

Once, Twice, Three Times Delayed: Considering a Permanent Stay of Prosecution in *Rodrigues v The National Director of Public Prosecutions*

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Abstract

The National Prosecuting Authority is vested with the power, as *dominus litus*, to institute and discontinue charges whereas high courts are empowered to order a permanent stay of the prosecution prohibiting the continuation of the trial. However, such an order is considered to be a "drastic remedy" and is not empowered in terms of statute such as the *Criminal Procedure Act* 51 of 1977 but rather vested in the right of an accused to have their trial begin and conclude without unreasonable delay under section 35(3)(d) of the *Constitution of the Republic of South Africa*, 1996. A permanent stay of the prosecution is an order made on a case-by-case basis, balancing various factors such as the prejudice faced by the accused, systemic factors as well as the reason for the delay. The ultimate question however remains whether the lapse of time in a particular case is unreasonable. The Supreme Court of Appeal in *Rodrigues v The National Director of Public Prosecutions* had to evaluate whether the 47-year-delay and eventual prosecution between the death of anti-apartheid activist, Ahmed Timol, was unreasonable. Both the majority and minority of the Supreme Court of Appeal, although for different reasons, concluded that the delay was not unreasonable. This contribution discusses the recent judgment in *Rodrigues v The National Director of Public Prosecutions* against the backdrop of the principles relating to permanent stays as established by South African courts. Both the majority and minority judgments are discussed and evaluated to discern important themes and considerations. It is argued that the judgment is a strong reminder of the significance of the right to a speedy trial.

Keywords

Fair trial rights; permanent stay of the prosecution; speedy trial; National Prosecuting Authority.

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1 Introduction

Section 35(3)(d) of the *Constitution of the Republic of South Africa*, 1996 guarantees an accused the right to a fair trial which includes having their trial begin and conclude without unreasonable delay. This right "is a recognised norm and touchstone for a fair trial" in the South African criminal justice system.¹ However, and especially considering the backlogged South African criminal justice system,² "systemic factors" such as financial constraints³ and forensic backlogs often inhibit the right of an accused to receive a speedy trial. Concerning the former, it was reported in March 2021 that South Africa was facing a severe backlog of DNA tests involving approximately 172 787 cases⁴ and by August this number reportedly "exceeded 210,000 cases" which will probably only be cleared by 2023.⁵ One of the reasons for the backlog has also been attributed to the loss of experienced police officers at the start of the democratisation of South Africa.⁶ This loss translated into an ineffectual and frustrated National

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¹ *Broome v Director of Public Prosecutions, Western Cape; Wiggins v Acting Regional Magistrate, Cape Town* 2008 1 SACR 178 (C) (hereafter the *Broome* case) para 45. In *Berg v Prokureur-Generaal, Gauteng* 1995 2 SACR 623 (T) 627, the Transvaal Provincial Division, relying on *Kabe v Attorney-General* 1958 1 SA 300 (W), asserts that this right was already implicit in South African criminal procedure.

² See generally Jeffery 2021 https://www.justice.gov.za/m_speeches/2021/20210525-BudgetVoteSpeech-DMin.pdf where it was stated that there was a 53% backlog in the regional courts and 48% backlog in the district courts before the hard lockdown in March 2020. This backlog was of course exacerbated by the hard lockdown. This backlog however decreased to 48,87% for regional courts and 14,14% for district courts by the end of March 2021. Matters involving incidents of gender-based violence, accused persons awaiting trial, children and corruption were prioritised while audio-visual technologies were also implemented. Also see Portfolio Committee on Justice and Correctional Service 2020 <https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmates> Ministers briefing; Cele 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-05-13-mp-flags-court-backlogs-compounded-by-trivial-cases-under-covid-19-rules/>.

³ See *Sanderson v Attorney General, Eastern Cape* 1998 1 SACR 227 (CC) (hereafter the *Sanderson* case); *S v Motsasi* 1998 2 SACR 35 (W) (hereinafter the *Motsasi I* case); *S v Motsasi* 2000 1 SACR 574 (W) (hereafter the *Motsasi II* case); *Broome* case paras 69-79 especially.

⁴ Rall 2021 <https://www.iol.co.za/news/south-africa/kwazulu-natal/concerns-raised-over-dna-backlog-172-787-cases-still-to-be-processed-89393f94-425f-43df-a0fe-7137fb8499d1>; Hlati 2021 <https://www.iol.co.za/capetimes/news/forensics-gbv-backlog-a-travesty-0bdfe58e-0133-4896-9321-28ef54f6438d>.

⁵ Daniel 2021 <https://www.businessinsider.co.za/south-africa-dna-backlog-wont-be-cleared-by-2023-2021-8>. See generally Portfolio Committee on Police 2021 <https://pmg.org.za/committee-meeting/32411/>.

⁶ Albeker refers to the fear of and actual change within the police structures which eventually led to unsustainable salary increases to "buy enough support from the rank-and-file" to assist the transition into the transformed police service. The salary

Prosecuting Authority (NPA) which was further exacerbated by "catastrophically malign or inept appointments by former President Jacob Zuma".⁷ It also had the collateral issue of placing further strain on the already overcrowded prison system.⁸ It has been reported that about one third of the South African prison population are persons who are remanded and not formally sentenced.⁹ In *S v Jackson*,¹⁰ it was held that South African courts recognise three forms of prejudice resultant "for the want of a speedy trial".¹¹ These forms are the loss of personal liberty, "the impairment of personal security" due to reputational harm, ostracism and unemployment as well as trial-related prejudice such as the degradation of evidence and witness memory, death or unavailability.¹²

Section 342A(1) of the *Criminal Procedure Act* 51 of 1977 (CPA) empowers courts to investigate delays in the proceedings that appear to be unreasonable and potentially "cause substantial prejudice to the prosecution" or other parties such as the state, the accused, the legal practitioner of the accused or witnesses.¹³ Section 342A(2)¹⁴ enumerates certain factors a court must consider in determining whether a delay is unreasonable, such as the duration of the delay,¹⁵ the reasons advanced for the delay,¹⁶ the extent, seriousness and complexity of the vexed charges,¹⁷ any potential or actual prejudice by the accused or the state by the delay, including, but not limited to the weakening of the evidence, unavailability, death or disappearance of witnesses, and issues relating to the loss and gathering of the evidence¹⁸ and any other factor the court

increase was however unsustainable and resulted in encouraging existing staff to leave the police service. See Altbeker *Dirty Work of Democracy* 261-262.

⁷ Cameron, Du Toit and Katsiginis 2020 <https://www.derebus.org.za/justice-postponed-what-causes-unreasonable-delays-in-criminal-trials/> referring to Altbeker *Dirty Work of Democracy* 261. The authors also point out that the leadership issues started with former president Thabo Mbeki's suspension of Advocate Vusi Pikoli as the National Director of Public Prosecutions.

⁸ See Whatney 2007 *TSAR* 422.

⁹ Cameron, Du Toit and Katsiginis 2020 <https://www.derebus.org.za/justice-postponed-what-causes-unreasonable-delays-in-criminal-trials/>.

¹⁰ *S v Jackson* 2008 2 SACR 274 (C) (hereafter the *Jackson* case).

¹¹ *Jackson* case para 31. See also Joubert *et al Criminal Procedure Handbook* 356-357.

¹² *Jackson* case para 31.

¹³ In the *Motsasi II* case 576-577 reports submitted to the court pointed mainly towards financial constraints suffered by various state departments, exacerbated by the high incidence of crime and high population density. Also see the *Motsasi I* case 68.

¹⁴ For a detailed discussion on the factors, see Grant "General Provisions" 33-32E to 33-32G.

¹⁵ Section 342A(2)(a) of the *Criminal Procedure Act* 51 of 1977 (hereafter the CPA).

¹⁶ Section 342A(2)(b) of the CPA.

¹⁷ Section 342A(2)(e) of the CPA.

¹⁸ Section 342A(2)(f) of the CPA.

deems relevant to take into account.¹⁹ If a court indeed finds that the delay was unreasonable, it has wide powers under section 342A(3)²⁰ to make an order including refusing further postponement²¹ and granting a postponement subject to conditions set out by the court.²² Judicial officers should maintain a firm, yet fair approach when confronted with unnecessary postponements and unjustified delaying tactics.²³ In this regard, the court in *S v Steward* correctly pointed out that "[s]uch an approach would obviate uncalled for applications for permanent stays of prosecution".²⁴

The powers under section 342A do not, however, directly empower a court to order a permanent stay of the prosecution.²⁵ Although similar considerations apply under the process in terms of section 342A and an application for a permanent stay of the prosecution, the former is only available once a trial has commenced.²⁶ Nevertheless, a High Court is empowered to make an order for the permanent stay of the prosecution due to a violation in terms of section 35(3)(d).²⁷ This power is founded in section 38 of *the Constitution* which enables courts to grant appropriate relief for a violation of a right under the Bill of Rights.²⁸ This is considered a "drastic remedy" and is only appropriate in circumstances where the delays have "caused irreparable prejudice to the accused".²⁹ This involves a balancing test where certain factors are considered by weighing up the conduct of the accused and the prosecution against each other.³⁰ This is especially a drastic remedy if one considers the fact that the state is the *dominus litus* in criminal matters and is ordinarily considered to have the discretion as to

¹⁹ Section 342A(2)(i) of the CPA.

²⁰ Section 342A(3)(a)-(f) of the CPA.

²¹ Section 342A(3)(a) of the CPA.

²² Section 342A(3)(f) of the CPA.

²³ *S v Steward* 2017 1 SACR 156 (NCK) para 6 (hereafter the *Steward* case). Also see Grant "General Provisions" 33-31.

²⁴ *Steward* case para 6.

²⁵ Theophilopoulos *Criminal Procedure* 291.

²⁶ See Grant "General Provisions" 33-31.

²⁷ Theophilopoulos *Criminal Procedure* 291. Henney J in *Dimov v Director of Public Prosecutions, Western Cape* (WCC) (unreported) case number 5376/16 of, 6 March 2017 para 26 held that an order for a permanent stay of the prosecution "is not a right but a matter of a discretion exercised by the court based on individual circumstances and the merits of a particular case before it". Also see *Lethoko v Minister of Defence* 2021 2 SACR 661 (FB) para 19. Grant points out that this dictum must "be understood in the context of the all-embracing constitutional right to a fair trial". See Grant "General Provisions" 33-31.

²⁸ Reddi 2022 SACJ 98.

²⁹ *Bothma v Els* 2010 2 SA 622 (CC) (hereafter the *Bothma* case) para 18. Also see *Broome* case para 80; *Rodrigues v The National Director of Public Prosecutions* 2021 2 SACR 333 (SCA) (hereafter the *Rodrigues* case) paras 51-52, 59.

³⁰ *Sanderson* case para 25; *Bothma* case para 18; *Broome* case para 46.

whether to discontinue a prosecution.³¹ The NPA is vested with the constitutional mandate to prosecute crime.³² As pointed out in *Broome v Director of Public Prosecutions, Western Cape; Wiggins v Acting Regional Magistrate, Cape Town*³³ (where a permanent stay was granted), a permanent stay of the prosecution

indeed prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. Orders of this nature may also undermine public confidence in the criminal justice system and may adversely impact on the functions of democratic institutions in this country. I am acutely aware of the serious nature of the charges against the accused in this case and the alleged impact it had on the ordinary citizen in civil society. A permanent stay of prosecution will result in alleged perpetrators, that allegedly amassed their wealth in defrauding ordinary citizens of millions of rand, walking free.³⁴

This contribution discusses the recent judgment in *Rodrigues v The National Director of Public Prosecutions*³⁵ against the backdrop of the principles relating to permanent stays as established by South African courts. This case considered whether a 47-year delay between the death of political activist, Mr Ahmed Essop Timol (Mr Timol) and the subsequent charging of the now-deceased appellant, Mr João Rodrigues, constituted an unreasonable delay warranting a permanent stay of the prosecution. Both the majority and minority judgments will be discussed and evaluated to discern important themes and considerations. This contribution argues that although Mr Rodrigues passed away in September 2021,³⁶ the judgment is a strong reminder of the significance of the right to a speedy trial.

2 Factors considered

There is no strict test or formula that courts employ to ascertain whether the delay complained of should result in a permanent stay of the prosecution. Seminal judgments have however elucidated certain factors that courts may consider in granting this order such as the "balancing test" alluded to in the

³¹ See s 6(a) and (b) of the CPA. See further Part 3.3 and fn 86 below.

³² See especially s 179(1), 179(4) and 179(5)(d) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*).

³³ *Broome* case.

³⁴ *Broome* case paras 80-81. These sentiments were also echoed in *Van Heerden v National Director of Public Prosecutions* 2017 2 SACR 696 (SCA) (hereafter the *Van Heerden* case) para 54. Also see Whatney 2007 TSAR 422 where the author makes a similar comment: "[j]ustice delayed erodes the public's confidence in the very system that is supposed to protect society through a speedy and efficient dispensation of criminal justice".

³⁵ *Rodrigues* case.

³⁶ Matwadia 2021 <https://mg.co.za/news/2021-09-07-joao-rodrigues-accused-of-1971-murder-dies-aged-82/>.

introduction. In *Sanderson v Attorney General, Eastern Cape*, the Constitutional Court (hearing the matter under the *Constitution of the Republic of South Africa 200 of 1993 (interim Constitution)*)³⁷ held that the "critical question" is to ascertain "whether the particular lapse of time is reasonable".³⁸ The Constitutional Court here relies on a foreign law approach, namely a balancing test,³⁹ weighing up the different factors associated with the delay including the prejudice that the accused might have suffered, the duration of the delay and the reasons advanced by the state for the delay.⁴⁰ Although the amount of time that has elapsed is the "critical question", it may be tempered by other factors such as systemic reasons associated with the trial, the accused's waiver of certain time periods, or inherent time requirements associated with the case.⁴¹ Consequently, courts must consider how the lapse of time has impacted the three interrelated interests of the accused, namely "liberty, security and trial-based interests" with trial-based interests arguably being the most difficult to ascertain.⁴²

Kriegler J warned against imposing draconian timeframes on the prosecuting authority and asserted that it would be inappropriate to dictate timeframes.⁴³ The court here implies that it would constitute a violation of the separation of powers to do so.⁴⁴

Furthermore, the nature of the prejudice suffered by the accused, including where the accused is incarcerated pending the start of the trial, must be given due consideration. Other factors include the social stigma that the accused may face, the disruption to the practice of their occupation, or

³⁷ The predecessor of s 35(3)(d) is s 25(3)(a) of the *Constitution of the Republic of South Africa 200 of 1993 (interim Constitution)* and the content thereof is identical to s 35(3)(d).

³⁸ *Sanderson* case para 25. The Constitutional Court also references reliance of the accused on their right to a speedy trial. The Constitutional Court however points out as the "vast majority", at least at that time, of South Africans are unrepresented and have no conception of the right to speedy trial. It would therefore be unjust to require them to expressly rely on this right in the balancing exercise. Kriegler J makes these comments especially in the context of considering the appropriateness of relying on foreign jurisdictions. In this instance, Krieger J noted that it would be "[t]o deny them relief under section 25(3)(a) because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of our society are concerned". See *Sanderson* case para 26.

³⁹ See *Barker v Wingo* 407 US 514 (1972).

⁴⁰ *Sanderson* case para 25.

⁴¹ *Sanderson* case para 29.

⁴² *Sanderson* case para 30.

⁴³ *Sanderson* case para 30.

⁴⁴ *Sanderson* case para 30.

where the defence of the accused may be endangered.⁴⁵ Where these factors have a more serious impact, in theory at least, the shorter the trial period for the accused should be.⁴⁶ An accused who has consented to postponement may further have difficulty in proving their case but they also do not have to establish that they have a genuine desire to have their case tried.⁴⁷ Equally, an accused may find it difficult to successfully rely on their right to a speedy trial where they have been "the primary agent of delay".⁴⁸

The Constitutional Court points to the second important factor namely, the nature of the specific case.⁴⁹ Certain cases are of course intrinsically more complex and would therefore necessitate a longer preparation time for the state. In addition, the availability and willingness of witnesses to cooperate can further exacerbate this. Third is systemic factors that inhibit the right to a speedy trial, especially "resource limitations" that hamper the proper functioning of the justice system. This may include, in particular, the resource constraints of police stations⁵⁰ and backlogged courts.⁵¹

The ultimate issue remains, namely the "reasonableness" of the delay. Evaluating the reasonableness of a delay ultimately involves a value judgment.⁵² Courts must bear in mind two arguably competing interests. First, the interest of society to bring those to book who have (potentially) committed an offence.⁵³ Granting a permanent stay of the prosecution disallows the NPA to carry out its constitutional mandate and may exacerbate society's distrust of the justice system. Unreasonable delays, on the other hand, may "debase" the presumption of innocence as an ever-looming trial may "in itself [be] a form of extra-curial punishment".⁵⁴ Society in general, and the parties to the prosecution, in particular the accused, therefore have vested interests in bringing a case to finality.⁵⁵ Kriegler J refers to the maxim *interest reipublicae ut sit finis litium* or, "it is in the interest of the state that there be an end to litigation".⁵⁶

⁴⁵ Sanderson case para 31.

⁴⁶ Sanderson case para 31.

⁴⁷ Sanderson case para 32.

⁴⁸ Sanderson case para 33.

⁴⁹ Sanderson case paras 33-34.

⁵⁰ See *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC); Van der Linde 2020 PELJ.

⁵¹ Sanderson case para 35. See also Part 1 above.

⁵² Sanderson case para 36.

⁵³ Sanderson case para 36.

⁵⁴ Sanderson case para 36.

⁵⁵ Sanderson case para 37.

⁵⁶ Sanderson case para 37.

An order for the permanent stay of the prosecution is also a "radical" remedy both from a socio-political and philosophical paradigm.⁵⁷ It prevents the state "from presenting society's complaint against" the accused.⁵⁸ Therefore, the remedy is only available where an "accused has probably suffered irreparable trial prejudice as a result of the delay".⁵⁹ In *Van Heerden v National Director of Public Prosecutions* (a case concerning a rare instance of where a permanent stay was granted), Navsa ADP (on behalf of the uniramous Supreme Court of Appeal) warned against an over-zealous resort to this remedy:

It must be emphasised that decisions in matters of this kind are fact specific. It follows that this judgment should not be resorted to as a ready guide in determining the reasonableness or otherwise of delays in the finalisation of trials. Whether a breach of a right to an expeditious trial has occurred and relief is justified, are to be determined by a court after having been apprised of all the facts on a case-by-case basis.⁶⁰

3 *Rodrigues v the National Director of Public Prosecutions*

3.1 *The issues in Rodrigues*

The appellant argued that the court *a quo* erred in finding that the delay did not infringe his fair trial rights.⁶¹ It was further alleged that then-president and Minister of Justice interfered by halting the prosecution cases flowing from the Truth and Reconciliation Commission (TRC) and that there would be a substantial amount of others who face similar prejudice.⁶² The Supreme Court of Appeal found these reasons, in particular the potential interference by the president and Minister of Justice, compelling enough to hear the appeal.⁶³ The appellant relied on section 35(3) (the right to a fair trial), bolstered with section 12 of the *Constitution* (freedom and security of the person).⁶⁴ The grounds of appeal were expanded upon and it was submitted that the planned prosecution will infringe the appellant's right to

⁵⁷ *Sanderson* case para 38.

⁵⁸ *Sanderson* case para 38.

⁵⁹ *Sanderson* case para 39.

⁶⁰ *Van Heerden* case para 69.

⁶¹ *Rodrigues* case para 6.

⁶² *Rodrigues* case para 7. For more on the work and legacy of the TRC, see Stanley 2001 *JMAS*; Allan and Allan 2000 *Behaviour Sciences and the Law*; Mamdani 2002 *Diacritics*; Van Zyl 1999 *J Int'l Aff*, Llewellyn and Howse 1999 *UTLJ*.

⁶³ *Rodrigues* case para 7.

⁶⁴ It is however not stated which subsection of s 12 of the *Constitution* is specifically relied upon, but it is likely s 12(1)(a) which guarantees the right to "not to be deprived of freedom arbitrarily or without just cause".

have a procedurally fair trial and to not be prosecuted with unlawful or improper motives; the right to

- (i) "have the trial begin and be concluded without unreasonable delay";
- (ii) also to be informed of the charge with sufficient detail in order to answer to it;
- (iii) be able to challenge and effectively adduce evidence and lastly, the right to not incriminate himself and the right to silence.⁶⁵

Added to these interrelated grounds, was also the submission that the appellant was granted amnesty, that there was an agreement that he would not be prosecuted and also that there was political interference to not prosecute together with an agreement that no prosecution would take place.⁶⁶

3.2 Factual background

Mr Timol was arrested at a roadblock on 22 October 1971. He was found in possession of leaflets of the South African Communist Party (SACP), a banned organisation at the time.⁶⁷ Mr Timol died while being held in detention and the inquest into his death "determined" that he had committed suicide by jumping from the tenth floor of John Vorster Square.⁶⁸ This was however followed by a second inquest in 2017,⁶⁹ 47 years later where Mothle J found that Mr Timol had not committed suicide but had in fact been pushed from the tenth floor with the intention to kill him.⁷⁰ It was also found that the police tortured Mr Timol before falling to his death. This finding was supported by the presence of serious injuries found on Mr Timol's body,⁷¹ presumably other than those associated with the fall. Importantly, it was found that Mr Rodrigues had assisted in the cover-up of the murder, and he should be investigated to determine whether he should be prosecuted.⁷²

⁶⁵ *Rodrigues* case para 15.

⁶⁶ *Rodrigues* case paras 15-16.

⁶⁷ *Rodrigues* case para 9.

⁶⁸ *Rodrigues* case para 9.

⁶⁹ This was done under s 17A of the *Inquests Act* 58 of 1959. The provision holds that "[t]he Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge resident of a provincial division of the Supreme Court to designate any judge of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest".

⁷⁰ *Rodrigues* case para 10.

⁷¹ *Rodrigues* case para 10.

⁷² *Rodrigues* case para 10.

This investigation did in fact result in a charge of murder on 30 July 2018 with his first appearance being on 18 September. The trial proceedings were paused pending the outcome of the application for a permanent stay.⁷³ It is also worth noting that, as a result of an application under the *Promotion of Access to Information Act 2 of 2000*, it was discovered that around R3,6 million in tax monies has been spent on Mr Rodrigues's defence.⁷⁴ This is because he was acting in his official capacity as a member of the former Security Branch of the South African Police Service at the time of the alleged crime.⁷⁵

3.3 The relevant time periods and outcome

There are three periods of time relevant to this case. As already mentioned, approximately 47 years had passed between the death of the deceased and the arrest of the appellant. In this regard, the Supreme Court of Appeal correctly pointed out that between 1971 and 1994, while the apartheid government was still in power, there was no political will to investigate the incident further or to challenge the findings of the original inquest.⁷⁶ The appellant was never formally charged during this period. Although the Supreme Court of Appeal found that the period before charging should not be ignored as a matter of course, it found that in this instance it is irrelevant for determining whether an unreasonable delay had occurred.⁷⁷

The majority of the Supreme Court of Appeal, per Ledwaba AJA (with Maya P, Dlodlo JA and Poyo-Dlwati AJA concurring), describes the second period as between 1994 and 2002. During this time, South Africa underwent its democratic transition, and a feature of this period was the TRC hearings.⁷⁸ Persons who had committed political crimes during this period could apply for amnesty.⁷⁹ Where an applicant was successful, they would not face criminal prosecution in the future. Those who elected not to apply for amnesty or who were unsuccessful in their applications would not be

⁷³ *Rodrigues* case para 11.

⁷⁴ Foundation for Human Rights and Webber Wentzel 2021 <https://unfinishedtrc.co.za/press-release-joao-rodrigues-files-an-appeal-with-the-constitutional-court/>; Anon 2019 <https://www.ahmedtimol.co.za/doj-cd-forced-to-disclose-nearly-r36m-paid-for-rodrigues-legal-costs-at-taxpayers-expense/>.

⁷⁵ Foundation for Human Rights and Webber Wentzel 2021 <https://unfinishedtrc.co.za/press-release-joao-rodrigues-files-an-appeal-with-the-constitutional-court/>.

⁷⁶ *Rodrigues* case para 12.

⁷⁷ *Rodrigues* case paras 18-21.

⁷⁸ *Rodrigues* case para 13.

⁷⁹ Under the *Promotion of National Unity and Reconciliation Act 34 of 1995*.

insulated from possible prosecution.⁸⁰ The third period, according to the Supreme Court of Appeal, is between 2003 and 2017 where amnesty was allegedly granted by the president and an "alleged agreement between Government and other interested parties".⁸¹ Former National Director of Public Prosecutions, Advocate Vusi Pikoli, had "complained about the interference of the Government" in matters concerning those who were denied amnesty or who did not apply for it. The Supreme Court of Appeal subsequently accepted that there was indeed political interference with the prosecutorial decisions of the NPA.⁸² However, the Supreme Court of Appeal found that this period was also not relevant in calculating whether an unreasonable delay had occurred due to the operation of the *Promotion of National Unity and Reconciliation Act* 34 of 1995 and the TRC hearings.⁸³ The appellant however did not make use of these proceedings and therefore knew that he could face criminal prosecution in the future. During the TRC period, the NPA was therefore not able to carry out the prosecution and the delay here could therefore not be ascribed to the NPA.⁸⁴

The vexed period can be narrowed down to 2003 to 2017. The Supreme Court of Appeal here pointed to the "perplexing and inexplicable" policy by the state that the relevant TRC cases would not be prosecuted during that time. Further, that it is an "ineluctable conclusion" that some degree of political interference took place.⁸⁵ This is particularly puzzling in light of the "TRC advocating [for] a bold prosecutions policy" and the independence of the prosecuting authority as well as "its constitutional obligation to prosecute crimes" and act in the best interests of the victims of the associated

⁸⁰ *Rodrigues* case para 13.

⁸¹ *Rodrigues* case para 14.

⁸² *Rodrigues* case para 17.

⁸³ *Rodrigues* case para 22.

⁸⁴ See *Rodrigues* case paras 23-25. See further *S v Basson* 2005 1 SA 171 (CC) paras 31-33.

⁸⁵ *Rodrigues* case para 30.

crimes.⁸⁶ Ledwaba AJA reminded of the independence of the NPA⁸⁷ that this body has the exclusive power to institute proceedings on behalf of the state⁸⁸ and to "exercise its functions without fear, favour and prejudice".⁸⁹ The Supreme Court of Appeal echoes the sentiments of the court *a quo* in that there should be an investigation into the alleged interference.⁹⁰

The somewhat concomitant issue of whether the political decisions amounted to a pardon was not raised in the Full Court, but the Supreme Court of Appeal held that the issue could still be addressed there. However, despite the Supreme Court of Appeal essentially censuring the political figures involved in the non-prosecution of apartheid-era suspects, the court found that this did not impact the substantive fairness of the trial.⁹¹ Ledwaba AJA here referred to *Bothma v Els*,⁹² without further elaboration,⁹³ where the Constitutional Court also considered an application for a permanent stay of the prosecution. Sachs J held that the question is whether the right to a fair trial right was violated "in a broader sense" (and not so much the right

⁸⁶ *Rodrigues* case para 26. The "constitutional obligation to prosecute crimes" must be tempered against the fact that the prosecution of crime in South Africa is *discretionary*. The Prosecution Policy of the National Prosecution Authority (NPA 2013 <https://static.pmg.org.za/docs/1999/990301policy.htm>) para 3.A states that there must be a sufficient and admissible evidentiary basis "to provide a reasonable prospect of a successful conviction" (original emphasis). Joubert *et al* therefore correctly points out that South Africa does not employ "a system of compulsory prosecution" and that prosecutions should only follow in instances where there is a *prima facie* case and in the absence of "reasons" to not prosecute – see Joubert *et al Criminal Procedure Handbook* 4.14. This is echoed in the Prosecution Policy para 4.C where it is stated that prosecutions should take place "unless public interest demands otherwise". In fact, one of the factors mentioned under the Prosecution Policy, is whether there has been an unreasonable delay between the commission of the crime and the date the prosecution was instituted. Para 3.C specifically states that a prosecutor should consider the complexity of the case as well as the role of the accused in causing the delay.

⁸⁷ *Rodrigues* case paras 28-29.

⁸⁸ Section 179(2) of the *Constitution*.

⁸⁹ Section 179(2) of the *Constitution*.

⁹⁰ Under s 41(1) the *National Prosecuting Authority Act* 32 of 1998 holds that "[a]ny person who contravenes the provisions of s 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment". Further, s 32(1)(a) states that "[a] member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law". Lastly, s 32(1)(b) states that "[s]ubject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions".

⁹¹ *Rodrigues* case para 30.

⁹² *Bothma* case.

⁹³ *Rodrigues* para 30. The court merely references the *Bothma* case para 35.

under section 35(3)(d) in that it was irreparably violated "as a consequence of the extreme belatedness of the prosecution".⁹⁴ Sachs J, in turn, relied on *S v Zuma*,⁹⁵ where it was held that the right to a fair trial under the *Constitution*⁹⁶ is not limited to the rights enumerated thereunder. It rather "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the [interim] Constitution came into force".⁹⁷ Sachs J in *Bothma* ultimately held that "the delay ... 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".⁹⁸

3.4 Majority decision

The majority of the Supreme Court of Appeal (per Ledwaba AJA, with Maya P, Dlodlo JA and Poyo-Dlwati AJA concurring) stressed the socio-political consequences of a permanent stay, as highlighted in *Sanderson*.⁹⁹ The Supreme Court of Appeal supports the Constitutional Court's former jurisprudence in *Sanderson* and *Bothma* where it was decided that it remains a "value judgment" of the evidence "relating to the relevant factors" such as the length of and reasons for the delay and the prejudice to the accused.¹⁰⁰ These often interrelated factors, however, do not constitute a closed list of considerations and "public policy considerations" as well as the nature of the offence may be taken into account when evaluating such an application.¹⁰¹ Regarding the nature of the offence, the Supreme Court of Appeal referred to *Zanner v Director of Public Prosecutions, Johannesburg*,¹⁰² where it was held that

[t]he sanctity of life is guaranteed under the Constitution as the most fundamental right. 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 instill public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. (See *S v Jaipal* 2005 (4) SA 581 (CC) para 29.) It is also not an insignificant fact that the right to institute prosecution in respect of murder

⁹⁴ *Bothma* case para 35.

⁹⁵ *S v Zuma* 1995 4 BCLR 401 (CC) (hereafter the *Zuma* case).

⁹⁶ The *Zuma* case was decided under the *interim Constitution* but the *dicta* still remain relevant.

⁹⁷ *Zuma* case para 16; *Bothma* case para 35.

⁹⁸ *Bothma* case para 35.

⁹⁹ *Rodrigues* case para 31.

¹⁰⁰ *Rodrigues* case para 32.

¹⁰¹ *Rodrigues* case para 32.

¹⁰² *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) (hereafter the *Zanner* case).

does not prescribe. (See s 18 of the Criminal Procedure Act 51 of 1977). Clearly, in a case involving a serious offence such as the present one, 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.¹⁰³ [sic]

No evidence was adduced to the effect that the NPA was unreasonably tardy in actually charging the appellant after the finding of the second inquest. The appellant also did not submit that there was a period of unreasonable delay after his first court appearance in 2018. Consequently, the provisions under section 342A(1) and (2) could not be relied upon.¹⁰⁴ The Supreme Court of Appeal then predictably concludes that, although there was a 47-year delay between the events at John Vorster Square and the prosecution, it did not render the trial unfair.¹⁰⁵ The Supreme Court of Appeal held further that the present hearing was the appropriate forum for the appellant to challenge evidence led at the inquest and also not to raise his old age (and failing memory) – the latter could be brought up at sentencing.¹⁰⁶

Taking account of the matrix of factors discussed above, the Supreme Court of Appeal held that there had not been an unreasonable delay and no "trial-related prejudice" had been suffered and consequently dismissed the appeal.¹⁰⁷

3.5 Minority decision

The minority judgment (per Cachalia JA) agreed with the conclusion of the majority but disagreed with how this conclusion was reached.¹⁰⁸ Cachalia JA criticised the appellant's apparent incongruent merger of appeal grounds in that the remedy the appellant wanted a permanent stay of the prosecution but based this on a supposed presidential pardon¹⁰⁹ as well as the alleged agreement between the NPA, the Minister of Justice and the president.¹¹⁰ The argument relating to the presidential pardon was not further substantiated in the appellant's heads of argument and the president (as the

¹⁰³ *Zanner* case para 21; *Rodrigues* case para 34. The term "prescription" refers to the South African equivalent of the statute of limitations. Also see *Broome* case para 81 (quoted above in Part 1) where Le Grange J points out the acute awareness that granting a permanent stay (which was done in that case) will result in the exoneration of an accused who has defrauded people of millions of rand.

¹⁰⁴ See Part 1 above.

¹⁰⁵ *Rodrigues* case para 34.

¹⁰⁶ *Rodrigues* case paras 36-38.

¹⁰⁷ *Rodrigues* case paras 39-41.

¹⁰⁸ *Rodrigues* case para 42.

¹⁰⁹ Under s 84(2)(j) of the *Constitution* which reads that "[t]he President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures".

¹¹⁰ *Rodrigues* case paras 44; 47.

sole functionary responsible for presential pardons) was also not joined to the matter.¹¹¹ The minority held that the alleged pardon and agreement (the additional grounds) were merely raised "to add colour to the stay application" and the appellant did not buttress the additional grounds with any form of evidence.¹¹² In fact, as Cachalia JA quite accurately pointed out, there would be no need for a stay application if these additional grounds were actually and lawfully granted¹¹³ and they do not serve as evidence for a stay application.

Dealing with the application for permanent stay, the court pointed out that this drastic remedy may only be granted in instances "where the delay is egregious and has resulted in irreparable trial-related prejudice", in other words, in instances where such prejudice has been "demonstrably clear".¹¹⁴ For this reason, the remedy has rarely been granted.¹¹⁵ One such exception is *Broome*, where, although not as significant as in *Rodrigues*, the time-delay of a "mere" seven years proved to be prejudicial enough in light of the other contextual factors, especially due to the loss of evidence and the fact that some of the charges also included events from 18 years prior.¹¹⁶

Cachalia JA was critical of the assertions of political interference and stated that this type of assertion (as a shield against prosecution) has gained prominence in recent years and refers to former President Jacob Zuma. The minority points to the matter in *National Director of Public Prosecutions v Zuma*¹¹⁷ and quotes the following dictum:

A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent ... which in any event can only be determined once criminal proceedings are concluded. The motive behind the prosecution is irrelevant.¹¹⁸

¹¹¹ *Rodrigues* case para 45. Cachalia J here relies on *Minister of Justice and Constitutional Development v Chanco* 2010 4 SA 82 (CC) paras 40, 44 where the Constitutional Court correctly held that as "[t]he President retains full powers and functions – and is therefore the bearer of all obligations – in the greater pardons process under s 84(2)(j)" the President must be joined to proceedings involving presidential pardons.

¹¹² *Rodrigues* case para 47.

¹¹³ *Rodrigues* case para 47.

¹¹⁴ *Rodrigues* case para 51. See also *Bothma* case para 24 where the Constitutional Court pointed out, in the context of whether the degraded quality of evidence (including the memory of witnesses) constituted a prejudice to the accused, it held that there must be proof of actual prejudice and "not speculative prejudice".

¹¹⁵ *Rodrigues* case para 51.

¹¹⁶ See *Broome* case para 82; *Rodrigues* case para 51, fn 10.

¹¹⁷ *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA).

¹¹⁸ *Rodrigues* case para 55 quoting Harms DP in *Zuma* case para 37.

The minority therefore held that, in light of the dictum in *Zuma*, even if there was political interference, the decision eventually to prosecute the appellant was not unlawful.¹¹⁹ A prosecution will therefore only be unlawful where, in addition to the wrongful motive, there is *also* no basis for such a prosecution.¹²⁰ Therefore, the interference could not have caused trial-related prejudice and the permanent stay of the prosecution would furthermore not have been a competent remedy in that scenario, even if there was such interference.¹²¹

Cachalia JA similarly rejected the appellant's contention that the former's right to adduce and challenge evidence¹²² has been infringed upon due to the state's refusal to provide further particulars.¹²³ It is correctly held, once again, that a permanent stay is not the appropriate remedy where there is a wanting for further particulars. This issue can be raised at trial through a request for further particulars.¹²⁴ Where there is a failure to provide satisfactory particulars, the appellant could have applied to have the charges quashed, and as Cachalia JA pointed out, that would have had the same effect as a permanent stay.¹²⁵

The family of the deceased is characterised by the minority (rightfully so) as the other victims of the delay and describes their struggle to bring the perpetrators to trial as "heroic" and further that the societal interests demand that their struggle not be in vain.¹²⁶ Unfortunately, since the passing of Mr Rodrigues, Mr Timol's family will never have finality or full closure to the matter.

Despite the degree of censure expressed towards the appellant's application, the minority still warned that the trial judge must be cognisant of the prejudice the appellant might face in formulating a proper defence

¹¹⁹ This can therefore be seen as a general "exception" to the requirement that the exercise of prosecutorial discretion may not be *mala fides*, illegal, irrational or for otherwise ulterior motives. See also Theophilopoulos *Criminal Procedure* 185 where the authors rely on *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SA 254 (GNP) paras 117-124 (especially para 124).

¹²⁰ Theophilopoulos *Criminal Procedure* 184 fn 45.

¹²¹ *Rodrigues* case para 56.

¹²² Under s 35(3)(i) of the *Constitution*.

¹²³ *Rodrigues* case para 58.

¹²⁴ See ss 85, 87 and 106 of the CPA; *Rodrigues* case para 59.

¹²⁵ *Rodrigues* case para 59.

¹²⁶ *Rodrigues* case para 60. Also see the sentiments expressed by the court *a quo* in *Rodrigues v National Director of Public Prosecutions* 2019 2 SACR 251 (GJ) (hereinafter referred as *Rodrigues a quo*) para 39.

due to substandard evidence owing to the passage of time.¹²⁷ Cachalia JA alluded to the fact that the burden of proof remains with the state and that the former will face a similar difficulty in *proving* its case. The trial court must similarly consider the difficulties that the appellant faces in preparing a defence and if that is not the case, the appellant still retains his right to appeal.¹²⁸ However, regarding the present appeal, the minority ultimately dismissed the appellant's case.¹²⁹

4 Discussion and evaluation

One cannot fault the overall conclusion of the majority in *Rodrigues*. The majority carefully considered all the relevant factors and came to the correct conclusion that although there has been a substantial separation in time between the events in question and the decision to prosecute the appellant, the only relevant period is the period between 2003 and 2017. Essentially as soon as the moratorium against the prosecution TRC was lifted, and after the second inquest was performed in 2017 fingering Rodrigues, the former was charged in July 2018, with his first appearance occurring in July 2018. Unlike *Broome*, these factors were beyond the control of the NPA and not due to ineffectual or improper management of the case.

It is submitted that the minority decision is more doctrinally sound as it separates the conflated grounds of appeal which were amalgamated into one application for a permanent stay of the prosecution. Nevertheless, the permanent stay of the prosecution is not a super-remedy to be requested where an applicant feels aggrieved due to several alleged procedural or contextual issues. Only where such issues have caused an unreasonable delay, and that is mainly or solely attributable to the state, can a court consider granting a permanent stay. As the minority has pointed out, there are other remedies available, such as the request for further particulars. Over and above the apparently baseless assertion by the appellant that he

¹²⁷ *Rodrigues* case para 61; *Bothma* case para 24. Cachalia JA in the *Rodrigues* case relies on authority by the Canadian Supreme Court in *R v Carosella* [1997] 1 SCR 80 para 105 (as approvingly relied on in the *Bothma* case para 81) where L'Heureux-Dubé J held that: "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" (original emphasis).

¹²⁸ *Rodrigues* case para 61.

¹²⁹ *Rodrigues* case para 62.

has received a presidential pardon, the provisions under the CPA¹³⁰ and the *Constitution*¹³¹ seem to imply a person must be *convicted* first before a pardon can be granted.

It is now firmly established in South African law that an application for the permanent stay of the prosecution is a drastic remedy and will not be readily granted by a court. This application is one of the few procedural requests not directly regulated by the CPA and the discretion lies with a court to make the relevant determination, considering a host of relevant factors. These factors are considered considering the conduct of the accused and the prosecution during the pre-trial process and against an overall backdrop of reasonableness. The factors do not constitute a closed list but ordinarily include the duration of time passed, the prejudice potentially suffered by the accused, the nature of the offence and the reasons the state assert for the delay. The court in *Sanderson* especially has warned against the application of draconian timeframes. Furthermore, the rejection of the application in cases spanning decades, in particular, *Rodrigues* (47 years) and *Bothma* (39 years), have proven to be indecisive, while in *Broome*, 7 years, contextually, proved to be sufficient. Although the facts in these cases differ vastly and involve societal scourges in their own right (murder, rape, and fraud respectively), the courts were always mindful of the societal interest and expectation in holding potential offenders responsible for the alleged transgressions. If this societal interest and expectation is disappointed, belief in the criminal justice system is impacted negatively.

Societal expectations regarding the nature of the crime are also important to consider. An order for the permanent stay of the prosecution is already a "drastic remedy" in itself but it appears that it will even less likely be ordered in a case involving murder.¹³² The logic has, however, been applied to cases involving sexual violence such as rape.¹³³ Prescription periods, especially in relation to crimes that do not prescribe such as murder and rape, would be rendered pointless if there is a significant passage in time between the events in question and the charging of the accused. As pointed out by the minority in *Rodrigues*, a prolonged passage of time not only impacts the

¹³⁰ Under s 106(1)(e) of the CPA read with s 327(6).

¹³¹ Section 84(2)(j) of the *Constitution* (quoted above at fn 109).

¹³² See *Zanner* case para 21; *Rodrigues* case para 34.

¹³³ See *Bothma* case paras 44-66 where the Constitutional Court comprehensively discusses the relevance of the nature of the offence and its impact on the case. Also see *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 2 SACR 283 (CC).

State's case but also the defence of the accused. These are important considerations that courts must take into account.

A paradigm that is often neglected is the impact of the extended trial periods on the victim. Often courts refer to broader "societal interests" in prosecuting crime and holding those who have perpetrated crime responsible for their actions.¹³⁴ Both the majority (in the context of the victims' families involved in the TRC trials), as well as the minority (referring to Mr Timol's family specifically) in *Rodrigues*, discussed the victims impacted by this case. The court *a quo* also recognised the interests of victims (and/or their families) and held that "[t]he role and participation of victims have been a central feature in the approach to dealing with crimes committed in the past. A victim's interests and voice, whilst not dispositive, are important parts of the balancing exercise that *Sanderson* contemplates".¹³⁵ The conversation surrounding the permanent stay of the prosecution is dominated (and most would likely submit correctly so) by the impact the delayed prosecution has on the life of the accused. Meanwhile, the families of victims are in a seemingly perpetual state of uncertainty awaiting justice or at least finality. The victim's position is even more precarious as they do not have tangible mechanisms during times of delay, save perhaps for the general right to receive information in terms of the general right under section 3 of the Service Charter for Victims of Crime in South Africa,¹³⁶ particularly the right request information regarding the status of the case. A similar provision has also been included in the Victim Support Services Bill 2019.¹³⁷ In addition, the *Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development (2021)*¹³⁸ also echoes these sentiments. It calls for the protection of victims' rights including promoting assistance at every stage of criminal proceedings.¹³⁹ It is reassuring to see that more attention

¹³⁴ See fn 34 above.

¹³⁵ *Rodrigues a quo* para 39 (footnotes omitted). Also see Grant "General Provisions" 33-31 where it is pointed out that "the interests of the family and the victims of the alleged crime were recognised for the first time" in *Rodrigues a quo*.

¹³⁶ See Department of Justice and Constitutional Development 2004 <https://www.justice.gov.za/vc/docs/vc/vc-eng.pdf>.

¹³⁷ In terms of s 5(1)(c) of the Victim Support Services Bill 2019 (Gen N 791 in GG 43528 of 17 July 2020).

¹³⁸ Adopted at the 14th United Nations Congress on Crime Prevention and Criminal Justice.

¹³⁹ *Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development (2021)* Clause 31. Also see Clauses 32 and 34.

is being paid to the victim's paradigm in case law, the media and in terms of legislation and international instruments.

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List of Abbreviations

CPA	Criminal Procedure Act 51 of 1977
J Int'l Aff	Journal of International Affairs
JMAS	Journal of Modern African Studies
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SACP	South African Communist Party
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
TRC	Truth and Reconciliation Commission
UTLJ	University of Toronto Law Journal