is not placed in issue as contemplated in subsection (3), the court may deem such fact or facts, subject to the provisions of subsections (5) and (6), to have been sufficiently proved at the proceedings concerned.
>
> (5) If a notice was forwarded or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of

consulting with the applicants and their associates. The respondent contends that the charges were straightforward and not technical and the High Court applied the principles of law in considering the evidence as a whole. The matter has a six-year history and the record should be considered in this context.

Issues

[25] This Court must determine the following issues:

(a) Condonation.

(b) Leave to appeal.

(c) Fair trial: Refusal to grant further postponement for legal representation of choice.

(d) Bias.

(e) The implementation of section 342A of the CPA.

Condonation

[26] Mr Ramabele's application was filed in this Court in September 2017. It is out of time by approximately 14 months. Mr Ramabele states that, after his application for reconsideration was refused, he tried to raise funds with the assistance of his family to instruct an attorney, but to no avail. He was subsequently advised to approach the Bloemfontein Justice Centre. The Bloemfontein Justice Centre initially agreed to help, but later informed him that it did not fund applications to the Constitutional Court. Furthermore, the delays are occasioned by the fact that he is incarcerated.

[27] The application for the Msimango applicants was lodged in July 2018. Due to financial constraints, the Msimango applicants submit that they struggled to obtain the

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the reaction thereto, if any, and the court shall thereupon institute an investigation into such of the facts which are not disputed and enquire from the accused whether he or she confirms the information given by the prosecutor and whether he or she understands his or her rights and the implications of the procedure and where the legal adviser of the accused replies to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not.

(6) The court may on its own initiative or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4)."

full record and appoint legal representatives. Eventually, their legal advisor agreed to assist them with their application to this Court where possible, despite the fact that applicants lacked sufficient funds. Their incarceration in different correctional centres around the country made outside communication and consultations difficult and they were assisted by family and friends to brief their current counsel. As mentioned above, when they became aware that Mr Ramabele had already filed a similar application, the Msimango applicants wrote to the Registrar of this Court on 27 February 2018 seeking a directive on how to proceed with this matter.

[28] On the other hand, the respondent opposes the condonation application. It argues that the applicants have flouted the rules of the High Court, the Supreme Court of Appeal, and this Court, and it is not in the interests of justice to grant condonation.

[29] In my view, the explanation for the delay is satisfactory. The applicants are incarcerated in various correctional centres across the country and the logistical problems would indeed prove very difficult for them to consult with their legal team. Furthermore, they experienced financial constraints due to the fact that they are sentenced prisoners.

Jurisdiction and leave to appeal

[30] It is trite that for leave to appeal to be granted, an applicant must show that the matter falls within the jurisdiction of this Court and that the interests of justice warrant the granting of leave.[12] This Court's jurisdiction is engaged when a matter raises a constitutional issue or an arguable point of law of general public importance that ought to be considered by this Court.[13]

[31] The applicants have approached this Court, on a variety of fronts, to vindicate their rights to a fair trial in terms of section 35 of the Constitution coupled with the right

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[12] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 35.

[13] Section 167(3)(b)(i) and (ii) of the Constitution.

to equality, in particular equal protection and benefit of the law pursuant to section 9(1) of the Constitution.

[32] The right to a fair trial has been described by this Court as a "comprehensive and integrated right"[14] and is "not to be equated with what might have passed muster in our criminal courts before the Constitution came into force".[15] This Court has indicated that a matter engages this Court's jurisdiction when it implicates the rights to equality before the law and to a fair trial, as these are fundamental rights entrenched in the Bill of Rights.[16]

[33] However, the issues relating to whether there was sufficient evidence, and whether the trial Judge properly analysed the evidence of several state witnesses, falls outside the scope of this Court's jurisdiction. This is because mere factual disputes do not amount to "constitutional matters" as envisaged by section 167(3)(b)(i).[17] Disagreements with other courts as to the assessment of facts are not sufficient to constitute a breach of rights in the Bill of Rights, and no constitutional right is engaged when applicants dispute the findings of fact made by lower courts.[18]

[34] But, an issue concerning judicial bias constitutes a constitutional matter since "the impartial adjudication of disputes in both criminal and civil cases is a 'cornerstone of any fair and just legal system"[19] and "an impartial judge is a fundamental prerequisite

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[14] *S v Dzukuda; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078; 2000 (11) BCLR 1252 (CC) at para 9.

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

[16] *S v Mhlongo; S v Nkosi* [2015] ZACC 19; 2015 (2) SACR 323 (CC); 2015 (8) BCLR 887 (CC) at para 17 and affirmed in *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 13. Although these cases were raised in the context of extra-curial statements by an accused against a co-accused in a criminal trial, they are equally apposite in this context.

[17] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR (CC) 36 at paras 15 and 39.

[18] Id at para 15 where this Court noted that "whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter . . . disagreement with the [High Court's] assessment of the facts is not sufficient to constitute a breach of the right to a fair trial".

[19] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 21. See further, in the context of recusals, *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 2 and *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4)

for a fair trial".[20] Furthermore, when it comes to the issue of unreasonable delays in criminal proceedings, this Court has accepted that "[t]he right to a trial within a reasonable time is expressly cast as an incident of the right to a fair trial".[21] Therefore, given these specific issues, this Court's jurisdiction is engaged as this matter raises constitutional issues.

[35] I turn to the interests of justice enquiry, which involves the weighing up of various factors where reasonable prospects of success are not determinative but carry more weight than other factors.[22] The other factors include the nature of the dispute, the importance of the issue and whether a decision by this Court is desirable.[23] While this Court has pronounced on the importance of unreasonable delays in criminal proceedings in terms of section 25(3)(a) of the interim Constitution and section 35(3)(d) of the Constitution,[24] it is yet to properly engage with section 342A of the CPA. In *Wild*[25] this Court said:

> "Commendably, the Legislature has taken a major step in remedying the scourge of delays in criminal cases by furnishing criminal courts with practical tools that can be

SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 30 where this Court held that the application for recusal raised a constitutional matter. See further *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson 2*) at para 26 which states that:

> "As far as criminal trials are concerned, the requirement of impartiality is also closely linked to the right of an accused person to a fair trial, which is guaranteed in section 35(3) of the Constitution."

[20] *S v Le Grange* [2008] ZASCA 102; 2009 (2) SA 434 (SCA) at para 21.

[21] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at paras 21 and 28. Reiterated in *Van Heerden v National Director of Public Prosecutions* [2017] ZASCA 105; 2017 (2) SACR 696 (SCA) at para 47.

[22] *General Council of the Bar of South Africa* above n 12 at para 36.

[23] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 31; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 28; *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14; *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-6.

[24] *Sanderson* above n 21 and *Wild v Hoffert NO* [1998] ZACC 5; 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC) at paras 31 - 32.

[25] *Wild* above n 24.

> used in furthering the speedy trial objectives of section 25(3)(a). A new section 342A has been introduced. . . . Although this is neither the time nor the place to comment in detail on the section, the novel provisions of which will have to be interpreted and applied by courts other than this one, it can and should be observed that proper application of such provisions could materially contribute to protection of an accused person's rights under section 25(3)(a) . . . . The interpretation of the new section and its practical application in the administration of the criminal justice system will be worked out by the courts over time. In doing so they will have to be mindful of the constitutional context created by section 25(3)(a) of the Interim Constitution (and its successor in the Final Constitution, section 35(3)(d))".[26]

[36] It may, therefore, be worthwhile for this Court to engage with this novel provision, examine how other courts have grappled with it thus far, and consider its impact on criminal proceedings and the criminal justice system more broadly.[27] Thus, it is in the interests of justice to grant leave to appeal.

Merits of appeal

[37] Following a thorough reading of the record, I am of the view that the applicants' allegations, that they did not have a fair trial, have no merit for the reasons provided below.

Application for postponement for legal representation of choice

[38] Insofar as the application for the postponement is concerned, the record revealed the following: The matter, and eventually the trial itself, was postponed on numerous occasions – either at the instance of the defence or that of the State. The parties agreed that the first trial dates be from 2 to 31 March 2009 and 2 to 29 May 2009. However, it was brought to the attention of the trial Court that the legal representatives had not been properly placed with the requisite funds to enable them to proceed to act for the

[26] *Wild* above n 24 at para 32.

[27] *Sanderso*n above n 21 at para 24 states that:

> "The right to a trial within a reasonable time also seeks to render the criminal justice system more coherent and fair by mitigating the tension between the presumption of innocence and the publicity of trial."

applicants and their co-accused. This led to the trial being postponed for a year and the parties agreed that the trial would be heard from 27 July 2010 to 30 September 2010. The defence wanted to apply for funds to be made available for their legal expenses from those funds that had been part of the preservation order. This resulted in the trial being postponed again. The application for funds to be made available was heard in 2011. A new trial date was arranged from 11 June 2012 to 3 August 2012.

[39] The trial eventually commenced on 11 June 2012. Due to the complexity and magnitude of the case, it became apparent that the trial would not be concluded within the allocated period. On 3 August 2012, it was agreed that the continuation of the trial would be conducted from April to August 2013. Initially, the applicants had engaged their own legal team consisting of an attorney Mr Schoeman and Advocate Nel. The State called 82 witnesses, and most of these were cross-examined by Advocate Nel. During May 2013, it appeared that the applicants would not be able to retain the legal services of Advocate Nel due to lack of funds. This crisis was averted when the defence team managed to secure funds and the trial continued until its postponement on 23 August 2013. The trial Court declared that the matter should be finalised and that the trial would proceed in 2014 until its conclusion. Advocate Nel reported that his clients would not have sufficient funds to cover his expenses for the entire period. The trial was postponed to January 2014 to ascertain whether the defence had funds to enable their counsel to carry on acting for them.

[40] On 27 January 2014, there was no clear indication of the financial circumstances of the accused and as a result, the High Court postponed the matter to 26 February 2014. On that day, Advocate Nel indicated his unwillingness to carry on with the case where he was not assured that he would be paid for the duration of the trial. He thus withdrew his legal services.

[41] As mentioned above, the trial Judge had approached the Bloemfontein Justice Centre to consider providing legal assistance in the event that the legal team withdrew its services. When this became a reality, Mr Pieter Nel was instructed by the

Bloemfontein Justice Centre to represent the accused. He too carried on with the defence case and the cross-examination of the remaining witnesses. On 6 June 2014, the applicants indicated that they were not happy with the services of Mr Pieter Nel as they thought he was not up for the task and did not properly execute their instructions. Mr Ramabele further noted that Mr Pieter Nel was not properly prepared to conduct their defence as he had very little time to peruse the voluminous record. The accused said that they would instruct their own counsel as they had raised enough funds to pay the original legal team. This occurred while Mr Pieter Nel was busy with the cross-examination of the last state witness, Officer Flynn. Mr Pieter Nel thus withdrew. The trial was postponed for two weeks to 17 June 2014 to allow the applicants the opportunity to arrange legal representation.

[42] On that day, no legal representative appeared on behalf of the defence. Instead, the applicants made a rather strange request. They applied to have the trial postponed for a period of five months to enable them to return to their respective employment or businesses. This would enable them to earn an income and raise funds to engage another legal representative. They proposed that the High Court sits intermittently – for example, the trial would run for three weeks and thereafter be postponed for another five months. This would go on until the required funds were secured and until the conclusion of the trial.

[43] However, there was no indication that the applicants had approached any attorney or counsel who would be prepared to help them. There was also no certainty whether they would be able to raise funds, which were estimated to be in excess of R1 million.

[44] The High Court dismissed the application and postponed the trial for a week until 23 June 2014. On resumption of the trial, the applicants were still unrepresented. They informed the High Court that they were not able to raise the funds within the short period of time. Their previous attorney, Mr Schoeman, indicated he would not risk coming to court without any proof that he would be paid. The trial continued and the

State closed its case on 25 June 2014. Thereafter, the matter was postponed for a month until 28 July 2014 for the defence case.

[45] On that day, the applicants indicated that they were not prepared to testify and sought a postponement until February 2015 – in effect, they persisted with their request that the trial Court sits for three weeks, adjourns for five months and then returns for another sitting. Still, there was no hope that a legal representative would be available. This application was dismissed.

[46] The right to legal representation during a trial is a fundamental right of an accused and is inherent in the right to a fair trial.[28] Section 35(3)(f) provides—

> "a right to a fair trial, which includes the right . . . to choose, and be represented by, a legal practitioner, and to be informed of this right promptly".

[47] Generally, when legal assistance is appointed for the accused by the State, they ought to accept the legal representation. They do not necessarily have the right to select the legal representative appointed for them.[29]

[48] Furthermore, there is also a duty placed upon Judicial officers to afford the accused an opportunity to obtain legal representation as well as a duty to inform the accused that if their legal representative withdraws, they have a right to apply for a postponement to enable another legal representative to be appointed.[30] This constitutional guarantee requires that an accused is given a fair and reasonable opportunity to obtain legal representation. In order to consider what constitutes a fair

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[28] Joubert *Criminal Procedure Handbook* 12 ed (Juta, Cape Town 2017) at 97-8.

[29] In the context of section 25(3)(e) of the Interim Constitution see this Court's judgment in *S v Vermaas, S v Du Plessis* [1995] ZACC 5; 1995 (3) SA 292; 1995 (7) BCLR 851 (CC) at para 15. The right to have legal representation at State expense does not include the right to have a legal representative of choice. See *S v Halgryn* [2002] ZASCA 59; 2002 (2) SACR 211 (SCA) at para 12.

[30] See Currie and De Waal *Bill of Rights Handbook* 6 ed (Juta, Cape Town 2018) at 771-2 and *Mafongosi v Regional Magistrate, Mdantsane* 2008 (1) SACR 366 (Ck) at para 24.

and reasonable opportunity, there are a myriad of factors to take into account.[31] This should be considered on a case by case basis, and failure to do so in certain circumstances may very well result in irregularities.[32] However, the right to be represented by a legal representative of the accused's own choice does not include: a right to have an ongoing trial postponed for a lengthy period in order to allow an accused an opportunity to earn and save sufficient income to secure the services of a particular legal representative of their choice, since this may go beyond the bounds of reasonableness.[33]

[49] In my view, the trial Court was correct in refusing a further postponement of the trial. It had afforded the applicants ample time to arrange their finances. When it became apparent that they had financial constraints, the High Court referred the accused to the Bloemfontein Justice Centre to apply for legal aid. This was provided to them. The High Court still granted them some latitude when they expressed their displeasure at being represented by Mr Pieter Nel. The trial was postponed to enable them to engage their own legal team and when that failed to materialise, the High Court correctly proceeded with the trial.

[50] It is clear from the record that the trial Judge explained the rights of the applicants and their co-accused and the purpose of cross-examination. They elected not to cross-examine the witnesses. It is clear that this was most likely a ploy on their part to delay the trial. They sought to dictate the pace of litigation and this was untenable. Their actions had an adverse impact on their co-accused, who remained in custody for six years, during the entire period of these postponements until the trial was finalised. It

[31] Factors include: the gravity of the charges; the availability of sufficiently experienced practitioners; the amount of preparation required and the complexity of the case; the interests of the complainants, the witnesses and the co-accused as well as the desirability of disrupting court rolls and delaying the disposal of criminal cases. See further *K v Regional Court Magistrate N.O.* 1996 (1) SACR 434 (E); *S v Stefaans* 1999 (1) SACR 182 (C); S v M [2004] 2 All SA 74 (D); *S v Tsotetsi* 2003 (2) SACR 623 (W); and *Pretorius v Minister of Correctional Services* 2004 (2) SA 658 (T).

[32] See for instance *S v Van Wyk* 1972 (1) SA 787 (A) and *S v Seheri* 1964 (1) SA 29 (A).

[33] In *S v Swanepoel* 2000 (7) BCLR 818 (O) that Court considered a request for postponement of several months (at least seven months) in order to enable the accused to earn and save sufficient funds to secure the services of a particular advocate to defend the accused. This was in the context of a trial that had been set down for hearing.

was unreasonable for the applicants and their co-accused to expect the trial Court to grant the postponement on their terms, which would have entailed the trial being conducted for three weeks and postponed for a period of five months. This was a peculiar request and if granted, the delay would have been inordinate.

Bias

[51] Turning to the judicial bias challenge, impartiality is essential to the proper discharge of the duties of the judicial office and is central to the administration of justice. It applies not only to the decision itself but also to the process by which the decision is made. The word "impartial" connotes absence of bias, actual or perceived. Impartiality must exist as a matter of fact and as a matter of reasonable perception.[34] If a judicial officer is perceived to be partial, that perception is likely to aggrieve some persons and leave a sense of injustice to the affected parties and society at large, thereby diminishing confidence in the judicial system.[35] The test to determine whether a judicial officer should be excluded from hearing a case by reason of a reasonable apprehension of bias was articulated by this Court in *SARFU*:[36]

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."[37]

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[34] *Van Rooyen v The State (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at paras 32-5.

[35] See *Basson 2* above n 19 at para 27 and *Van Rooyen* id at para 32 which cites with approval the Canadian Supreme Court case *Valente v The Queen* [1985] 2 SCR 673 at 689d-f which states:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."

[36] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU*).

[37] Id at para 48.

[52] In this matter, the trial Judge was inclined to make comments to the accused such as "I'm not interested in getting you somebody else to attend to your matter you will carry on in person"; and "I don't care what you do. . . this matter is not postponed for you to get legal representation". The applicants described the remarks as an indication of being unfair or of bias in favour of the State. The trial Judge did indeed make use of inappropriate language, particularly when expressing his frustration at the delays occasioned by the applicants and their co-accused. That, however, does not amount to bias or the perception of bias when regard is had to what transpired.[38]

[53] In fairness to the trial Judge, he was pushed to the limit by the accused, who kept requesting postponements and insisting on having a legal representative of their choice despite the fact that they lacked funds and had been provided with State appointed counsel. I am satisfied that the trial Judge was not biased against the accused nor was his conduct of the proceedings such as to provoke a suspicion of bias. The High Court demonstrated an ability to conduct an objective analysis based on the facts. The High Court did not readily accept the evidence of the State at face value but evaluated it. This is evident from the judgment, and at the end the trial Judge acquitted the applicants on some of the charges.

Section 342A application

[54] The applicants submit that the trial Judge misdirected himself when he applied the provisions of section 342A of the CPA and that in the process: he failed to assist the applicants, who were unrepresented at the time; he failed to explain the provisions to them; and incorrectly found that exceptional circumstances existed as contemplated in section 342A(4).

[55] The relevant part of section 342A, which is titled "unreasonable delays in trials" reads:

[38] See [38] to [45].

"(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) the duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person can be blamed for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order–

. . .

(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed."

[56] The overarching aim of section 342A is to "provide courts with a statutory mechanism to avoid unreasonable delays in the finalisation of criminal proceedings".[39] Section 342A empowers a court to examine the reasons for the delay.[40] In order to

[39] Du Toit *Commentary on the Criminal Procedure Act* (Juta & Co Ltd, Cape Town 2020) at 29.

[40] Id at 30.

ascertain whether the delay is reasonable or not, courts consider an array of factors as stipulated in section 342A(2). In the event the court finds that the delay is unreasonable, section 342A(3) provides an open list of potential remedies.

[57] It has been said that section 342A is "the vehicle for giving practical application to the section 35(3)(d) right to have a trial begin and conclude without unreasonable delay".[41] Therefore, when considering section 342A, one must be mindful of section 35(3)(d) of the Constitution which entrenches an accused's constitutional right to an expeditious trial. This section provides:

> "Every accused person has a right to a fair trial, which includes the right—
> . . .
> (d) to have their trial begin and conclude without unreasonable delay".

[58] The seminal case on unreasonable delays in criminal proceedings, before section 342A came into operation, is *Sanderson*.[42] In that matter, this Court recognised that prejudice to an accused resulting from an unreasonable delay could take many forms; delays which could jeopardise the fairness of the trial itself and the more general delay-related prejudice not having a bearing on the trial itself.[43] This Court further recognised the threefold categorisation of the kinds of interests protected by speedy trial provisions, namely: the right to liberty; to personal security; and to a fair trial.[44]

[59] This Court has proffered guidance to determine whether a particular lapse of time is reasonable.[45] With reference to foreign law including American jurisprudence, such

[41] Currie and De Waal above n 30 at 798.

[42] *Sanderson* above n 21.

[43] See *Wild* above n 24 at para 4 for a summary of *Sanderson* id. The latter type of prejudice can be considered in two broad categories: first, prejudice related to an awaiting trial person's loss of personality liberty (e.g. resulting from pre-trial detention or restrictive bail conditions), and second, a whole range of disadvantages inherent in the public nature of our criminal justice system, such as loss of reputation, ostracism and loss of employment.

[44] *Sanderson* above n 21 at para 25 -27 relying on the Canadian case of *R v Morin* (1992) 8 CRR (2D) 193 at 202.

[45] *Wild* above n 24 at para 6: reiterated *Sanderson* id which stated that:

as *Barker v Wingo*,[46] this Court in *Sanderson* stated that the inquiry requires a flexible balancing test.[47] However, the Court accepted that the specific South African context requires its own home-baked approach.[48] Therefore, the approach is as follows: courts ought to consider whether a lapse of time is reasonable by considering an array of factors including: (a) the nature of the prejudice suffered by the accused; (b) the nature of the case; and (c) systemic delay. Courts have developed further factors such as the nature of the offence[49] as well as the interests of the family and / or the victims of the alleged crime.[50] A proper consideration of these factors requires a value judgment with reasonableness as the qualifier.[51] Furthermore, it is a fact specific inquiry.[52]

[60] Therefore, the fact of a delay cannot automatically constitute an infringement of the right to a fair trial.[53] Whether there has been an "unreasonable delay" requires a value judgment by applying the factors to the specific circumstances of each case.

[61] A proper reading of section 342A as a whole reveals that the section requires an investigation into the reasonableness of the delay. Courts have grappled with this provision and held that an enquiry is necessary in order to sufficiently consider the reasonableness of the delay. For instance, in *Ndibe*[54] it was held:

> "Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is not merely a trigger to an enquiry as to prejudice. . . 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".

[46] 407 US 514, 538 (1972) at 529 and 530.

[47] Id at para 25. Kriegler J also accepts that South African courts have utilised the *Barker v Wingo* balancing test to interpret and apply section 25(3)(a) see fn 21.

[48] Id at para 6.

[49] *Bothma v Els* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) BCLR 1 (CC) at para 38.

[50] *Rodrigues v National Director of Public Prosecution* 2019 (2) SACR 251 (GJ) at para 39.

[51] *Sanderson* above n 21 at paras 27 and 36.

[52] In *Van Heerden* above n 21 at para 69 Navsa JA states that: "I cannot stress enough that decisions in matters of this kind are fact specific."

[53] See for instance *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); at para 14.

[54] [2012] ZAWCHC 245.

"A holistic reading of the provisions of section 342A leaves me with the impression that what is intended is first the investigation into whether the delay is unreasonable, this as a matter of course *necessitates an enquiry*. The investigation includes taking into account the factors listed in section 2. Those factors are not limited to the prejudice suffered by an accused person and also include the impact an unreasonable delay may have in the administration of justice, the victim, and the State's case."[55]

[62] That Court went on to remark on the nature of the enquiry as follows:

"Even though section 342 (3) does not specifically state that a 'formal' enquiry be held, it does call at the very least for an enquiry, on the basis of which a finding must be made. Such an enquiry must have regard to the full conspectus of the factors in section 3(2). In the absence of an enquiry, a court may find it difficult to assess whether a delay is unreasonable or how much systemic delay to tolerate. That can only be determined when there has been an enquiry albeit informal, in which the conspectuses of the factors listed have been considered. This I say mindful of the fact that the bulk of the criminal cases are heard before the magistrate's court, and to insist on a formal enquiry is likely to be burdensome to the already overstretched court rolls. The finding should be followed by a remedy the court considers appropriate, depending on whether the accused person had already pleaded or evidence led. It seems to me that, once the provisions of section 342 are invoked, the following three stages must be followed:

(1) investigation of the cause of the delay in the finalisation of the case, taking into account the listed factors;
(2) making of a finding whether the delay is reasonable or unreasonable;
(3) depending on the stage of the proceedings, the application of the remedies provided."[56]

[55] Id at para 6.

[56] Id at para 6. Also in *Director of Public Prosecutions North Gauteng v Makhubela* [2014] ZAGPPHC 535 the Court underscored the importance of the enquiry where it was held that the court below misdirected itself for failure to consider the appropriate aspects provided in section 342A(2) to determine the suitability of an order refusing the postponement and to follow or comply with the prescripts of section 342A(4)(a) that are prescriptive in nature and thus resulted in a gross irregularity.

[63] It is worth noting what this Court has said regarding delays that are primarily a result of the conduct of the accused:

> "I would suggest that if an accused has been the primary agent of delay, [they] should not be able to rely on it in vindicating [their] rights under section 25(3)(a). The accused should not be allowed to complain about periods of time for which [they] sought a postponement or delayed the prosecution in ways that are less formal."[57]

[64] And this Court further stated in *Wild*:

> "A further feature mentioned in *Sanderson* is the attitude of the accused towards delays and [their] role in prolonging the pre-trial period. Although the conclusion was that there need not be any assertion of the right to a speedy trial on the part of an accused, it was nevertheless emphasised that an accused who had been a party to or the primary cause of delay could not be heard to complain of such delay. In the same context the judgment makes plain that fault on the part of the prosecution which results in delay is an important circumstance. Although the ultimate enquiry is whether the time between the charge and the trial is unreasonable, it is obviously relevant that the one or the other party is to blame, in whole or in part, for the delay."[58]

[65] More recently in *Dalindyebo,*[59] the Supreme Court of Appeal reiterated that given the circumstances of that case, since the delay in the appellant's prosecution was caused largely by the appellant's own problematic behaviour, there was no trial delay impeding on fair trial rights.[60] However, it is critical to note that a delay, even an aggravated delay, caused by an accused person, does not deprive the accused of the right to challenge the fairness of the trial.[61] It is clear from *Dalindyebo* that an accused

[57] Id at para 33.

[58] *Wild* above n 24 at para 8.

[59] *S v Dalindyebo* [2015] ZASCA 144; 2016 (1) SACR 329 (SCA).

[60] Id at paras 20-1.

[61] Du Toit above n 39 at 31.

will not be able to abuse such delay in the process in order to construct a platform from which to attack the fairness of the process, including the trial itself.[62]

[66] Therefore, what can be derived from this is that: where the delay was caused by the conduct of the accused, the delay cannot *per se* serve as a basis for the court to decide that the subsequent behaviour was unfair.[63]

[67] In the matter before us, after the dismissal of the defence application for the postponement of the trial, on 28 July 2014, the State requested the High Court to invoke the provisions of section 342A(3) of the CPA and close the defence case if they still refused to testify. The High Court refused to close the defence case on the basis that the State had failed to give the accused proper notice in terms of section 342A of the CPA. The State proceeded to inform the accused who were present in court[64] of its intention to apply for an order in terms of section 342A of the CPA by way of oral notice. The High Court explained the request by the State to the accused and stated that if they did not make use of their right to testify, an order that their cases were deemed closed in accordance with section 342A of the CPA could be granted. This would mean that they would not be able to testify at a later stage should they so wish. The High Court asked the accused whether they understood the consequences of a section 342A order as explained to them. The accused responded that they understood the consequences. The High Court further explained to the accused that the trial would be postponed for two weeks to enable them to consider their position in light of the State's request. The trial was thereafter postponed until 11 August 2014.

[68] On 11 August 2014, the State requested that the High Court utilise the provisions of section 342A. The applicants still elected not to testify and insisted on their request for a postponement. The trial Judge noted that there was still no indication that suitable

[62] Id at p 32.

[63] Id.

[64] Only accused 18 was not present in court on the day and a notice was emailed to him. He is not participating in the appeal before this Court.

financial arrangements had been made and that all attempts to speed up the trial had failed and the accused were not concerned with the finality of the matter. The High Court after considering the factors set out in section 342A, found that there were exceptional circumstances to warrant the application of the provisions of section 342A(3)(d). Accordingly, the trial Judge declared that the cases of the applicants were deemed closed.

[69] Having regard to what transpired, I am satisfied that the State notified the applicants of its intention to invoke the provisions of section 342A. The trial Judge properly explained the said provision and the consequences thereof to the applicants that were unrepresented at the time. When the applicants elected not to testify and insisted on a further postponement for a period of six months without any indication that they would be able to secure funding to appoint a legal representative of their choice, the trial Judge stated that the applicants "were fully aware of their obligations, the consequences of their actions or inaction and that there were indeed exceptional circumstances".[65] He underscored what this Court said in *Shaik*:[66]

> "The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires fairness to the public as represented by the State. It has to instil confidence in the criminal justice system".[67]

[70] Having considered the record, I am satisfied that the High Court followed the correct procedure, that it sufficiently informed and explained the implications of the section to the unrepresented applicants, and that there were indeed exceptional circumstances for the High Court to apply the provisions of section 342A(3)(d) of the CPA.

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[65] *High Court leave to appeal judgment* above n 8 at para 15. See further High Court judgment at pages 160-182.

[66] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC).

[67] Id at para 43 and fns 52-3.

[71] Lastly, on 11 August 2014, the State addressed the High Court and the applicants were afforded an opportunity to address the court on the merits of the case. The applicants still adopted the stance that they should have been granted a postponement and some refused to respond to the allegations by the State. Some indicated that they knew nothing about the allegations and were not involved in the commission of the offences. This is another indication that the applicants' rights to a fair trial were not infringed.

[72] It follows that the trial Judge ensured that the proper procedure required by section 342(A)(3)(d) was followed and that exceptional circumstances warranted an order to close the accused's case in terms of section 342(A). The appeal therefore falls to be dismissed.

Order

[73] In the result, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.