



**THE RIGHT TO A FAIR TRIAL; AN ANALYSIS of s342 (A), s168 OF THE CRIMINAL  
PROCEDURE ACT AND A PERMANENT STAY OF PROSECUTION**

BY

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**DECLARATION/STATEMENT OF ORIGINALITY**

I do hereby declare that the dissertation titled ‘*The right to a fair trial; an analysis of s342A, s168 of the Criminal Procedure Act and a permanent stay of prosecution*’ is my own work and all sources used and referred to have been acknowledged in full. This project is an original piece of work, which may be made available for photocopying and for inter-library loan.

Thus signed and dated on the    day of July 2017 at Durban



Londeka Zandile Ngalo



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To my Heavenly Father, Thank you for giving me the strength, patience and the resilience to go on. I am because of you, for you. Glory is your name.

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## CHAPTER ONE

### INTRODUCTORY OVERVIEW

#### 1.1 Introduction

‘The right of every man to a fair hearing before he is condemned lies at the root of the tree of justice’.<sup>1</sup> Role players in the criminal justice system must be vigilant and ensure that undue delays in criminal proceedings are curbed as a failure to protect the right to a fair trial will lead to society mistrusting the criminal justice system.

‘Undue delay in the administration of criminal justice system poses serious threats to the freedom and well-being of the individual citizen. If criminal charges are long pending against an accused, he or she may suffer extreme anxiety and harassment and may be forced to undergo lengthy imprisonment prior to trial’.<sup>2</sup> ‘Delay can also impair the ability of an accused to refute the charges brought against him-potential witnesses may no longer be available, or the memories of available witnesses maybe blurred by the passage of time’.<sup>3</sup>

Unreasonable delays in proceedings have always been a continuously growing problem. Shakespeare had summarised the seven burdens of man and said that delay was the fifth burden.<sup>4</sup> This shows that even in the pre-medieval times delays were prevalent. The genesis of unreasonable delays in criminal proceedings can be traced back to 1972 to the case of *Barker v Wingo* where the Supreme Court of the United States of America approved a four factor test.<sup>5</sup> In deciding upon a speedy trial claim the court stated that one must look at ‘(1) the length of the delay before the institution of the prosecution; (2) the reason for the delay; (3) the assertion by the accused of his rights; and (4) the prejudice to the accused’.<sup>6</sup> This case illustrated that the courts must consider the above factors, when deciding if delays have occurred in criminal proceedings.

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<sup>1</sup> *Rowe v Australian United Steam Navigation Co Ltd* (1909) 9 CLR 1.

<sup>2</sup> AL Schneider ‘The right to a fair trial’ (1968)20 *Stan LR* 476.

<sup>3</sup> *Ibid* 476.

<sup>4</sup> W Shakespeare *Hamlet* (1603) 4.

<sup>5</sup> *Barker v Wingo*, 407 U.S.514 (1972).

<sup>6</sup> *Barker* supra note 5 at 1376.

It was noted by the court that ‘the fact that there has been a deprivation of a right to a speedy trial does not *per se* prejudice the accused’s ability to defend himself in proceedings’.<sup>7</sup> Over the years with the accumulation and flooding in of cases, delays in trials have become a problem in the criminal justice system. International conventions and local statutes have been created to protect this right to a fair trial because of the increasing delays in the finalisation of criminal proceedings.<sup>8</sup> It has been argued that ‘fairness cannot be reconciled with unreasonable delay; it is not possible to reconcile it with the fact that the accused avoid it’s just desserts’.<sup>9</sup> This notion is based on the premise that the accused person should not avoid proceedings.

Kruger submits that ‘society’s criminal policy requires that if you commit a crime punishment should follow’.<sup>10</sup> This utilitarian approach has found favour amongst many academics.<sup>11</sup> A delay in criminal proceedings should not be seen as a way for the accused to avoid punishment. Even if an accused person has committed an offence it is important that his procedural rights are protected.

## 1.2 Background & Context of the Study

Section 35 (3) (d) of the Constitution<sup>12</sup> came into effect on 1 September 1997 and it obliges the court in which criminal proceedings are pending, to investigate any delay in the conviction of the proceedings which appears to be unreasonable.<sup>13</sup> S35(3) of the Constitution states that ‘every accused person has the right to a fair trial which includes (d) the right to have the trial begin and concluded without unreasonable delay’.<sup>14</sup>

Prior to the enactment of s342A of the Criminal Procedure Act (hereinafter referred to as the Act),

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<sup>7</sup>*Barker* supra note 5 at 1376.

<sup>8</sup> ‘The Criminal Procedure Act 51 of 1977’ governs the entire criminal justice system including provisions that deal with unreasonable delays in South Africa; The Constitution of the United State of America 1789 governs speedy trials.

<sup>9</sup> A Kruger *Hiemstra’s Criminal Procedure* (2009) 168.

<sup>10</sup> *Ibid* 168

<sup>11</sup> *Ibid* 168.

<sup>12</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s35.

<sup>13</sup> C Ballard ‘Research report on remand and detention in South Africa: An Overview of the current law and proposals for reform’ available at <http://acjr.org.za/resource-centre/South%20Africa%20Ballard> accessed on 2014

<sup>14</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s35.

the courts applied the remedy of permanent stay of prosecution when the court was faced with unreasonable delays in trials.<sup>15</sup> Hiemstra's *Criminal Procedure* states that the sole reason for the enactment of this provision was to ensure that delays decrease.<sup>16</sup> It was enacted to enforce the principle of expeditious trials.<sup>17</sup> This principle had already existed in common law.<sup>18</sup>

Section 342A of the Act was inserted following the investigations by the South African Law Reform Commission.<sup>19</sup> In 2003 cabinet instructed a task team the Justice Crime Prevention and Security (JCPS) team to 'conduct and review the criminal justice system with a view of identifying challenges and obstacles within the justice system and for recommendations to be made'.<sup>20</sup> S342A of the Criminal Procedure Act 51 of 1977 gives the court the power to grant remedies that will deter and decrease delays.<sup>21</sup>

### 1.3 Research Questions

The following questions shall be examined in this study,

1. Whether the remedies that are currently available are sufficient to remedy unreasonable delays?
2. Whether they serve their intended purpose of decreasing delays?
3. Whether there are other possible remedies that may decrease delays in criminal proceedings?

### 1.4 Focus of the Study

The focus of this study is to analyse the available remedies and to see if they are effective in remedying delays in trials. This study will analyse the provisions of s168 of the Act.

The Act states that:

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<sup>15</sup> Kruger (note 9 above;169).

<sup>16</sup> Ibid 8.

<sup>17</sup> Kruger (note 9 above;169 ).

<sup>18</sup> *Berg v Prokureur* 1995 (2) SACR 623 (T) 6.

<sup>19</sup> *Criminal Justice Review Report on Section 342A of the Criminal Procedure Act 51 of 1977(2003)* 2.

<sup>20</sup> Ibid 1.

<sup>21</sup> Act 51 of 1977.

A court which criminal proceedings are pending may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of the Act.<sup>22</sup>

This provision allows a party in criminal proceedings to ask the court for a postponement. The court may only grant a postponement if it is necessary or expedient.

The statutory remedies of s342A (3) will be analysed in relation to a right to a fair trial.<sup>23</sup> The following are statutory remedies available in terms of s342A (3) of the Act. The court (1) may refuse a further postponement which may only be granted once the court has exhausted all the other remedies; (2) may grant a postponement; (3) may strike a matter off the roll and it may only reinstate the matter on the roll with permission from the attorney general; (4) where the accused has pleaded to the charge and either party 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 ;(5) may grant wasted costs incurred by either party as a result of unreasonable delay caused by the other party (not yet in force) (6); that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary to be taken against the person causing the delay.<sup>24</sup>

This study shall focus on the common law remedy of a permanent stay of prosecution because it is the only remedy that brings criminal proceedings to an end.<sup>25</sup>

## 1.5 Aim of the study

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<sup>22</sup> Act 51 of 1977.

<sup>23</sup> Act 51 of 1977 s342A (3).

<sup>24</sup> Act 51 of 1977 s342A (3).

<sup>25</sup> S Lawrence 'The power of a court to stay a prosecution as an abuse of process: Judicial law enforcement of fundamental values and principles' Presented at the Reasonable Cause Criminal CLE Conference on 16 September 2012.



The aim of this study is to encourage the courts to consider remedies that may be more effective in eradicating unreasonable delays in trial. This study will recommend other remedies such as cost order provisions to be included in the Act. It will show the available remedies and the consequences of granting those remedies.

It is recommended that the common law remedy of a permanent stay of prosecution be codified and be included in the Criminal Procedure Act. This study hopes that the courts will consider the interest of justice as part of s168 of the Act. The aim is for legislature, academics and legal professionals to revisit the issue of delays so that delays can decrease in the criminal justice system.

## **1.6 Research Methodology**

The research is based on the qualitative approach. It is desktop research in which data was collected in an attempt to compare, contrast and analyse data relating to the right to a fair trial and unreasonable delays in trials. This research consists of case law, statutes, journals, internet sources, law reviews and books on the topic of delays and remedies. This research was done in an effort to discover new remedies and answer the questions of this study.

## **1.7 Overview of the Chapters**

Chapter one (1) introduces all the chapters holistically by branching out and explaining what each chapter will be dealing with, it explains the main focus of the study. Chapter two (2) introduces the due process model and the crime process model. It shall examine the due process model in the United States of America juxtaposition to the one in South Africa.

Chapter three (3) deals with the right to a fair trial and the nature and extent of the right as far as it relates to unreasonable delays in trials. This chapter will deal with the statutory remedies s342A (3) of the Criminal Procedure Act. This chapter will deal with s168 of the Act, the postponement provision. It will analyse postponements and the consequences of postponements and how they contribute to unreasonable delays in trials. Chapter four (4) shall look at the common law remedy

of a permanent stay of prosecution. The history and the success of this remedy shall be discussed. Chapters five (5) are concluding arguments drawn from the previous chapters, recommendations and suggestions.

## CHAPTER TWO

### DUE PROCESS AND THE CRIME CONTROL MODEL

#### 2.1 Introduction

This chapter will deal with the criminal justice system in as far as it relates to the right to a fair trial.

The Criminal Justice System consists of two (2) models: the Crime Control model and the Due Process model.<sup>26</sup> Criminal procedure is a system that seeks to balance certain fundamental values; these values can be explained in terms of crime control and due process model.<sup>27</sup> Packer originally said that ‘two models of a criminal process existed, the crime control model and the due process model’.<sup>28</sup> It will be more than one but not more than two.<sup>29</sup> It depends entirely on the model used in a criminal justice system that will determine how the right to a fair trial is treated.

The crime control model has been described as a ‘conveyor belt’.<sup>30</sup> The model is based on the proposition that ‘the repression of criminal conduct is by far the most important function to be performed by the criminal processes’.<sup>31</sup> The due process model can be described as ‘a type of

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<sup>26</sup> H L Packer *The Limits of Criminal Sanction* (1969) 149

<sup>27</sup> JJ Joubert *Criminal Procedure Handbook* 8ed (2007) 7.

<sup>28</sup> Ibid

<sup>29</sup> Ibid 149.

<sup>30</sup> Ibid 149.

<sup>31</sup> Ibid 149.

justice system which is based on principle that a citizen has absolute rights and cannot be deprived of life, liberty or property without appropriate legal procedures and safeguards'.<sup>32</sup>

This chapter will briefly discuss the United States of America and its criminal justice system juxtaposition to that of South Africa. The United States of America criminal justice system is based on the due process model.<sup>33</sup> In South Africa both models are used the criminal justice system. This chapter will then conclude by illustrating the model used in South Africa. Chapter 3 will discuss the right to a fair trial.

## 2.2 Criminal Process Model<sup>34</sup>

'It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, whether I do good or whether I do evil is in material, for innocence itself is no protection, and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever'.<sup>35</sup>

Packer contended that the criminal justice system consist of two models .The first model is the crime control model. The crime control model is a model which is 'based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal processes'.<sup>36</sup>

Packer asserted 'that the crime control model is a positive guarantor of social freedom'.<sup>37</sup> Crime control process 'operates like a *conveyor belt* the criminal process model, is seen as a screening process in which each successive stage-pre-arrest investigation, arrest, post- arrest investigation, preparation for trial, trial or entry of plea, conviction, and disposition-involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along

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<sup>32</sup> 'Due Process Model Law and Legal definition' available at <https://definitions.uslegal.com/d/due-process-model/> , accessed on 9 June 2013.

<sup>33</sup>The Constitution of the United States of America, 1787.

<sup>34</sup> Packer (note 26 above;1).

<sup>35</sup> J Adams *The Portable John Adams* 2004.

<sup>36</sup> Ibid 149.

<sup>37</sup> Packer (note 26 above; 10).

to a successful conclusion’.<sup>38</sup>

The aim is to bring the case to an end at an early stage. He contended that in this model, the police because they were skilled could tell whether someone is guilty or not at a very early stage.<sup>39</sup>

To show evidence of this is the *presumption of guilt*, policemen and prosecutors are given the powers to screen possible people as being innocent or guilty.<sup>40</sup> Once they have made a determination that a person is probably guilty than all ‘subsequent activity directed at him is based on the view that his probably guilty’.<sup>41</sup> This system aims to discover ‘the truth or to establish the factual guilt of the accused’.<sup>42</sup> The failure of law enforcement to bring criminal conduct under tight control is viewed as ‘leading to the breakdown of public order and hence to the disappearance of an important condition of human freedom’.<sup>43</sup>

Packer found that with this model innocent people could end up being convicted.<sup>44</sup> Packer contended ‘that a failure of convicting guilty people would lead to a breakdown of the justice system, thus leading to a disappearance of fundamental human rights’.<sup>45</sup>

Primarily the crime control model’s aim is to convict people, and to determine whether the person is guilty or not at a very early stage in the proceedings. The procedural rules of evidence may be broken so long as the end result is that someone is found guilty. The second model is the due process model which is concerned with protecting the accused procedural rights at any expense.<sup>46</sup>

## 2.3 The Due Process Model<sup>47</sup>

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<sup>38</sup> Ibid 11.

<sup>39</sup> Packer (note 26above; 11).

<sup>40</sup> Packer (note 26above; 11).

<sup>41</sup> Packer (note 26 above; 11).

<sup>42</sup> Packer (note 26 above; 13).

<sup>43</sup> Packer (note 26 above; 13).

<sup>44</sup> Packer (note 26 above; 13).

<sup>45</sup> Packer (note 26 above; 13).

<sup>46</sup> Packer (note 26 above; 13).

<sup>47</sup> Packer (note 26 above; 17).

The due process model ‘is based on the principle that citizens have absolute rights and cannot be deprived of life, liberty or property without appropriate legal procedures and safeguards’.<sup>48</sup> The criminal justice system should provide ‘due process and fundamental fairness under law’.<sup>49</sup> The due process is concerned about ensuring the principles of fairness, and many systems across the world have employed these principles as is evidence, in their own bill of rights.<sup>50</sup> Packer ‘stated that the criminal justice system should concentrate on the defendant and not the victim’.<sup>51</sup>

Packer described the due process model as ‘*obstacle course* in that it consists of a series of impediment that take the form of procedural safeguards that serve as much to protect the factually innocent as to convict the factually guilty’.<sup>52</sup> The due process model is aware that errors maybe occur and innocent people might end up being convicted so in order to prevent this, they try and eliminate any possible mistakes that might occur. This is evident and is probably why many legal systems require that the guilt of a person be proven beyond a reasonable doubt.<sup>53</sup> He argued that the state should not ‘factually find’ someone guilty but that a person’s guilt should be determined by the legal procedures.<sup>54</sup>

He contended that ‘prosecutors, policemen, investigators people who play a part in the criminal justice system should be held accountable if they fail to follow procedural law and the guidelines of fairness’.<sup>55</sup> He argued that their powers should be limited and not unlimited like in the crime

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<sup>48</sup> ‘Due Process Model Law and Legal definition’ available at <https://definitions.uslegal.com/d/due-process-model/> accessed 2014.

<sup>49</sup> Packer (note 26 above; 17).

<sup>50</sup> The African Charter on Human and Peoples Rights of 1986; The International Covenant on Civil and Political Rights of 1966; The Universal Declaration on Human Rights of 1948; The American Convention on Human Rights 1978; European Convention for the protection of human rights and fundamental freedoms (ECHR) 1950 (All these convention were enforced to promote the right to a speedy trial and to prevent unreasonable delays in trials.

<sup>51</sup> Packer (note 26 above; 13).

<sup>52</sup> Packer (note 26 above; 13).

<sup>53</sup> JJ Joubert (note 76 above 21;17-18) states that ‘the onus of proof rests on the prosecution because of presumption of innocence regarding the accused , this means that an accused person does not have to prove that he is innocent, the prosecution must cover adequately every substantive element of the crime. If but a single element is not proved by the prosecution beyond the reasonable doubt the accused can in no way be convicted’.

<sup>54</sup> Packer (note 26 above; 17).

<sup>55</sup> Packer (note 26 above; 13).

control model.<sup>56</sup> Packer stressed the importance of protecting the accused rights and not subjecting him/her to grave harm.<sup>57</sup> It cannot be overly emphasized how important the fairness principle is in the due process model.

Roach<sup>58</sup> criticized Packer's models and said that 'it placed too much emphasize on the defendants (accused) right. He argued that the due process model and the crime control model were intertwined'.<sup>59</sup>

After Packer had formed these models he received criticism and amongst those critics was Roach who said the issue with the models that had been advanced was that victimisation studies had not been considered and therefore the models were highly flawed.<sup>60</sup> He then advanced two more models, the non-punitive and the punitive model.<sup>61</sup> The punitive model 'could be described as a rollercoaster; victims should play an active role in the prosecution of crime'.<sup>62</sup>

'A reliable system is ultimately impossible it's rather difficult to ensure a completely fair system Joubert and others argued'.<sup>63</sup> They argue that these systems can never be in harmony for the following reasons:

Firstly the argument is that 'strict rules cannot be applied to criminals, because they submit that those rules must also be created with the idea that innocent people might be dragged into the system'.<sup>64</sup> Secondly 'the liberty of the innocent should not be sacrificed to increase efficiency of crime control'.<sup>65</sup> Thirdly it was asserted 'that if the state were able to curb criminality the state might live in tyranny, perhaps we should try and find a system where there is complete crime

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<sup>56</sup> Packer (note 26 above; 13).

<sup>57</sup> Packer (note 26 above; 13).

<sup>58</sup> K Roach 'Models of the Criminal Process' (1973) 89 *The Journal of Criminal Law and Criminology* 671-716.

<sup>59</sup> *Ibid* 1.

<sup>60</sup> Roach (note 58 above; 1).

<sup>61</sup> Roach (note 58 above; 1).

<sup>62</sup> Roach (note 58 above; 1).

<sup>63</sup> JJ Joubert (note 27 above; 8).

<sup>64</sup> JJ Joubert (note 27 above; 8).

<sup>65</sup> JJ Joubert (note 27 above; 8).

control to confirm this assertion'.<sup>66</sup> On the other hand they argue that if a person ends up having absolute rights, this may lead to problems. In South Africa accused people do have rights, but no right is *absolute*.<sup>67</sup> The rights in the bill of rights can be limited by the limitation clause.<sup>68</sup>

One may argue that the State represents the victims and by this the victims' rights are protected. 'In South Africa the criminal justice system is based on the due process model and the crime control model'.<sup>69</sup>

## 2.4 The Current Position in South Africa

The Constitution is not the cause of crime in this country. The courts' job is to uphold the constitution in such a manner that it gives it proper effect which I consider is to attempt to achieve some balance between the models of crime control and due process' (*S v Cloete 1999(2) SACR 137(2) 150h*).<sup>70</sup>

This statement shows South Africa's current criminal justice system.<sup>71</sup> Prior to 1994, during the apartheid-era the criminal justice system was focused on advancing the political rights of a few people. This system did not adhere to the principles of fairness nor did the system attempt to decrease crime in the Republic of South Africa. It was primarily a system based on racism and discrimination, as parliament could enact any legislation even if it infringed on human rights and freedoms of the people.

Prior to 1994, human rights were being violated, and the state were abusing its power, they would force confessions from accused people, detention without trial, even death in detention.<sup>72</sup> After 1994, 'South Africa became a democratic state which was founded on certain values amongst these were human dignity, equality and advancements of human freedoms and values such as non-

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<sup>66</sup> JJ Joubert (note 27 above; 8).

<sup>67</sup> The Constitution of South Africa, 1996 ,s36.

<sup>68</sup> The Constitution of South Africa, 1996 ,s36.

<sup>69</sup> *S v Cloete 1999 (2) SACR 137(2)150h*.

<sup>70</sup> JJ Joubert (note 27 above; 9).

<sup>71</sup> *Ibid*.

<sup>72</sup> JJ Joubert (note 27 above; 9).

racialism, non-sexism, supremacy of the constitution and the rule of law'.<sup>73</sup> Section 2 of the constitution is here to ensure constitutional supremacy and states that any conduct, or law inconsistent with is invalid'.<sup>74</sup> The United States of America is similar to South Africa as they are also concerned with ensuring that procedural rights are protected.<sup>75</sup>

## 2.5 The Current Position in the United States of America

The Fourteenth (14<sup>th</sup>) Amendment: Section 1: All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny any person protection within its equal protection of laws (Due Process Clause).<sup>76</sup>

In the United States of America (hereinafter referred to as USA) has a clause dedicated to protecting the due process model. In the USA the due process model plays an important role, the clause applies to all states within the United States and no individual may waiver a person's rights without due process of law. Evidence of the above statement can be seen in the Alabama judgment. 'In *Powell v Alabama* the court reversed the judgement of Alabama Supreme Court and determined that a defendant must be given access to counsel upon her own request in a capital trial as part of the due process rights'.<sup>77</sup>

In the case of *In Re Winship no.778 397, U.S 358 (1970)*, the court held that 'proving that someone is guilty beyond a reasonable doubt formed part of the due process'.<sup>78</sup> The court had the following to say 'lest there remain any doubt about the constitutional stature of the reasonable doubt-standard, we explicitly hold that the due process arose protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which

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<sup>73</sup> The Constitution of South Africa, 1996, Chapter 1(The founding provisions).

<sup>74</sup> The Constitution of South Africa, 1996, s2.

<sup>75</sup> The Constitution of the United States of America, 1787, 14th Amendment.

<sup>76</sup> The Constitution of the United States of America, 1787.

<sup>77</sup> *Powell v Alabama* 287 U.S 451932.

<sup>78</sup> *In Re Winship no.778 397, U.S 358 (1970)*.



he is'.<sup>79</sup> These sentiments can be expressed in South Africa as it is trite law that the onus of proof rests on the State to prove its case beyond a reasonable doubt.<sup>80</sup>

In the case of '*In Re Gault* 387 U.S 113(1967), the issue the court was faced with was whether the fourteenth amendment required a hearing at this stage and whether it should conform with the requirements of a criminal trial or even of the usual administrative proceedings the due process clause'.<sup>81</sup> The court 'held that the due process model does require application during the adjudicatory hearing of the essentials of due process and fair treatment'.<sup>82</sup> The due process model is present in USA as can be seen from case law above.

## 2.6 Concluding Comments

The model used in a criminal justice system will determine the weight placed on the right to a fair trial. The due process model ensures that the procedural rights are afforded to the accused person such rights. The due process model requires full protection to the accused and his procedural rights such as the right to a speedy trial; notification of charges and the opportunity to be heard and the right to legal representation and the same can be seen in South Africa.<sup>83</sup> Both South Africa and the USA have elements of the due process model.<sup>84</sup>

The best way to describe the crime control process is that the criminal justice system should always focus on finding the '*factual guilt of the accused*'.<sup>85</sup> 'Furthermore a failure of convicting guilty people will lead to the breakdown of the justice system, thus leading to a disappearance of fundamental human rights'.<sup>86</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> *Khumalo v S* (CA.28/08) (2011)ZANWHC 21 (2011).

<sup>81</sup> *In Re Gault* 387 U.S 113(1967).

<sup>82</sup> Ibid.

<sup>83</sup> The Constitution of South Africa, 1996, s35 (3).

<sup>84</sup> The Constitution of South Africa, 1996, s35 (3); The Constitution of the United States of America, 1787, 14th Amendment.

<sup>85</sup> Packer (note 26 above; 13).

<sup>86</sup> Parker (note 26 above; 13).

In South Africa the rights of the victim are protected by the State that acts on before of the complainant. The complainants are given an opportunity of convey their version in court. They also form part of the criminal proceedings. One of the fundamental rights of the accused is being afforded the right to a fair trial as envisaged in the constitution, this right is afforded to accused persons and this is an example of the due process model.<sup>87</sup>

If we are to explain the right to a fair trial s35(3)(d) of the constitution and the remedies of unreasonable delays in trials, we must first ascertain which criminal justice system is operative in South Africa, in order to determine the weight placed on the right to a fair trial.<sup>88</sup> In order to establish how the courts apply provisions of the bill of rights when they are placed under the microscope (under scrutiny). The right to a fair trial shall be discussed in the following chapter, this right is afforded international recognition and protection and its importance cannot be undermined or over emphasized. In Chapter three (3) we shall be discussing the nature and extent of the right to a fair trial. This chapter will discuss s168 of the Criminal Procedure Act and it shall be considered in relation to unreasonable delays in trials.<sup>89</sup> The chapter will discuss the statutory remedies as envisaged in s342A (3) of the Criminal Procedure Act.<sup>90</sup>

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<sup>87</sup> The Constitution of South Africa, 1996, s35 (3).

<sup>88</sup> The Constitution of South Africa, 1996, s35 (3).

<sup>89</sup> Act 51 of 1977.

<sup>90</sup> Act 51 of 1977.

## **CHAPTER 3**

### **UNREASONABLE DELAYS IN TRIALS**

#### **3.1 Introduction**

This chapter shall be dealing with the right to a fair trial, the nature and its extent. The right to a fair trial complies with both procedural and substantive fairness.<sup>91</sup> The extent of s35 of the constitution is that no right in the bill of rights is absolute.<sup>92</sup> The nature of this right is that it protects accused persons only. The right to a fair trial shall be discussed in as far as it relates to unreasonable delays in criminal proceedings.

This chapter will focus on the right to have your trial begin and end without unreasonable delay in trials, this principle is recognised by majority of the world. This chapter will discuss section 168

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<sup>91</sup> Uir.unisa.ac.za, accessed on 2017.

<sup>92</sup> The Constitution of South Africa, 1996, s36.

of the Act<sup>93</sup> which gives the court the right to grant a postponement where the court deems such postponement necessary and expedient. S168 of the Act will be discussed in as far as it contributes to the unreasonable delays in trials.

This chapter will deal in detail with each of the statutory remedies as envisaged in section 342A (3) (a-f) of the Criminal Procedure Act.<sup>94</sup> Each remedy shall be explored individually. This chapter will deal with the following remedies, (1) Refusal of a postponement; (2) Granting of a postponement;(3) Striking the matter off the court roll and reinstating it with permission of the Attorney-General; (4) The court dealing with the matter with available evidence;(5) Cost order provision even though it has not been promulgated as yet and (6) The matter be referred to appropriate authority for administrative investigations and possible disciplinary action. Each of these remedies shall be discussed to show whether or not they eradicate unreasonable delays in trials”.<sup>95</sup>

### **3.2 Right to a fair trial**

The right to a fair trial encompasses many other fundamental human rights which are afforded to citizens by virtue of being a democratic state.<sup>96</sup> Such ‘rights include the right to remain silent, to be presumed to be innocent and not to testify during proceedings’.<sup>97</sup>

The aspect of fairness and justice would require giving the accused an opportunity to cross-examine the witness in criminal proceedings.<sup>98</sup> If the accused is not given an opportunity to cross examine a witness the court held that this amounts to a failure of justice.<sup>99</sup>

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<sup>93</sup> Act 51 of 1977.

<sup>94</sup> Act 51 of 1977.

<sup>95</sup> Act 51 of 1977;s342A(3).

<sup>96</sup> [www.internationallawyers-org](http://www.internationallawyers-org), accessed 2017.

<sup>97</sup> The Constitution of South Africa, 1996; s35 (3).

<sup>98</sup> The Constitution of South Africa, 1996 ;s35(3).

<sup>99</sup> *R v Ndawo & Others* 1961(1) SA16 (N).

In the case of *S v Ntuli* the court interpreted the words 'fair trial' and the court noted that it no longer refers to a trial that complies with procedural requirements as was declared by Nicholas AJA in *S v Rudman* and *S v Mthwana*

A fair trial refers to a trial that is substantively fair, it embraces the concept of substantive fairness which is not to be equated with what might have passed constitutional muster in our criminal courts before the constitutional court came into force.<sup>100</sup>

The right to a speedy trial is considered one of the fundamental procedural rights of a person accused of having committed an offence. This right is enshrined in the constitutions and laws of many nations and can be found in numerous international instruments and international criminal tribunals.<sup>101</sup> This is a universal principle and majority of the world adheres to it.<sup>102</sup> It is evident from the Universal Declarations of Human Rights Article 10 which states that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.<sup>103</sup> The African Charter on Human Rights states at Article 7 (4) that: 'Every individual shall have the right to have his cause heard'.<sup>104</sup>

International conventions protect this right to a fair trials can be seen from: Article 6 of the European Convention for the protection of human rights, states that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.<sup>105</sup>

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<sup>100</sup> *S v Ntuli* (CCT17/95) (1995) ZACC 14; 1996 BCLR 141; 1996 (1) SA 1207.

<sup>101</sup> B Farrell 'The Right to a Speedy Trial before International Criminal Tribunals', (2003) 19 *SAJHR* 98.

<sup>102</sup> Protected at International law in Article 14(3)(c) of the International Covenant on Civil and Political Rights, Articles 20(4)(c) and 21(4)(c) of the Statutes of the International Criminal Tribunals for Rwanda and for the former Yugoslavia respectively, Article 7(1)(d) of the African Charter on Human and Peoples' Rights, Article 8(1) of the American Convention on Human Rights and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>103</sup> The Universal Declaration of Human Rights (1948).

<sup>104</sup> The African Charter on Human and Peoples Rights (1986).

<sup>105</sup> European Convention for the protection of human rights and fundamental freedoms (1950).

In South Africa, there are statutes that govern the right to a fair trial. <sup>106</sup>S35 (3) (d) is the provision we shall be dealing with. It states that ‘every accused person has the right to a fair trial which includes the right to have the trial begin and end without unreasonable delays’.<sup>107</sup> In the case of ‘*S v Zuma*, the court held that the right to a fair trial is not a closed list, and that the right specified in s35 (3) are prerequisites of the right to a fair trial’.<sup>108</sup>

The right to a fair trial ensures that fairness is done not only to the accused but to the justice system as a whole. The true effect of violating the right of a fair trial is that you disrespect the proper functioning of criminal justice system. The effect of violating the right to a fair trial is that society mistrusts the system and furthermore it creates anxiety amongst accused persons. The essence of having procedural law and substantive law is so that people adhere to rules of law, but if law is not respected, we will have anarchy in our country. In the following paragraph we shall deal with the nature and the extent of this right.

### **3.3 The Nature and Extent of s35 of the Constitution**

#### **3.3.1 The Nature of s35**

Conviction or sentence may be set aside upon review or appeal if the court finds that the accused did not have a fair trial. The right to a fair trial is a cornerstone of any civilised criminal justice system and it is the duty of every presiding officer to ensure that this right is not unjustifiably infringed upon or during the course of a criminal trial.<sup>109</sup>

Section 7 of the constitution says that ‘the State must respect, protect, promote and fulfil the rights

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<sup>106</sup> Act 51 of 1977; The Constitution of South Africa, 1996.

<sup>107</sup> Act 51 of 1977.

<sup>108</sup> *S v Zuma* 1995 (2) SA 642 (CC).

<sup>109</sup> T Van der Walt ‘The right to a fair trial revisited: *S v Jaipal*’ (2006)19 *SAJCL* 315-319.

in the bills of rights.<sup>110</sup> The following rights fall within the ambit of s35 (3) and it reads as follows:

‘Every accused person has a right to a fair trial, which includes the right’-

- (a) To be informed of the charge with sufficient detail to answer it;
- (b) To have adequate time and facilities to prepare a defence;
- (c) To a public trial before an ordinary court;
- (d) To have their trial begin and conclude without unreasonable delay.<sup>111</sup>

The rights in s35 (3) range from (a) to (m), above are a few of the rights that make up the right to a fair trial.<sup>112</sup> These rights are there to protect the accused and to ensure fairness throughout the criminal proceedings. Van de Walt states that the court said that the fact that the prosecutor and assessors were sharing an office amounted to a violation of S35 (3).<sup>113</sup> The court further noted that ‘the right to a fair trial is a cornerstone of any civilised criminal justice system and it is the duty of every presiding officer to ensure that this right is not unjustifiably infringed upon or during the course of a criminal trial’.<sup>114</sup>

The court reiterated this principle earlier in the case of ‘*S v Zuma* under the interim constitution of s25 (3), 1993 that criminal trials must be conducted in accordance with notion of basic fairness and justice in all courts in criminal proceedings’.<sup>115</sup> The case of *S v Jaipal* the court in relation to section 35(3) in a unanimous judgement said ‘that while the applicant's trial had irregularities it did not per se result in an unfair trial’.<sup>116</sup> The application for leave was allowed and the appeal was dismissed the court did warn that ‘limited resources must not be allowed to compromise constitutional rights to a fair trial’.<sup>117</sup> The courts are leaning towards the notion that not every minor irregularity will per se amount to a violation of the right to a fair trial.

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<sup>110</sup> Section 7 of the Constitution of South Africa, 1996.

<sup>111</sup> The Constitution of South Africa, 1996, s35.

<sup>112</sup> The Constitution of South Africa, 1996, s35.

<sup>113</sup> Van der Walt (note 109 above; 317).

<sup>114</sup> Van der Walt (note 109 above; 317).

<sup>115</sup> *Zuma* supra note 238 at 81.

<sup>116</sup> *Jaipal v State* 2005(4) SA 58 (CC); 2005(5) BCLB423 (CC).

<sup>117</sup> *Jaipal* supra.

Olivier and Clara wrote an article in which they analysed the judgement of ‘*S v Shinga* and they sort to contend that the constitutional court took it too far in trying to protect the right of a fair trial’.<sup>118</sup> The following can be observed from the article, the constitutional court ‘made it known that all criminal proceedings appeals, reviews should also be fair as a trial itself would be’.<sup>119</sup> The court found that if an appeal is granted it is to be heard in an open court.<sup>120</sup>

Olivier and Clara say that ‘the right to a fair trial encapsulates a compendious of rights guarantee of cognate due process rights, which is however not exhausted by these expressly enumerated and described in the bill of rights’.<sup>121</sup> Dane Ally states that ‘evidence obtained in a manner that violates any right in the bill of rights and said that evidence that is tendered before court must be excluded if the admission of that evidence would render the trial unfair or detrimental to the administration of justice’.<sup>122</sup> This has found favour as the provision of s35 (5) of the constitution guards against the way evidence is obtained.<sup>123</sup>

Roux submits that ‘in a democratic criminal justice system a suspect will not result in a conviction if the trial has been conducted in a procedurally unfair manner, procedural justices outweighs substantive justice’.<sup>124</sup> His article was concerned about court structures, this shows that even the way the courts are structured can infringe on the right to a fair trial.<sup>125</sup>

‘The constitution is the supreme law of the land and all provisions in the bill of rights ought to be respected at all *times* it is submitted’.<sup>126</sup> The Bill of rights is subject to the limitation clause, and no right in the bill of rights is absolute.<sup>127</sup>

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<sup>118</sup> NJJ Olivier & C Williams ‘The right to a fair trial in subsequent criminal proceedings: how the Constitutional Court took matters into its own hands in *Shinga v The State*’ (2010) *SACJ* 9.

<sup>119</sup> *Ibid* 15.

<sup>120</sup> Olivier & Williams (note 118 above; 15).

<sup>121</sup> Olivier & Williams (note 118 above; 2).

<sup>122</sup> DAV Ally ‘Pillay and Others v S: Trial fairness; the doctrine of discoverability; and the concept of “detriment” – the impact of the Canadian s 24(2) provision on South African s 35(5) jurisprudence’ (2005) 1 *South African Journal of Criminal Justice* 66.

<sup>123</sup> The Constitution of South Africa, 1996, S35 (5).

<sup>124</sup> W Le Roux ‘The Right to a fair trial and the architectural design of court buildings’ (2005) 122 *SALJ* 308-318

<sup>125</sup> Roux (note 121 above 310).

<sup>126</sup> Section 2 of the Constitution of South Africa, 1996.

<sup>127</sup> The Constitution of South Africa, 1996, S36.



### 3.3.2 The Extent of the right to a fair trial

‘The right to a fair trial is subject to the limitation clause and this is clear from the *Van Rooyen v S case*’.<sup>128</sup> S36 of the Constitution is known as the limitation of rights clause; it restricts and justifies the limitation on all the rights in the bills of rights.<sup>129</sup> S36 states that (1) ‘the rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors’ , “including- (a) the nature of the right;(b)the importance of the purpose of the limitation(c) the nature and extent of the limitation;(d)the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose”.<sup>130</sup>

The provision in subsection 2 states ‘that except as provided in subsection (1) or any other provision in the Constitution, no law may limit any right entrenched in the Bills of Rights’.<sup>131</sup> Authors have submitted that the general limitation clause is applicable to the bill of rights and not the other rights in the constitution, this means therefore is that rights outside the bill of rights are not subject to the limitation clause.<sup>132</sup> ‘The constitution still remains supreme and all law or conduct inconsistent with it is invalid and all obligations must be fulfilled’.<sup>133</sup>

Van der Walt states that the issue of whether an accused’s rights is justifiably infringed can become an issue at trials, in the manner evidence is obtained and the manner the trial is handled itself.<sup>134</sup> This assertion is true as unconstitutionally obtained evidence may not be allowed by the court. ‘The right to a fair trial includes the right to have your trial begin and conclude without undue

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<sup>128</sup> *Van Rooyen v S (General Council of the Bar of South Africa Intervening* 2002 (5) SA 246 (C).

<sup>129</sup> The Constitution of South Africa, 1996, s36.

<sup>130</sup> The Constitution of South Africa, 1996, s36.

<sup>131</sup> The Constitution of South Africa, 1996, s36.

<sup>132</sup> I Currie & J De Waal *The Bill of Rights Handbook* 5ed (2007) 163 states that ‘constitutional rights and freedoms are not absolute.’ ‘The section applies to the limitation of the rights in the bill of rights provisions elsewhere in the constitution that directly/indirectly grant rights cannot be limited by reference to s36.’

<sup>133</sup> Section 2 of the Constitution of South Africa, 1996.

<sup>134</sup> Van der Walt (note 109 above; 319).

delay’.<sup>135</sup>

### 3.4 The right to have the trial begin and end without unreasonable delays<sup>136</sup>

Justice delayed is justice denied .Delay devalues judgements , creates anxiety in litigants, and results in loss or deterioration of evidence upon which rights are to be determined...Delays signals a failure of justice and subjects the court system to public criticism and loss of confidence in its fairness and utility as a public institution.<sup>137</sup>

The maxim ‘justice delayed is justice denied’ has often been used to stress the importance of speedy trials in court, and to show that long and overdue delays are by their very nature a violation of the right to a fair trial and the justice system.

The Constitution of the South Africa s35 (3) (d) states that ‘everybody has the right to a fair trial, which includes the right to have the trial begin and concluded without undue delays in trials’.<sup>138</sup>

The constitution is a starting point to emphasize the importance of a trial beginning and ending expeditiously. In order to stay in line with the ethos of the constitution which is to afford the accused the right to a fair trial, legislation was enacted to ensure that unreasonable delays do not go unwarranted.

The law has vertical application therefore ‘when a person alleges that there right to a fair trial has been infringed because of unreasonable delays in trial they may do so in terms of S342A (1)’.<sup>139</sup> S342A(1)says that ‘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 witness’.<sup>140</sup>

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<sup>135</sup> Act 51 of 1977;s35.

<sup>136</sup> The Constitution of South Africa,1996, s342A.

<sup>137</sup> V Basserman ‘Justice delayed is justice denied: Proposed law reform’ 1989 *Consultus* 113.

<sup>138</sup> The Constitution of South Africa, 1996.

<sup>139</sup> Act 51 of 1977; s342A(1).

<sup>140</sup> Act 51 of 1977; s342A(1).

The following are factors the courts will consider to determine if there has been a delay, S342(A) (2) says that ‘ in considering the question whether and delay is unreasonable, the court shall consider the following factors : a) the duration ; (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 the witnesses; (e) the seriousness, extent or complexity of the charge or charges (f) actual or potential prejudice caused the state or the defence by the delay , including a weakening of the quality of evidence , the possible death of disappearance or non-availability of witnesses, the loss of evidence ,the 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 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’ .<sup>141</sup>

The courts have on many occasions applied the guidelines, no single factor is decisive on its own, and the court will consider the factors collectively.<sup>142</sup> It can be argued that some of the guidelines in s342A (2) where enacted because of the leading case of *Barker v Wingo*.<sup>143</sup>

In the case of *Barker v Wingo* stated that the following factors must be considered ‘(1) the length of the delay before the institution of the prosecution; (2) the reason for the delay; (3) the assertion by the accused of his rights; and (4) the prejudice to the accused’ .<sup>144</sup> In *Barker v Wingo* case the court rejected the contention that had been made by *Beavers v Hauabert 198 U.S at 87* that a person who fails to mention the right to a speedy trial waives his right.<sup>145</sup>

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<sup>141</sup> Act 51 of 1977.

<sup>142</sup> *S v Maredi* 2000 (1) SACR 611 – this case shows that the right to have your trial to begin and end without unreasonably had been violated. The accused was in custody for 22 months before the case was concluded. The court considered the length of time; *S v Joseph*, there were numerous postponements during the seven months, the court held that the matter had been prematurely struck off the roll.’ The court furthermore stated that ‘there was a no question of dereliction of duty as the problem was really ‘an unfortunate systematic on due to resource limitations at paragraph (13)’.The court conclude that in matters such as the present one in so far as the application of the provisions of s342A of the Act is concerned the court should apply its mind.

<sup>143</sup> *Barker* supra note 5.

<sup>144</sup> *Barker* supra note 5.

<sup>145</sup> *Barker* supra note 5.

Delays are seen in criminal proceedings on a daily basis and are caused by postponement, in the following paragraph we shall be dealing with postponements, which is governed by s168 of the Criminal Procedure.<sup>146</sup>

### 3.5 S168 of the Criminal Procedure Act<sup>147</sup>

Section 168 of the Criminal Procedure Act states that:

a court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.<sup>148</sup>

This provision in the Act allows the court to grant a postponement. A postponement is asking for a case to be adjourned to a date in the future. A postponement is an application made by either the State or Legal representative of the accused that a matter be postponed for another date, so the matter cannot proceed on that day in question.

The State or the Defence may make an application to the court for a postponement. An application for postponement is asking for the proceedings not to continue on that date which it had been set either because the accused is sick, or he is still seeking legal representation. The granting of a postponement is an indulgence and an applicant is not entitled to a postponement if no reason whatsoever has been shown.<sup>149</sup>

To grant or to refuse a postponement lies solely with the court.<sup>150</sup> Such discretion 'is a judicial discretion and has to be exercised judicially based on the specific facts of the matter'.<sup>151</sup> It may not be exercised 'capriciously or upon any wrong principle, but for substantial reasons'.<sup>152</sup>

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<sup>146</sup> Act 51 of 1977.

<sup>147</sup> Act 51 of 1977.

<sup>148</sup> Act 51 of 1977, s168.

<sup>149</sup> (*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 180D-181J); (*Isaacs and Others v University of the Western Cape* 1974 (2) SA 409 (C) at 411H.

<sup>150</sup> Act 51 of 1977.

<sup>151</sup> *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399.

<sup>152</sup> *Ibid*

The granting of a postponement cannot be ‘set aside on appeal because the appeal court itself would have come to a different conclusion on the postponement application’.<sup>153</sup> In the case of *National Police Services Union v Minister of Safety and Security*<sup>154</sup>, the constitutional court stated ‘that a postponement of a matter set down for hearing on a particular date cannot be claimed as a right’.<sup>155</sup> An applicant seeks an indulgence from the court. Postponements will not be granted unless the court is satisfied that this is in interest to do so. The applicant must show that there is ‘good cause’.<sup>156</sup> In order to ‘show good cause exists, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to an application.’<sup>157</sup>

A postponement may not be agreed upon by mere agreement between the parties.<sup>158</sup> In the judgment of *National Police Services Union*,

The appellant applied for a postponement the day before it was scheduled hearing, after apparently having reached an agreement with the respondents that a postponement would be sought. Counsel for the respondent did not appear in court the following day and the court found the reasons furnished to be inadequate and denied the postponement.<sup>159</sup>

The court made it clear in this judgment that a postponement cannot be claimed as a right.<sup>160</sup> The court in this instance refused a postponement.

The court held that factors to be considered but are not limited to ‘(1) whether the application has been timeously made; (2) Whether application for postponement is full and satisfactory and (3) whether there is prejudice to any of the parties and whether their application is opposed’.<sup>161</sup>

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<sup>153</sup> *R v Zackey* 1945 AD 505 511-512); *Madnitsky v Rosenberg* supra; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NMS) at 314H-315B (paras 3 and 4).

<sup>154</sup> *National Police Services Union and Others v Minister of Safety and Security and others* (CCT21/00) (2000) ZACC 15; 2000 (4) SA 110; 2000(4) SA 1110; 2001 (8) BCLR 775 (CC).

<sup>155</sup> Note 154 above, 3.

<sup>156</sup> Note 154 above, 3.

<sup>157</sup> Note 154 above, 3.

<sup>158</sup> Note 154 above, 4.

<sup>159</sup> Note 154 above, 1-2.

<sup>160</sup> Note 154 above, 1-2.

<sup>161</sup> Note 154 above, 3.

The court held in *Lekolwane and Another v Minister of Justice and Constitutional Development*<sup>162</sup> held that regarding postponements that the factors that must be considered are (1) ‘The broader public interest; (2) the prospects of success on the merits; (3) The reason for the lateness of the application if not timeously made; (4) the conduct of counsel the costs involved in the postponement; (5) the potential prejudice to other interested parties consequences of not granting a postponement and;(6)the scope of the issues that ultimately must be decided’.<sup>163</sup>

One may take guidance from ‘section 60(11)(b) of the Criminal Procedure Act which deals with schedule 5 offences, the accused is required to adduce evidence and must show that the interests of justice permit his releases when he makes a bail application’.<sup>164</sup> It is suggested by academics that s168 of the CPA be amended to codify the concept of the ‘interest of justice’ as far as it relates to postponements. The interest of justice may require that a litigant be granted a postponement however the court will also take into account that cases need to be finalised.

The court held however ‘*what* is in the interest of justice will be determined not only, by what is in the interests of the parties themselves, but also what, in the opinion of the court, is in the public interest’.<sup>165</sup>

One of the reason/s why there are so many postponements in criminal proceedings is because of further investigations. Further investigations are prevalent in the district court, one case in the district court the accused person had been in custody for two months and the State had asked for a postponement, the court refused saying it was not in the interest of justice that the matter be adjourned once more. The court held further that this postponement was not expedient and the State had at its disposal all the resources to ensure a speedy trial. The court refused a postponement, the State provisionally withdrew the charges against the accused.

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<sup>162</sup> *Lekolwane & Another v Minister of Justice and Constitutional Development* 2007(3) BCLR 280 (CC) at para 7.

<sup>163</sup> *Lekolwane* supra note 162 at para 7.

<sup>164</sup> Act 51 of 1977.

<sup>165</sup> Note 154 above; 4.

The effect of s168 is that the court will eventually refuse a further postponement as the court cannot grant postponements indefinitely. In essence it does not bring the proceedings to finality it merely postpones and delays proceedings. In the district court, the magistrates will mark a postponement final to ensure that the party who is seeking a postponement does not appear in court on the next occasion and ask for another postponement of the very same nature. The court usually gives the State 8 weeks for further investigations and if they are still incomplete the court will refuse a postponement.

The effect of a postponement is that it contributes to delays in trials; however some postponements are necessary for the proper functioning of the criminal justice system, such as postponing a matter for statements to be furnished to the accused in order for him/her to be able to prepare for trial. The State may also ask the court for a postponement due to the fact that witnesses are not before court, and because of this reason trial cannot proceed. The court may grant a postponement if for example the subpoenas were not served personally on the witnesses.

The court however is unlikely to grant a postponement were subpoenas had been served personally, and the witnesses had not provided reasons for the failure to appear in court. The court may refuse a postponement if it will not be in the interest of justice. The court will consider the fact that should it postpone the matter it will not have certainty that the witnesses will avail themselves to court on the next occasion.

A postponement may be granted by the court; however the true effect of postponements is that they contribute to delays in trials. The court will eventually find itself in a position where it has to grant the remedies of s342A (3) because of the postponements that it had granted earlier in the proceedings. There is no limit to the number of postponements a party may ask the court. The court will have to decide if the postponement is necessary or expedient.

This application has the effect that it can terminate proceedings should the court decide to refuse a further postponement, this means that the State will have no choice but to withdraw charges against the accused, the defence likewise will have no option but to proceed. This section needs to

be codified to ensure that the interest of justice is included in the Act as far as it relates to postponements. Statutory remedies have been used by the courts such as those stipulated in s342A (3) of the Act, the following remedies will be discussed below as they have been applied by the courts. The intention of the legislature when it implemented s168 was to ensure that the State and the Defence were in a position to proceed for trial and to grant them an opportunity to seek indulgence from the court if they are not ready to proceed to trial it is submitted. In the following paragraph we shall deal with the statutory remedies.

### **3.6 Act 51 of 1977 Section 342A (3) Statutory Remedies of Delays**

Prior to the enactment of s342A of the Act the court applied the remedy of permanent stay of prosecution to eradicate unreasonable delays in trials.<sup>166</sup> In 2003 cabinet instructed a task team (Justice Crime and Prevention and Security) to conduct and to review the criminal justice system with the view of identifying challenges and obstacles within criminal justice system to reform and change –relating to humans resources to improve efficiency and effectiveness.<sup>167</sup>

S342A was inserted ‘following the investigation by the SA Law reform commission into the delays into the finalisation of criminal cases’.<sup>168</sup> The motivation was based on the causes of delays in the disposal of criminal cases.<sup>169</sup> Kruger states that ‘s342A of the Act was enacted to enforce the principle that trials should be expeditious’.<sup>170</sup>

The commentary suggests that initially there are two questions to be asked when dealing with s342A of the Act.<sup>171</sup> The first question to ask is the length of time for which the prosecution can

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<sup>166</sup> Kruger (note 9 above; 169).

<sup>167</sup> Criminal Justice Review *Report on Section 342A of the Criminal Procedure Act 51 of 1977 (2003)*.

<sup>168</sup> Ibid

<sup>169</sup> South African Law Commission (Project 123) *Simplification of Criminal Procedure (1996)* 8.

<sup>170</sup> Kruger (note 9 above; 169).

<sup>171</sup> Act 51 of 1977.



be blamed and secondly what must be done as a result thereof.<sup>172</sup>

Kruger suggests that s342A (3) embodies a pliable approach to remedies that the remedies can easily be bent. He implies that the courts have failed in applying the remedies and that in *S v Motsasi* they ended up using the provision of s342A to embark on a fishing expedition (to further investigate).<sup>173</sup>

S342A(3) ‘states that if the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems it fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice including any other order’ -

- (a) Refusing further postponement of the proceedings;<sup>174</sup>
- (b) Granting a postponement subject to any such conditions as the court may determine;<sup>175</sup>
- (c) Where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without written instructions from the attorney-general;<sup>176</sup>
- (d) Where the accused has pleaded to the charge and the State or 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 prosecution or the defence, as the case may be, has been closed;<sup>177</sup>
- (e) That- (i) that the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State; (ii) the accused or his or legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser as the case may be;<sup>178</sup>

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<sup>172</sup> Kruger (note 9 above; 171).

<sup>173</sup> *S v Motsasi* 1998 (2) SACR 35 (W).

<sup>174</sup> Act 51 of 1977.

<sup>175</sup> Act 51 of 1977.

<sup>176</sup> Act 51 of 1977.

<sup>177</sup> Act 51 of 1977.

<sup>178</sup> Act 51 of 1977.

(f) That the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.<sup>179</sup>

(4)(a) An order contemplated in subsection (3) (a), where the accused has pleaded to the charge, an order contemplated in subsection (3) (d) shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the state, as the case may be, has given notice beforehand that it intends to apply for such an order’.<sup>180</sup>

The statutory remedies mentioned above may be granted by the courts to eradicate unreasonable delays in trials, in the following paragraphs the statutory remedies shall be discussed individually.

### **3.6.1 Refusal of a further postponement**

One of the statutory remedies available to a court is that the court may refuse a postponement.

S342A (3) (a) of the Act states that ‘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 any prejudice arising from it or to prevent further delay or prejudice , including an order (a) refusing further postponement of proceedings’.<sup>181</sup>

The court may grant this remedy in order to prevent further delay or prejudice being caused by the State or the accused.

An illustration is if the State asks the court for a postponement due to the fact that the second expert witness is not before court. The State may furnish reasons that the witness is on leave and cannot avail himself on the day the matter is set down for further evidence. The court will then give the Defence an opportunity to respond and will ask if the defence has any objections to this postponement. Defence Attorney may argue that the accused is in custody and is suffering actual

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<sup>179</sup> Act 51 of 1977.

<sup>180</sup> Act 51 of 1977.

<sup>181</sup> Act 51 of 1977.

prejudice and that the proceedings are now being delayed unreasonably as it is the third occasion that this matter has been postponed for this expert witness and may object on those grounds.

The court may invoke the provisions of s342A(3) (a) and state that it will not grant a further postponement in terms of this provision and is refusing a further postponement based on the fact that actual prejudice is now occurring to the accused and the proceedings are being delayed unreasonably.

The State will then have no choice but to close its case without having leading that expert witness evidence. The effect of a court refusing a postponement is that it brings finality or a sense of completion in proceedings. s342A (3) (d) is the only other statutory remedy that brings finality. The other statutory remedies merely give temporary relief.

The remedy of refusing postponement is subject to the proviso of s4 that first all the other remedies must have been exhausted.<sup>182</sup> ‘Furthermore all other attempts to speed up the process must have been tried’.<sup>183</sup> The State or the Defence must give notice that they intend making such an application.<sup>184</sup> The court may *only* use this remedy of refusing a further postponement where it has exhausted all the other remedies as is evident in s342A(4)(a) that ‘an order contemplated in subsection (3) (a) where the accused has pleaded to the charge, an order contemplated in subsection (3) (d) shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the state, as the case may be has been given notice beforehand that he/she intends to apply for such an order’.<sup>185</sup>

The courts will only refuse a postponement where the accused has already pleaded to the charge and there are exceptional circumstances that exist and all other attempts to speedup proceedings have been exhausted.<sup>186</sup>

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<sup>182</sup> Act 51 of 1977.

<sup>183</sup> Act 51 of 1977, s342A(4)(a).

<sup>184</sup> Act 51 of 1977.

<sup>185</sup> Act 51 of 1977.

<sup>186</sup> Act 51 of 1977.

Even though neither party in criminal proceedings is entitled to a postponement, a person may ask for a postponement as s168 states that a court may grant a postponement where it finds it necessary or expedient. It does however stipulate that so long as this provision is not inconsistent with any other provision.<sup>187</sup>

The court cannot unnecessarily refuse to grant a postponement, it must exercise its discretion judicially. The refusal of a postponement where there are good grounds for asking a postponement could amount to an irregularity and in the event it amounts to the failure of justice. Therefore it is submitted that the court must use its discretion wisely as a refusal can amount to a conviction being set aside.

If the court refuses to grant a postponement in order for the accused to obtain a witness it may amount to an irregularity. In such a case the matter may be sent for review and a higher court may set aside the decision aside if the accused was not feeling well, or if he was not afforded an opportunity to have legal representation.

In the matter *Madiba v Director Public Prosecutions*<sup>188</sup> the case went on appeal where the court had to decide whether the court a quo should have made a ruling on whether it should have granted the remedy of refusing a further postponement or striking the matter off the court roll.

The court held that it ‘doubted greatly that striking the matter of the roll against the appellant could really alleviate the emotional anguish that she was suffering because the State had no intention of withdrawing the charges’.<sup>189</sup> The prosecution would need written permission to reinstate the matter, which may cause more delays in the matter.<sup>190</sup> The court held that ‘the fact that the accused was joined to five other accused persons meant that there was bound to be some delays’.<sup>191</sup> The finalisation in the proceedings were being delayed because of the other accused persons who were exercising their constitutional right to legal representation and some had not received legal

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<sup>187</sup> Act 51 of 1977.

<sup>188</sup> *Madiba v Director Public Prosecutions* CA& R155/2015.

<sup>189</sup> *Madiba* supra note 188 above at 11.

<sup>190</sup> *Madiba* supra note 188 above at 11.

<sup>191</sup> *Madiba* supra note 188 above at 11.

representation at that moment.<sup>192</sup> The court held that it would not refuse a further postponement as the State was not the cause of the delay.<sup>193</sup>

This remedy does not remove the prejudice that an accused or the state may complain of, but if the court refuses further postponement it may have a detrimental effect on the party seeking a postponement. For instance if the court refuses a further postponement for the state to bring a witness or expert witness and the court refuses the state will have no option but to proceed whether they are in a position to do so or not and the accused may be acquitted due to lack of evidence. Remedies should not be seen as a way for the accused to avoid proceedings due to technicality.

It is understandable why s342A (3) (a) & s342A (3) (d) are only granted when all the other remedies have been exercised. This remedy may not be granted by the court, unless the court has exhausted all other remedies, furthermore it may not grant the remedy subsection (d) of this Act unless it has considered other remedies. The remedy of a cost order may not be granted as it has not been proclaimed as yet. The following remedy is the granting of a postponement.<sup>194</sup>

### **3.6.2 Granting a Postponement**

The second statutory remedy that is available to the court is a postponement. S342A(3)(b) of the Act states that ‘ 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 or any prejudice arising from it or to prevent further delay or prejudice , including an order of (b) granting a postponement’.<sup>195</sup>

The State or Defence may make an application to the court for a postponement to be granted, the accused may ask the court to grant a postponement that the proceedings being postponed for further defence evidence due to the accused medical condition. The State may respond by informing the court that they do not object to the postponement. The court may grant a postponement and inform the accused to bring a medical certificate on the next occasion and that the postponement is marked

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<sup>192</sup> *Madiba* supra note 188 above at 10.

<sup>193</sup> *Madiba* supra note 188 above at 10.

<sup>194</sup> Act 51 of 1977.

<sup>195</sup> Act 51 of 1977.

final. The court may grant this postponement in order to avoid prejudice being caused to the accused, because should the court continue proceedings whilst the accused is sick, the matter may be sent on review and be set aside.

This remedy does not remove the delays that occur in criminal proceedings, it merely removes the prejudice being caused by either the State or Defence temporarily and in some instance it does not at all. For instance if the State ask that a matter be postponed due to the fact that further investigations are still incomplete and the court grants a postponement. This in fact contributes to the delays in trials.

S168 of the Act stipulates the following ‘that the court may grant a postponement from time to time; during proceedings where it deems it necessary or expedient, on any date it seems proper to grant postponements so long as it is not inconsistent with any provisions in the act’.<sup>196</sup> The discretion lies solely with the court to grant or refuse a postponement.

Both s168 and s342A (3) (b) of the Act allows for the court to grant a postponement, the only difference is that s168 an applicant makes an application for a court to grant a postponement if it is in the interest of justice and it is necessary and expedient.<sup>197</sup> s342A (3) (b) states ‘that the court may grant a postponement if it will eliminate the prejudice or prevent further delay’.<sup>198</sup> This application is not made by an applicant seeking indulgence from the court to postpone the matter, it is made by the court to eliminate the delays as a remedy and that is the main difference that can be observed.

One of the reasons why matters become unreasonably delayed in criminal proceedings is that they caused by the court granting postponements for further investigation. At this point the criminal proceedings have not initially commenced.

In the event that a postponement is applied for by an accused whose legal representative is not available or for any other reason and it is not due to the accused fault, a postponement will be granted by the court. The court may grant that the matter be postponed further if this will eliminate

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<sup>196</sup> Act 51 of 1977.

<sup>197</sup> Act 51 of 1977, s168.

<sup>198</sup> Act 51 of 1977.

the prejudice. The court may grant a postponement for the witness of the accused or the State witness to be before court were a refusal would not be in the interest of justice. The court may also grant another statutory remedy of striking the matter off the court roll.

### **3.6.3 Striking the matter off the court roll**

The third statutory remedy that the court may grant to prevent and eliminate unreasonable delays in trials, is to strike the matter off the court roll.

S342A (3)(c) of the Act states that 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 or any prejudice arising from it or to prevent further delay or prejudice , including an order of (c) Where the accused has not yet pleaded to the charge that the case be struck off the roll and the prosecution not be resumed or instituted de novo without written instructions from the attorney-general'.<sup>199</sup>

The Act provides that the court may strike the matter of the court roll, if an accused person has not yet pleaded to the charge and delays have reached such a point that they can be said to be unreasonable, the court may strike the case of the roll.<sup>200</sup> In order for the case to be resumed or instituted de novo, written instructions are required from the attorney-general, it is *only* the Attorney-general that may reinstate the charges'.<sup>201</sup>

An example is if the State has been requesting that the matter be postponed for further investigations, and the accused had not pleaded as yet, the court may refuse to grant the State another opportunity for further investigation and make an order to eliminate and remove delays by striking the matter off the court roll. This remedy does not only eliminate the delays in criminal proceedings but it terminates the proceedings temporarily. This means that the matter is no longer on the court roll. The matter may be reinstated, back on to the court roll; it is not a challenging procedure. This remedy is similar to having charges withdrawn by the State temporarily. The

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<sup>199</sup> Act 51 of 1977.

<sup>200</sup> Act 51 of 1977.

<sup>201</sup> Act 51 of 1977s342A (3)(c).

reasoning is that if the court keeps postponing a matter for docket for example to be in court and it does not appear the accused is suffering prejudice whether he is in custody or out on bail or warning.

*S v Ndibe* is a perfect illustration of how the court failed to apply this remedy and to interpret s342A (3) (c) correctly.<sup>202</sup> This case dealt with a matter that was brought on review where the accused was charged with contravention of s5 (b) of the drugs and drugs trafficking and had pleaded.<sup>203</sup> It was alleged that the accused had unlawfully and intentionally have in his possession a dangerous dependence producing substance to wit cocaine in the quantity of 3842 in grams, he then pleaded not guilty to the charge.<sup>204</sup>

He was arrested in the year of 2000 and the delays continued until the year of 2009.<sup>205</sup> After numerous postponements, in March 2009, the accused attorney objected to the postponement due to the fact of the unavailability of the docket.<sup>206</sup> The presiding officer then consequently struck the matter of the court roll.<sup>207</sup>

In this case ‘the accused had already pleaded, once you have pleaded, and undue delay occurs the court cannot grant you the remedy of striking the matter of the roll, this remedy is only available if the accused *has not pleaded*’.<sup>208</sup> The court could have granted any other remedy provided for in the Act except this one.<sup>209</sup>

The magistrate had reinstated ‘the matter which it had struck off the court roll, the legal representative of the accused submitted correctly so, that the magistrate did not have *functus officio* to bring the matter back on the court roll, he argued’.<sup>210</sup> On review the judge held ‘ that the order of the magistrate striking the matter off the roll should be set aside’.<sup>211</sup>

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<sup>202</sup> *S v Ndibe* (14/544/2010) (2012) ZAWCHC 245.

<sup>203</sup> *Ndibe* supra note 202 at 1.

<sup>204</sup> *Ndibe* supra note 202 at 1-2.

<sup>205</sup> *Ndibe* supra note 202 at 1-3.

<sup>206</sup> *Ndibe* supra note 202 at 2.

<sup>207</sup> *Ndibe* supra note 202 at 2.

<sup>208</sup> *Ndibe* supra note 202 at 12.

<sup>209</sup> *Ndibe* supra note 202 at 12.

<sup>210</sup> *Ndibe* supra note 202 at 3.

<sup>211</sup> *Ndibe* supra note 202 at 12.



In *S v Joseph*, the court had granted numerous postponements during the seven month period that the matter had been in court, the magistrate then struck the matter off the roll.<sup>212</sup> The court held that the matter had been prematurely struck off the roll.<sup>213</sup> The court furthermore stated that ‘there was a no question of dereliction of duty as the problem was really an unfortunate systematic problem due to resource limitations, the court concluded that in matters such as the present one in so far as the application of the provisions of s342A of the act is concerned the court should apply its mind’.<sup>214</sup>

The court may only apply this remedy where the accused has pleaded and the case may only reinstated with the written consent from the attorney-general. This remedy is there to ensure that delays do not continue occurring, before the accused has even pleaded. It ends all proceedings if the court grants this remedy and it further stops proceedings. The true effect of this remedy is that a matter may be reinstated once written consent is given and a matter may be put back on the court roll. This remedy *prima facie* looks like it has finality, however it merely suspends proceedings. It is commonly seen in district court that matters are struck of the court roll and a few months later, the accused is served summons and the matter is back on the court roll.

Another remedy that is available to the court is that once the accused has pleaded the court may refuse to grant a postponement and order that the proceedings continue.

### **3.6.4 Court refuses postponement & continues with the available evidence**

The fourth available remedy to the court is that the court may refuse a postponement and continue with the proceedings.

S342A (3)(d) of the Act states that:

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<sup>212</sup> *S v Joseph* 2007 (1) SACR 497 (WLD).

<sup>213</sup> *Joseph* supra note 212 at 13.

<sup>214</sup> *Joseph* supra note 212 at 13.

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 or 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 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 prosecution or the defence, as the case may be, has been closed.<sup>215</sup>

The accused must have pleaded to the offence firstly and secondly the State or Defence must be unable to proceed with the case, or the court refuses to grant a postponement.<sup>216</sup> The problem with this remedy is that for instance if it is an assault case, and the matter is being adjourned for the doctor to be in court, to confirm the content of the J88 and the doctor does not appear in court, the court may refuse to grant a further postponement. The State will have no option but to close the state's case.

The accused may be acquitted as the court may find that not all the elements of for example assault with intent to do grievous bodily have been met and that it has failed to prove its case beyond a reasonable doubt. The consequence of this however is that the evidence of the doctor would not be confirmed or before court to show that he did make that report. The J88 will not be confirmed, especially if the defence is disputing the content thereof. This remedy may be fair to the other party but it does not mean that it is right, however what is important in keeping with the ethos of s35 is that the accused enjoys his right to a fair trial. The issue is about fairness it is submitted.

This remedy is however subject to s342A (4) which states that 'an order contemplated in subsection (3) (a) where the accused has pleaded to the charge, an order contemplated in subsection (3) (d) shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the state, as the case may be has been given notice beforehand that he/she intends to apply for such an order'.<sup>217</sup> This remedy is similar to s342A (3) (a) as it brings delays to an end. It brings an end to the proceedings; this is the reason why this remedy is only granted once the court has exhausted all the other available remedies.

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<sup>215</sup>Act 51 of 1977.

<sup>216</sup>Act 51 of 1977.

<sup>217</sup>Act 51 of 1977.

This remedy although it ends delays and eliminates them, the implication of this remedy are of a serious nature as has been illustrated above. The cost order remedy has not been enforced but in the following paragraph it shall be discussed.

### 3.6.5 Granting a Cost Order

The fifth statutory remedy that is available to the court is the cost order provision.

S342A (3) (e) states that- (i) ‘that the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State; (ii) the accused or his or legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser as the case may be’.<sup>218</sup>

This provision of a cost order has not come into effect as yet, not much emphasis shall be placed on this remedy as a date has not been set as to when it will come into effect. It was noted that the following issues may arise should the cost order come into effect:

- a) It will be a time consuming exercise to determine which official of the State is responsible for the delay, since various agencies of the State are involved in criminal trials;<sup>219</sup>
- b) The review procedure against decisions of the court to reward costs against either the State or the defence will bring about an additional workload on the Department as well as the State Attorney;<sup>220</sup>

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<sup>218</sup> Act 51 of 1977.

<sup>219</sup> Criminal Justice Review ( note 18 ;5)

<sup>220</sup> Criminal Justice Review ( note 18 ;5)

- c) No provision for any expenditure has been made where the State may be held liable for costs;<sup>221</sup>
- d) The time consuming procedure prescribed by Treasury Instruction W9, to determine if a prosecutor is liable for wasted costs, will increase the workload of the Department and the State Attorney;<sup>222</sup>
- e) To recover costs from an accused will overburden the State Attorney as well as the Department who already deals with a lot of debt files;<sup>223</sup>
- f) There is no basis upon which the State's wasted costs can be determined;<sup>224</sup>
- g) It is uncertain how the wasted costs will be determined according to the wording of the section, namely "the scale the court deems fit";<sup>225</sup>
- h) This section will not result in eliminating unreasonable delays caused by the accused, since the accused will in many circumstances not be in a financial position to pay such costs, and no successful actions and/or enforceable measures can be taken against an accused as envisaged in subsection (3) (f).<sup>226</sup>

It is argued that 'the court may order the State to pay the accused; however the court can not necessarily order the accused to pay costs because the State does not have a right to a speedy trial'.<sup>227</sup> Although some academics find that this provision will never be enforced. It is my submission that a similar provision been forced.

The aggrieved party should have a claim for unreasonable delays in trials caused by the other party. Cost orders are granted on a daily basis in civil proceedings for various reasons, and the same

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<sup>221</sup> Criminal Justice Review ( note 18 ;5).

<sup>222</sup> Criminal Justice Review ( note 18 ;5).

<sup>223</sup> Criminal Justice Review ( note 18 ;5).

<sup>224</sup> Criminal Justice Review ( note 18 ;5).

<sup>225</sup> Criminal Justice Review ( note 18 ;5).

<sup>226</sup> Criminal Justice Review *Report on s342A of the Criminal Procedure Act 51 of 1977* (2003) 5.

<sup>227</sup> E Steyn 'Undue delay in criminal cases: The Scottish and South African Response' (2003) *Acta Juridica* 139.

could be applied in criminal proceedings where it is clear to the court that the delays are unreasonable, the delaying party should be held accountable.

The court could order that costs be granted to the innocent party, such as wasted costs for coming to court. The court could order that it will grant an order for misconduct. Litigants will be weary when asking for postponements and this will decrease delays. This remedy could decrease delays in trials in the following way if cost orders are granted against the delaying party, then the Defence Attorneys and the State will avoid making superfluous postponements.

If Attorneys know that there are possible cost orders that will be granted against them, personally they will not seek unnecessary postponement and will avoid contributing to delays. This remedy does not remove the delay complained of but it ensures however that the party responsible is held accountable. The remedy of cost order is not effective as yet so there are only five remedies available to the court. One of the remedies available to a trial court is that the court may grant a remedy that the delays be investigated.

### **3.6.6 Investigating unreasonable delays**

S342A (3) (f) states that ‘the court may in order to eliminate the delay and any prejudice arising from unreasonable delays the court may refer the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay’.<sup>228</sup>

This remedy allows the court to hold an enquiry and investigate the reasons into the delays. Accused was in custody for 22 months before his trial was conducted, the court applied the factors in subsection s342A (3) of the Criminal Procedure Act and found that the duration of the delay was unreasonable and ordered that the matter be referred to authorities to investigate the conduct of the prosecutor and the magistrate concerned’.<sup>229</sup>

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<sup>228</sup>The Constitution of South Africa, 1996; s342 (A) (3) (f) of Act 51 of 1977.

<sup>229</sup>*S v Maredi* 2000 (1) SACR 611 (1).

‘In the case of *Thenga v S* the court ordered an immediate enquiry in terms of this provision and when the matter was ready for an enquiry Mr Swart for the State still informed the court that the State was still not ready to proceed because there was still uncertainty as to who would prosecute the matter’.<sup>230</sup> The reasons for the delays was that ‘the state was short staffed, and the control prosecutor had informed that his job was administrative in nature and could not proceed with the trial , another relief prosecutor had been of sick and another had since been deceased. Those were the reasons furnished for the cause of delays’.<sup>231</sup>

The prosecutor argued in the enquiry that ‘he could not proceed with the matter as he had not consulted with the witnesses and further that the accused was facing two counts and that another count was going to be added and the charge sheet had not been prepared as yet, after the short adjournment it was later discovered that more charges would be added, the court directed that Mr Swart the prosecutor be given an opportunity to consult’.<sup>232</sup> When the matter was due to proceed at 14h15 on that day, Mr Swart stated that the rape charge sheet was still in the district court and asked for a postponement that the matter be added to the other counts, the court granted a postponement till 14th March 2007.<sup>233</sup>

The court held that ‘the superiors of Mr Swart should be in court on the next court date to explain the reason for the delay on behalf of the National Prosecuting Authority. The court held that should the superiors not appear in court Advocate Thenga would be held in custody pending the outcome of the enquiry’.<sup>234</sup>

This remedy is effective even though it does not bring the matter to finality, it does however investigate reasons into the delays, and this may establish the causes for these delays. It is of utmost importance to investigate in order to determine the root of the problem, however merely investigating into the reasons and not taking disciplinary action will make the entire exercise a fruitless one.

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<sup>230</sup> *Thenga v S* (CA&R 9/2010) (2012)ZANCHC 16

<sup>231</sup> *Thenga* supra note 230 at 2.

<sup>232</sup> *Thenga* supra note 230 at 4.

<sup>233</sup> *Thenga* supra note 230 at 12.

<sup>234</sup> *Thenga* supra note 230 at 20.

In the case of ‘*S v Huysteen*’ the court held that a formal enquiry does not require it to be held nor that a formal finding to be made. If a presiding officer enquires as to the reasons for the request for further postponement and concludes that further postponement would lead to injustice it will be sufficient’.<sup>235</sup> This case illustrates that the enquiry does not have to be formal in its nature.

It is suggested that after an investigation, the party responsible for the delays be held accountable, and the court may go as far as holding a person in contempt of court. Investigating into the reason is in itself a delay, because the *actual* criminal proceedings will be paused until investigations have been finalised. This can be equated to being a delay, but investigations are necessary as they will find and resolve the problem.

### 3.7 Concluding Comments

The Constitution unequivocally ‘states that every accused person has the right to a fair’.<sup>236</sup> Cesare Beccaria states that society entered into a social contract but that society did not give up their entire rights, they only gave up a portion of their rights, and he contended further that is why if a person commits a wrong he asserted that the punishment must fit the crime.<sup>237</sup> The right to a fair trial it is submitted is one of those right in which society did not give up.

The right to a fair trial cannot be undermined or overly emphasized. Different countries have different political ideologies but the right to a fair trial is a right exercised in most countries as can be seen in their domestic laws and international treaties. S168 of the Act seems to indirectly contribute to delays in proceedings; the more postponements are granted the more delays increase in criminal proceedings. This provision was created to ensure that parties are given an opportunity to prepare fully for trial.

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<sup>235</sup>*S v Huysteen* 2004(2) SACR (C).

<sup>236</sup>The Constitution of South Africa, 1996, s35 (3) (a-o).

<sup>237</sup>J Hostettler *Cesare Beccaria: The Genius of on Crimes and Punishments* (2011) 53.

S342A was created to protect the accused right to a fair trial and this provision was enforced to ensure that matters begin and concluded without delay. This provision seems to be problematic to some magistrates as they do not understand the application as can be seen from the case of *S v Ndibe* above.

It is not to say that these remedies are ineffective but merely that other remedies can be considered to eradicate the delays. Furthermore before the courts grant the remedies of s342A (3) the court must apply its mind fully. From the provisions of s342A one would submit that the remedies are available to a party aggrieved by the delays, however there is a common law remedy which is a permanent stay of prosecution which may also be applied where it is clear that the delays are becoming unreasonable. The test is that the applicant must show of trial related prejudice or extraordinary circumstances before this remedy can be granted.

This following chapter will discuss the common law remedy of a permanent stay of prosecution. It will look at the history of a permanent stay of prosecution. It shall discuss the requirements and it shall focus on the current position in South Africa. It shall discuss the leading case law of *Zanner v DPP* and the *Bothma v Els* judgment.



## CHAPTER FOUR

### PERMANENT STAY

#### 4.1 Introduction

This chapter shall focus on a permanent stay of prosecution; it shall discuss the history of a permanent stay of prosecution. ‘A permanent stay of prosecution is a common law remedy and is drastic in its nature’.<sup>238</sup> The court may grant this remedy where it is evident that proceedings are being delayed unreasonably. ‘The doctrine of abuse of the criminal process is judge made and has been developed by the courts over the years’.<sup>239</sup>

This chapter will discuss the requirements of a permanent stay of prosecution in South Africa. The courts have held that the onus rests on the person who avers that there has been unreasonable delays in trial. The courts have held that there must be trial related prejudice and or exceptional circumstances/ extraordinary circumstances in order for an applicant to be successful in his application for a permanent stay.

This chapter will discuss the jurisdiction of a permanent stay of prosecution, the current position is as per the judgment of ‘*Naidoo v S* where the court held that regarding the jurisdiction of an

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<sup>238</sup> Lawrence (note 25 above;1)

<sup>239</sup> Ibid.

accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s35 (3) (d) of the constitution has been infringed by reasons of unreasonable delays before commencement of criminal proceedings in other words in circumstances not provided for in 342A of the CPA must bring an application before the High Court'.<sup>240</sup>

This chapter will discuss the judgment of '*Zanner v Director Public Prosecutions, Johannesburg* where the accused had been charged with murder in 1994 and the charges had been withdrawn, the charges were lately reinstated in 2011 and an application for a permanent stay of prosecution was made by the accused'.<sup>241</sup> The court held that claim alleged must not be 'vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice'.<sup>242</sup> The importance's of this case is that the court noted that the trial related prejudice must be definite and not speculative.

This chapter will deal with the judgment of *Bothma v Els and Others* the applicant had instituted private prosecution against Mr Els when she alleged that thirty nine years ago she had been raped by him. Counsel for the accused made a permanent stay of prosecution application. The court noted 'what is meant by irreparable prejudice is that the trial will be irreparably prejudiced if there is no way in which fairness of the trial could be sustained.'<sup>243</sup>

This chapter will then look at the current position in South Africa regarding the permanent of prosecution and how the courts have been applying this application, the courts are frequently applying this application as can be seen from judgments such a *Broome v DPP, Cape Town & Others*.<sup>244</sup> Lastly this Chapter will conclude on all that has been discussed above in regards to a permanent stay of prosecution.

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<sup>240</sup> *Naidoo v S* A293/2011.

<sup>241</sup> *Zanner v Director of Public Prosecutions, Johannesburg* 2006 2 SACR 45 (SCA) 12.

<sup>242</sup> *Zanner* supra note 12.

<sup>243</sup> *Bothma v Els and Others* 2010 2 SA 622 (CC).

<sup>244</sup> *Broome v Dpp, Cape Town & Others; Wiggins & another v WindeStreeklanddros, Cape Town & Others* (2007) JOL21012(C)

## 4.2 History of Permanent Stay

‘A permanent stay of prosecution is a drastic remedy that a court may grant where there has been an unreasonable delay in trials’.<sup>245</sup> The doctrine of abuse of the criminal process is judge made and has been developed by the courts over the years.<sup>246</sup>

The judicial system should not be abused, because such an abuse is a violation of fundamental values, purposes and principles embodied in a criminal system.<sup>247</sup> ‘A permanent stay is therefore a remedy to stop the misuse, misconduct and abuse of the criminal process. It’s a final remedy barring the prosecution for prosecuting the accused’.<sup>248</sup>

During the 1990’s there was an explosion of case law in England regarding the application of a permanent stay of prosecution.<sup>249</sup> In the case of ‘*R v Hakkim*, the presiding officer was of the view that a permanent stay of prosecution would be a suitable remedy because to continue to prosecute the accused would be against ‘common humanity’.<sup>250</sup> In this case the accused was not in good health.

Following that judgment in the case of *Jago*, the judge expressed the view ‘that it is not practicable to seek to precisely identify in advance the various factors which may be relevant in determining whether, in the circumstances of a particular case, unreasonable delay has produced the extreme situation in which any further proceedings should be permanently stayed’.<sup>251</sup>

Following the judgment of *Jago* many other jurisdictions including South Africa started adapting this approach that the criminal justice system should be protected and not abused and the courts started to apply this remedy.

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<sup>245</sup> Lawrence (note 25 above; 4).

<sup>246</sup> Lawrence (note 25 above; 4).

<sup>247</sup> Lawrence (note 25 above; 10).

<sup>248</sup> Lawrence (note 25 above; 50).

<sup>249</sup> R Sweet ‘Applications for a permanent stay in criminal proceedings: A guide to preparation and applicable legal principles’ available at [http://criminalcpd.net.au/wp-content/uploads/2016/09/Stay\\_Paper\\_Russell\\_Sweet.pdf](http://criminalcpd.net.au/wp-content/uploads/2016/09/Stay_Paper_Russell_Sweet.pdf), accessed on 2015.

<sup>250</sup> Ibid 1

<sup>251</sup> *Jago v The District Court of New South Wales and Ors* 168 C.L.R. 23) 1989.

### 4.3 Requirements for a Permanent stay of Prosecution

There can be no dispute that in South Africa's criminal justice system, 'a recognised norm and a touchstone for a fair trial of an accused person is the efficient and speedy conclusion of criminal proceedings'.<sup>252</sup> A permanent stay is 'a drastic remedy and is a remedy that is used as a matter of last resort and only in exceptional circumstances will it be granted'.<sup>253</sup> The onus that is borne by the accused is thus a heavy burden. There is no specific time limit or requirement set as to when an application for a permanent stay of prosecution should be applied for.

The person who makes an application for a permanent stay of prosecution bears the onus of proving such.<sup>254</sup> The onus of proof lies on the party who avers that there has been an unreasonable delay, it would stand to reason that he who alleges must prove.<sup>255</sup>

The following requirements must be satisfied in order for an applicant to be successful in his/her application for a permanent stay in proceedings. There must be trial related prejudice and or exceptional circumstances/ extraordinary circumstances, then only will a litigant be granted a stay of proceedings.

Trial related prejudice has been interpreted to mean, 'that the prejudice suffered by the accused is there mainly because of witnesses becoming unavailable and memories fading as a result of the delay, in consequence whereof such accused may be prejudiced in the conduct of his and her trial'.<sup>256</sup>

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<sup>252</sup>*Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

<sup>253</sup>*Zanner* supra note 241 at 164.

<sup>254</sup>Lawrence (note 25 above; 49).

<sup>255</sup>*Williams v Spautz* (1992)174 CLR 509 at 529 "the onus of satisfying the court that an abuse of process exists lies with the party alleging it".

<sup>256</sup>*Zanner* supra note 241 at 9.

The following however ‘is not trial related prejudice vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice; the prejudice must not be speculative but definite’.<sup>257</sup> The trial related prejudice must be something more than merely saying that witnesses are now unavailable , you must show how that the evidence of that witness would have assisted you if at all, at trial. The mere fact however that a witness has gone missing will not justify a permanent stay of prosecution.

This court held ‘in the case of *Zanner* judgment that the accused had failed to show that the prejudice was not speculative’.<sup>258</sup> The court said that ‘if you allege that because your witnesses are no longer available or parts are of evidence are missing you will not enjoy your right to a fair trial, you must show how that piece of evidence would have assisted you in your trial. It is not enough to merely say that it would have’.<sup>259</sup>

This principle can be found in Australian case law where the court held in *R v Adler* ‘that the fact a witness who is potentially able to corroborate an accused is, for one reason or another, such as death, disappearance or disability, unavailable at trial does not normally produce the result that the accused cannot obtain a fair trial and it has not been shown to produce the result in this case’.<sup>260</sup>

If the accused is saying that Mr. A is a witness and is now deceased and because of this, he is suffering trial related prejudice and will not be able to proceed to trial. It is not sufficient to merely say that; the accused would have to show that Mr. A would have assisted him in his trial. He could inform the court that he would have been his alibi and he would have to show the court that in fact he was never there on the night of the alleged housebreaking as he was in another city.

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<sup>257</sup> *Zanner* supra note 241 at 12.

<sup>258</sup> *Zanner* supra note 241 at 12.

<sup>259</sup> *Zanner* supra note 241 at 12.

<sup>260</sup> *R v Adler* Gleeson Unreported New South Wales Court of Criminal Appeal 60727/91 – 11 June 1992.

If the applicant cannot prove trial related prejudice he must show that there are exceptional circumstances that are present to allow the court to grant him/her a permanent stay of prosecution.<sup>261</sup>

Exceptional circumstances is a concept used in bail applications, one may draw from what the court have determined to be exceptional circumstances when dealing with bail applications. S60 (11) (a) of the Criminal Procedure Act 52 of 1977 ‘relates to offences mentioned in schedule 6, the accused must be detained unless he/she adduces evidence which satisfies the court that exceptional circumstances permitting release on bail exist, the courts have said the following are exceptional circumstances’.<sup>262</sup> ‘*S v Yanta* the court held that circumstances such as serious medical attention, terminal illness or lack of evidence implicating the accused may all amount to exceptional circumstances’.<sup>263</sup>

The accused may allege that the State’s case is weak and there is no of evidence and because of this exceptional circumstances exist. The court will grant a permanent stay of prosecution, if it is of the opinion that there are exceptional circumstances. The accused must show that the States weak case is an exceptional circumstance. In ‘*S v Jonas* the court expressed the following that exceptional circumstances is not defined, there can be as many circumstances which are exceptional as the term in essence implies’.<sup>264</sup>

The accused legal representative in the *S v Zanner* case contended that exceptional circumstances are all those factors thought of together or cumulative that would create an exceptional circumstances, such as missing parts of a docket, disappearance of a diary.<sup>265</sup>

The courts may when dealing with a permanent stay of prosecution consider the judgment of *S v Jonas* the court may determine the circumstances brought forth by the accused and then determine

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<sup>261</sup> *Zanner* supra note 241 at 12.

<sup>262</sup> Act 51 of 1977.

<sup>263</sup> *S v Yanta* 2000(1) SACR237 (TK).

<sup>264</sup> *S v Jonas* 1998(2) SACR 677 -678 H-I.

<sup>265</sup> *Zanner* supra note 241 at 12.

if they are exceptional in nature. The court may use this threshold to determine if there are exceptional circumstances that exist for a permanent stay to be granted. It may consider the medical condition of the accused, and if there is sufficient evidence implicating the accused in determining whether to grant a permanent stay or not.

This remedy may be granted ‘in the absence of trial-related prejudice if there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate’.<sup>266</sup> The applicant must show something extraordinary, clearly this something more than ordinary.

The court in ‘*Wild v Hoffert NO* held that there was a three (3) year delay between the applicants initial arrest for drug trafficking and the trial because of repeated incidents of prosecutorial postponement. The court held that while the delay had been unreasonable, there was no trial-related prejudice or exceptional circumstances and a stay of prosecution was refused’.<sup>267</sup> The courts are very cautious when granting a permanent stay of proceedings. A permanent stay of prosecution was refused based on a failure to meet the requirements.

The requirements for a permanent stay of prosecution in South Africa are different from those in other parts of the world. The Canadian Charter s11 states ‘that a person who is charged with an offence has the right to be tried within a reasonable time. Where there is a breach of this right, the available remedy to a court is a stay of proceedings. The applicant must first establish that the period raises the issue of reasonableness’.<sup>268</sup> ‘Once reasonableness has been raised, the delay that can be attributed to the applicant or waived by the applicant must be calculated to be subtracted from the overall calculation’.<sup>269</sup> The test in South Africa is different as requires that there be trial related-prejudice or an exceptional circumstance to exist before a permanent stay is granted.

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<sup>266</sup>Zanner supra note 241 at 6.

<sup>267</sup>*Wild and Another v Hoffert NO and Others* [1998] ZACC 5; 1998 (6) BCLR 656 (CC); 1998 (3) SA 695 (CC).

<sup>268</sup>A Gopual *The impact and constitutionality of delayed trials on the right of a suspect or accused persons during criminal proceedings* (unpublished LLM thesis, UNISA, 2015) 77.

<sup>269</sup> Ibid.

‘A permanent stay generally has the same effect as an acquittal’.<sup>270</sup> Although it is not the same as an acquittal because an acquittal is only granted once the magistrate decides upon the evidence given that the accused is innocent. A permanent stay of prosecution is when an accused is discharged without the evidence been heard. There is authority that ‘an application for permanent stay of prosecution can be rescinded if the basis for the stay no longer exist such authority has not been seen in South Africa.’<sup>271</sup> In order for an applicant to bring an application of a permanent stay of prosecution, the applicant needs to first establish which court has the jurisdiction to hear this matter.

#### 4.4 Jurisdiction

It had been suggested in the matter of *Director of Public Prosecutions Kwazulu-Natal v Regional Magistrate, Durban and Another*<sup>272</sup> by the court that the magistrate courts have jurisdiction to grant an order for a permanent stay of prosecution’.<sup>273</sup> ‘As per the judgement of *Naidoo* the position is now clear it is only the High court that may grant or refuse an application for a permanent stay of prosecution respectively’.<sup>274</sup>

In the judgment of *Naidoo v S* ‘the matter went on appeal when the regional court refused to grant a permanent stay of prosecution, the accused a Close Corporation was charged with 39 counts violation of the Custom Exercise Act 91 of 1964 of unpaid tax and certain penalties, criminal proceedings were then instituted for a failure to pay tax duties in the year 2010’.<sup>275</sup> Counsel ‘argued that the accused had pleaded to the offence that should this matter proceed it would infringe the right to a fair trial, which includes the right to have that trial to begin and end without unreasonable delay in trials’.<sup>276</sup> He made an application that the proceedings be permanently stayed.

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<sup>270</sup> Lawrence (note 25 above;27)

<sup>271</sup> *R v Griffiths* (1980) 72 Cr App R 307 (CA).

<sup>272</sup> *Director of Public Prosecutions Kwazulu-Natal v Regional Magistrate, Durban and Another* 2001 (2) SACR 463 (NPD).

<sup>273</sup> Ibid.

<sup>274</sup> *Naidoo v S* A293/2011.

<sup>275</sup> *Naidoo* supra note 274 at 1.

<sup>276</sup> *Naidoo* supra note 274 at 1-2.



The prosecutor argued that ‘the regional court had no jurisdiction to hear this matter and that counsel could not bring this application in the regional court but that this application should be heard in the High court’.<sup>277</sup> The regional court held that ‘the regional court had jurisdiction to hear this application and they referred to the case of *Director of Public Prosecutor, Kwazulu-Natal v Regional Magistrate, Durban & Another (2011)(2)SACR 463*,<sup>278</sup> where the court had held that the regional magistrate court have jurisdiction’.<sup>279</sup>

The appeal judges did note that the magistrate courts have always been a creature of statute.<sup>280</sup> This is evident from the judgment of *Minister of Safety and Security and Another v Bosman 2010(2) SA 148 (C)*<sup>281</sup> where the court stated ‘that our law is replete with case law and legal authority that the jurisdiction of magistrates courts is established and constituted, furthermore the magistrate court cannot exercise powers that are not in the Act or Rules’.<sup>282</sup>

By the wording of the Criminal Procedure Act s342A reads ‘any court’; the magistrate court has implied authority to grant remedies after the commencement of criminal proceedings not prior to the commencement of criminal proceedings. They can only grant statutory remedies that are in the Act, and a permanent stay of proceedings is not a statutory remedy.

The court in *Naidoo v S* held that regarding the jurisdiction ‘an accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s35 (3) (d) of the constitution has been infringed by reasons of unreasonable delays before commencement of criminal proceedings in other words in circumstances not provided for in s342A of the CPA must bring an application before the High court’.<sup>283</sup>

The position is now clear an application for permanent stay can only be applied for in the High court. Majority of delays in criminal proceedings are prevalent in the magistrate courts. This application should be available to the magistrate courts as delays occur on a daily basis. To

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<sup>277</sup>*Naidoo* supra note 274 at 1-2.

<sup>278</sup>*Director of Public Prosecutor, Kwazulu-Natal v Regional Magistrate, Durban & Another (2011)(2)SACR 463*

<sup>279</sup>*Naidoo* supra note 274 at 1-3.

<sup>280</sup>*Naidoo* supra note 274 at 5-9.

<sup>281</sup>*Minister of safety and Security and Another v Bosman 2010(2) SA 148 (C)*.

<sup>282</sup> *Ibid*.

<sup>283</sup>*Naidoo* supra note 274 at 14-15.

decrease delays in the lower courts it suggested that this remedy be codified to be included in the Act so that a lower court may have jurisdiction to grant this application. Permanent stay of prosecution is appealable and such can be seen in the judgment of *Zanner v Director Public Prosecutions*.<sup>284</sup>

#### **4.5 *Zanner v Director Public Prosecutions, Johannesburg 2006 2 SACR 45 (SCA)***<sup>285</sup>

In this case ‘the accused had appealed against an order of the High court refusing to grant the appellant a permanent stay of prosecution for a murder charge that had been laid against the accused in 1993 and which was later reinstated in the year 2004 when the accused Mr Zanner had later been charged for the murder of his wife’.<sup>286</sup> Counsel for the accused contended ‘that the accused would suffer trial related prejudice in relation to the murder charge of 1993 and that a permanent stay of prosecution should be granted in his favour’.<sup>287</sup>

In 1993, Mr Zanner had been charged for the murder of his colleague it was alleged that the Mr Zanner ‘had inflicted a fatal head wound on the deceased Samuel Segaletso with a measuring instruments known as vernier, on the day of the trial the matter was withdrawn at the instance of the State after there was an inquest done in terms of the Inquest Act 58 Of 1959’.<sup>288</sup> In 2004 Mr Zanner became a suspect in the murder of his wife, the National Prosecuting Authority then reinstated the charge that had been withdrawn against the accused 11 years ago.

The accused was now facing (2) two counts of murder, ‘Mr Zanner made an application to the High court that the proceeding of the murder case of 1994 be permanently stayed’.<sup>289</sup> Counsel for Zanner argued that the accused would ‘suffer trial-related prejudice if the prosecution were to be allowed after ten years had elapsed from the date the appellant was first charged with the offence

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<sup>284</sup> *Zanner* supra note 241 at 2.

<sup>285</sup> *Zanner* supra note 241 at 2.

<sup>286</sup> *Zanner* supra note 241 at 2.

<sup>287</sup> *Zanner* supra note 241 at 1.

<sup>288</sup> *Zanner* supra note 241 at 2.

<sup>289</sup> *Zanner* supra note 241 at 2.

as (i) the original case docket and the diary had disappeared; (ii) statements had been obtained from the minority of witnesses whose version suited the state case and other possible eye witnesses could no longer be traced, and (iii) the quality of the evidence would be materially flawed as a result of the lapse of time on the memories of the witnesses and the appellant'.<sup>290</sup> The accused contended that this was trial related prejudice.

The court firstly stated that some offences are so serious in nature that they do not prescribe and is why s18 of the Criminal Procedure Act was enacted.<sup>291</sup> Secondly 'the court held that the mere fact that the state had withdrawn charges did not mean the accused would never be charged for that offence ever again'.<sup>292</sup>

The court stated that 'the factors that had been put forth failed to show that there was trial related prejudice or extraordinary circumstances that justify a permanent stay of prosecution'.<sup>293</sup> The high court dismissed this application, saying that with the facts that it had before it the claim was 'vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice, and further they had to show in what specific manner the missing witnesses would have aided the defenses'.<sup>294</sup>

The appeal court Maya AJA for the majority embarked on an enquiry and stated that all factors stated in *Sanderson* should be considered.<sup>295</sup> The majority stated the importance of considering all factors is that 'the right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime'.<sup>296</sup> Clearly, in a case involving a serious offence such as (murder), 'the societal demand to

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<sup>290</sup> *Zanner* supra note 241 at 6.

<sup>291</sup> *Zanner* supra note 241 at 16.

<sup>292</sup> *Zanner* supra note 241 at 11.

<sup>293</sup> *Zanner* supra note 241 at 12.

<sup>294</sup> *Zanner* supra note 241 at 12.

<sup>295</sup> *Zanner* supra note 241 at 10.

<sup>296</sup> *Zanner* supra note 241 at 15.

bring the accused to trial is that much greater and the court should be that much slower to grant a permanent stay'.<sup>297</sup>

The court noted in this judgment that 'it is not merely sufficient to say that witnesses have disappeared, evidence is missing as well as that the docket and diary are missing, the court held that this would in fact be in favour of the accused because it would be that much difficult for the state to prove that the accused had committed the offence'.<sup>298</sup> The court stated that 'one must show how that evidence and those witnesses would have assisted you in trial'.<sup>299</sup>

The minority held 'it agreed with the majority judgment as far as refusing a permanent stay of prosecution, it found however that the test and the enquiry the majority had embarked upon was unnecessary because at that time Mr Zanner was not an accused, it took 10 years to reinstate the charges and at that time, he was not an accused'.<sup>300</sup> The minority further 'state that he was never deprived of his right to a fair trial as he had no right to be brought to trial during that period when he was not indicted by the prosecution'.<sup>301</sup>

The minority held that even if it was to use the wide interpretation, Mr Zanner was still not an accused person at that time. The minority it is submitted had a valid argument because how could Mr Zanner claim a right to which he was never entitled to. All factors of the *Sanderson* judgment must be considered collectively, the court must weigh one factor against the other equally as was stated in *Bothma v Els* judgment, where the constitutional court dealt with a permanent stay of prosecution and it had to decide whether to reverse the judgment that had been given by the court a quo.<sup>302</sup>

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<sup>297</sup> *Zanner* supra note 241 at 15.

<sup>298</sup> *Zanner* supra note 241 at 15.

<sup>299</sup> *Zanner* supra note 241 at 15.

<sup>300</sup> *Zanner* supra note 241 at 15.

<sup>301</sup> *Zanner* supra note 241 at 21.

<sup>302</sup> *Bothma* supra note 243 at 1-2.

#### **4.6 *Bothma v Els and Others 2010 2 SA 622 (CC) Judgment***<sup>303</sup>

Ms Bothma made an application to institute private prosecution against the accused Mr Els who was a family friend.<sup>304</sup> ‘She alleged that 39 years ago, during the periods of 1968 and 1970 Mr Els had taken her to his farm and raped her’.<sup>305</sup> Mr Els ‘then applied to the High court for a permanent stay of prosecution, he argued that the unreasonable delay Mrs Bothma had created would result in irreparable trial prejudice against him and it would deny him his right to a fair trial as envisaged in the constitution of South Africa’.<sup>306</sup>

In relation to a permanent stay of prosecution the High Court had the following to say: ‘it is a drastic remedy, which could only be appropriate if the delay caused irreparable prejudice to the accused’.<sup>307</sup> The remedy will only be granted if the party who seeks for an application can show that there has been irreparable prejudice done to him/her.<sup>308</sup> The High court made the following remarks that in considering the factors of *Sanderson v Attorney-General* Ms Bothma explanation for the delay ‘that guilt had haunted her’ was not persuasive.<sup>309</sup> Furthermore the court held that Ms Bothma was to be held fully culpable for the delay and that Mr Els had done nothing to contribute to this delay.<sup>310</sup>

The court after establishing that the Ms Bothma was solely to be blamed for the enormous delay , turned to the issue of trial prejudice before it could grant Mr Els a permanent stay of prosecution. The court held that ‘although it was mindful that this decision effectively shuts the doors of the courts and that the true effect of the delay on the outcome of the case will never be determined since it would only be determined at trial; however this was an exceptional case where a permanent stay of prosecution should be ordered because the evidence brought fought suggested that Mr Els

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<sup>303</sup> *Bothma* supra note 243 at 1-2.

<sup>304</sup> *Bothma* supra note 243 at 1-2.

<sup>305</sup> *Bothma* supra note 243 at 1-2.

<sup>306</sup> *Bothma* supra note 243 at 2.

<sup>307</sup> *Bothma* supra note 243 at 9

<sup>308</sup> *Bothma* supra note 243 at 9.

<sup>309</sup> *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) the court considered (1) The length of the delay (2) the reasons given by the prosecution to explain or justify the delay (3) the accused’s responsibility for and past attitude to the delay, (4) proven or likely prejudice to the accused (5) The public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

<sup>310</sup> *Bothma* supra note 243 at 9.

would suffer irreparable prejudice due to the delay and that he would because of this not receive a fair trial'.<sup>311</sup>

An appeal was made by Ms Bothma who contended 'that the High Court paid insufficient attention to the seriousness of the offence'.<sup>312</sup> The matter went to the Constitutional Court instead of the Supreme Court of Appeal to avoid further delays as this case had raised a constitutional issue. The constitutional court stated that it 'clearly raises some issues of complexity and it is manifestly in the interest of justice that the stay of proceedings be subjected to scrutiny'.<sup>313</sup>

The court held that the question before us is not whether his rights under section 35(3) (d) have been violated clearly they have not been.<sup>314</sup> It is whether in 'a broader sense his right to a fair trial would be irreparably violated as a consequence of the extreme belatedness of the prosecution'.<sup>315</sup> The court noted the following that 'in this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence'.<sup>316</sup>

The court was stating that should the trial proceed would it taint the overall substantive fairness of a trial. The court stated that 'the stay of prosecution in this matter, however, was based on a 39 year *pre-trial* delay, covering a period when Mr Els was not an accused person, what needed to be determined was whether Mr Els was even afforded protection by s35 (3) of the constitution and Mr. Els was afforded that right'.<sup>317</sup>

The Constitutional court stated 'that the court of a quo had paid insufficient weight in considering the seriousness of the offence; they had opted for a narrow approach and had only balanced the

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<sup>311</sup> *Bothma* supra note 243 at 10.

<sup>312</sup> *Bothma* supra note 243 at 13.

<sup>313</sup> *Bothma* supra note 243 at 13.

<sup>314</sup> *Bothma* supra note 243 at 13.

<sup>315</sup> *Bothma* supra note 243 at 35.

<sup>316</sup> *Bothma* supra note 243 at 35.

<sup>317</sup> *Bothma* supra note 243 at 35

3 factors of *Sanderson v Attorney-General* judgment'.<sup>318</sup> The court 'held that the offence of rape entails a sexualized act of humiliation and punishment that is meted out by perpetrator who possesses a mistaken sense of sexual entitlement'.<sup>319</sup> 'The criminal justice system should send a clear message through effective prosecution that no entitlement exists to perpetrate rape'.<sup>320</sup> Furthermore 'the reason why legislature accepted that there should be no prescription for the prosecution of rape, it must have been aware of the difficulties of proof that would inevitably accompany prosecutions delayed for more than two decades'.<sup>321</sup>

The court held that 'rape had the inherent effect rendering child victims unable to report the crime, sometimes for several decades, and rendering child victims unable to report the crime, sometimes for several decades, and that policy was not to penalise them for the consequences'.<sup>322</sup> Psychological studies 'had been undertaken of the sexual abuse of children and it had revealed the effects on victims which were very different from those suffered by the usual plaintiff in a delictual action'.<sup>323</sup> 'In this regard the court a quo failed to give sufficient weight to the seriousness of the offence'.<sup>324</sup>

The court noted that there must be irreparable prejudice or insurmountable prejudice. The court held that 'irreparable prejudice must be something more than just the disadvantage caused by the loss of some evidence, even if associated with delay, is not determination of irreparable prejudice'.<sup>325</sup> It must relate to 'insurmountable damage caused not to the sources of testimony as such, but to the fairness and integrity of a possible trial'.<sup>326</sup> Irreparability should not be equated

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<sup>318</sup> *Bothma* supra note 243 at 39.

<sup>319</sup> *Bothma* supra note 243 at 39.

<sup>320</sup> *Bothma* supra note 243 at 39.

<sup>321</sup> *Bothma* supra note 243 at 46.

<sup>322</sup> *Bothma* supra note 243 at 47.

<sup>323</sup> *Bothma* supra note 243 at 47.

<sup>324</sup> *Bothma* supra note 243 at 47.

<sup>325</sup> *Bothma* supra note 243 at 47.

<sup>326</sup> *Bothma* supra note 2403 at 47.

with irretrievability.<sup>327</sup> The court stated ‘that what is meant by this is that the trial will be irreparably prejudiced is to accept that there is no way in which fairness of the trial could be sustained’.<sup>328</sup>

The court held ‘that the appeal against the court a quo order must succeed and the stay of prosecution must be set aside’.<sup>329</sup> The court held the following reasons for setting it aside, ‘that the delay appeared to deprive both parties equally of supporting testimonies, and that the High court was faced with a classic bald allegation v bald denial, it was either one of them was lying and the other was telling the truth’.<sup>330</sup>

The court held that ‘the court of first instances had applied a narrow approach for determining whether there was irreparable trial prejudice’.<sup>331</sup> Furthermore that the High court should have let the trial courts determine the merits of the case.<sup>332</sup> The court held that ‘there was no suggestion that Mrs Bothma had acted in any way to destroy evidence, and that held that the specificity in relation to the alleged rapes would be dealt with at trial, no weight was given to the fact that Ms Bothma herself would suffer prejudice from being unable to call her witnesses as well as those that had passed away’.<sup>333</sup>

#### 4.7 Current position in South Africa

The current position in South Africa is as per *Broome v DPP*<sup>334</sup> judgment ‘where the appellants had applied for a permanent stay of prosecution, the appellants' alleged that there was unreasonably delay in the prosecution of the matter’.<sup>335</sup> The main issue for determination was ‘whether the facts showed that the delay in the pre-conviction stage of the trial had in fact caused the appellants to suffer irreparable trial prejudice that warranted a permanent stay of proceedings’.<sup>336</sup> The accused

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<sup>327</sup> *Bothma* supra note 243 at 47.

<sup>328</sup> *Bothma* supra note 243 at 47.

<sup>329</sup> *Bothma* supra note 243 at 47.

<sup>330</sup> *Bothma* supra note 243 at 47.

<sup>331</sup> *Bothma* supra note 243 at 47.

<sup>332</sup> *Bothma* supra note 243 at 47.

<sup>333</sup> *Bothma* supra note 243 at 47.

<sup>334</sup> *Broome* supra note 244 at 1.

<sup>335</sup> *Broome* supra note 244 at 3.

<sup>336</sup> *Broome* supra note 244 at 3.



were ‘charged with fraud that was allegedly committed between 1986 and 1994’.<sup>337</sup> ‘In 1994, a governmental commission of enquiry seized audit files, documents, and records’.<sup>338</sup>

‘There was a seven-year delay between the conclusion of the investigation and the formal charge in 2004, which the court found inexplicable and inexcusable’.<sup>339</sup> ‘The State had been responsible for the loss of documents instrumental to the Defense (the applicants had provided a detailed exposition of the material that was missing and a full explanation of the significance of the working papers)’.<sup>340</sup> The court granted a permanent stay ‘arguing that this would cause irreparable trial prejudice, as they no longer had documents to assist them with the trial’.<sup>341</sup>

In the kidney case, a permanent stay of prosecution had been granted for four surgeons and two Net care clinic staff implicated in what was known as the ‘cash for kidney scandal’.<sup>342</sup> The acting Durban Judge Anton Troskie ordered that a permanent stay of prosecution be granted, and he stated that in his view, it was the only ‘reasonable conclusion’.<sup>343</sup>

The surgeons John Robs, Ariff Haffejee, Neil Christopher and Mahdev Naidoo and the former staff at the St. Augustine’s hospital transplant unit had been charged with involvement in 90 illegal transplant operations.<sup>344</sup> It was alleged that poor Brazilians sold their kidneys to wealthy Israeli patients in exchange for cash between the year of 2001 and 2003, in contravention of the Human Tissue Act.<sup>345</sup>

The surgeons sought a permanent stay of prosecution arguing that ‘there was unreasonable delay of prosecution, unfair discrimination, and that they had suffered personal and trial related

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<sup>337</sup> *Broome* supra note 244 at 3.

<sup>338</sup> *Broome* supra note 244 at 3.

<sup>339</sup> *Broome* supra note 244 at 20.

<sup>340</sup> *Broome* supra note 244 at 6.

<sup>341</sup> *Broome* supra note 241 at 6.

<sup>342</sup> L Comins ‘Crime and Courts-Big defence in cash for kidney case’ (24 November 2012 available at [www.iol.co.za/news/crime-courts/big-defence-in-cash-for-kidney-case-1429840](http://www.iol.co.za/news/crime-courts/big-defence-in-cash-for-kidney-case-1429840) , accessed on 2016

<sup>343</sup> *Ibid.*

<sup>344</sup> Comins (note 342 above; 1).

<sup>345</sup> Comins (note 342 above; 1).

prejudice. Advocate Marais for the surgeons further stated that the doctors were arrested in 2005, the trial date had been set for the year 2006, months later at instance of the state the charges were withdrawn'.<sup>346</sup>

He stated that in the year of 2010 the surgeons were summoned to court once more, 'he argued that the surgeons were robbed of their years and emotionally scarred over this period'. He further said 'that the state had no urgency and this was not such a serious offence the surgeons would probably be ordered to pay R150 000 each as fine'.<sup>347</sup> Advocate for the surgeons further stated that state 'case is weaker than weak and that the states delay was entirely unreasonable, with the results that they can no longer properly defend themselves in the circumstances where the state will enjoy an immensely unfair advantage'.<sup>348</sup>

Advocate Palmer for the state argued 'that this application was only being made because the surgeons were attempting to 'backdoor' judicial review of the decision to prosecute, he argued that nobody is above the rule of law and that no organ trafficking would succeed if there were not surgeons willing to participate'.<sup>349</sup> He argued that 'the reasons for the delay of prosecution had been a result of factors including resources, the complexity of the case and the decision to prosecute the matter as a syndicate'.<sup>350</sup>

He argued 'that at this point it was not for the court to determine whether the state case was weak but rather but that as the test is whether there is trial related prejudice'.<sup>351</sup> He argued that 'the right to a fair trial requires fairness to the public as well not only to the accused'.<sup>352</sup> He argued for the State that the reasons for the delay had to be given careful consideration.<sup>353</sup> Rightfully so, it can be said that the test is whether there is trial related prejudice, irreparable or insurmountable prejudice.

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<sup>346</sup> Comins (note 342 above; 1-2).

<sup>347</sup> Comins (note 342 above; 1-2).

<sup>348</sup> Comins (note 342 above; 1-2).

<sup>349</sup> Comins (note 342 above; 2).

<sup>350</sup> Comins (note 342 above; 2).

<sup>351</sup> Comins (note 342 above; 2).

<sup>352</sup> Comins (note 342 above; 2).

<sup>353</sup> Comins (note 342 above; 2).

If we are to consider the *Zanner* judgment in relation to the kidney case judgment we realize that things the court in *Zanner* stated that ‘a stay may only be granted if there is trial related prejudice in the absence of such, extraordinary circumstances needs to be shown that would make this otherwise inappropriate remedy of a stay nevertheless appropriate’.<sup>354</sup> The court granted this remedy in the kidney case on the basis that it was the only ‘reasonable conclusion’. The test is not whether it is the ‘reasonable conclusion’; it is whether there is ‘trial related prejudice’ that remains the test in the South Africa.

However the judgment of *Zanner* states that there is a long delay cannot and does not per se amount to infringement of the right to a fair trial, the accused must show definite and not speculative prejudice, it would seem that in the kidney case they had not shown that the prejudice was definite.<sup>355</sup>

## 4.8 Concluding Comments

A permanent stay of prosecution is a common law remedy that has been applied in South Africa, Canada and United States of America. This remedy is sparingly granted because the true effect of this remedy is that it stays proceedings permanently.

This remedy terminates proceedings, caused by the unreasonable delays in trials but it does not prove your innocence or guilt.<sup>356</sup> The requirements for this application are very stringent and to be successful in your application you have to prove trial-related prejudice and or exceptional circumstances or irreparable prejudice as was stated in the *Zanner* and *Bothma v Els* Judgments.

The High court is the only court that may grant a permanent stay of prosecution, it is submitted that the lower courts should have jurisdiction because majority of delays occur in the lower courts. This remedy it is submitted that it was created to protect accused persons from the abuse of power

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<sup>354</sup>*Zanner* supra note 241 at 21.

<sup>355</sup>*Zanner* supra note 241 at 21.

<sup>356</sup> P De Vos ‘Permanent Stay of Prosecution for Zuma’ (25 November 2006 available at <http://constitutionallyspeaking.co.za/permanent-stay-of-prosecution-for-zuma/>), accessed on 2015.



by the State. It is unlikely and has not been seen to date, that the State would apply for a permanent stay in proceedings where the accused has failed or contributed to the delays. It is illogical that such would in fact ever happen.

This common law remedy is there to ensure the prosecution acts speedily and that it does not contribute to unreasonable delays in trial. The current position is that permanent stay in proceedings is being granted but very sparingly and in limited circumstances. The courts are stressing and emphasizing the trial-related prejudice requirement. This remedy should be codified so as to be included in the Criminal Procedure Act.

## **CHAPTER 5:**

## CONCLUSION

### 5.1 Findings & Recommendations

‘Justice delayed is justice denied, and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything to solve it’.<sup>357</sup>

The expeditious commencement and completion of criminal proceedings is a well-recognised criterion for a fair trial. Unreasonable delays in criminal trials and proceedings have been tried to be combatted, by various case law, statutes, and international treaties. This fundamental right of the accused to have his trial begin and end without unreasonable delays is there to ensure that justice is done to the accused, who at this point in the criminal proceedings has only been charged and has not been found guilty of the offence. It is apparent that unreasonable delays in trials are an on-going problem. Future delays will keep occurring if they are not curbed.

Procedural law is there to enforce the basic principles of evidence to protect the rights of accused, arrested and detained persons. Substantive law is based on the actual offence the accused is charged with when he first appears in court. A balance should be met between procedural and substantive fairness to ensure a proper functioning of the criminal justice system.

The sole reason for protecting the right to a fair trial is to ensure that none of the role players in the criminal justice system violate any of the rights enshrined in the Constitution or the Criminal Procedure Act. This dissertation has been based solely on the remedies of unreasonable delays in trials and the prejudice caused not only to accused persons, the criminal justice system and the society.

The primary concern however has been on the *accused* as has been established earlier that it is he/she that suffers the most in criminal proceedings. It has been exhausted, overstated, the message that being put across is that the delays that occur in trials should not be accepted by the courts. The

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<sup>357</sup>*Gray v Gray* (1955 (6) III. App. 2d, 571,128 N.E.2d 602.

delays are tantamount to violation of human's basic rights amongst these being the presumption of innocence.

Prevention is better than cure as has been, but once you have surpassed that stage, one still requires the best remedy. Although there are available remedies to the court, the court must ensure that there is the least amount of delays in criminal proceedings.

## 5.2 Suggestions & Recommendations

Firstly, it is suggested that s168 of the Criminal Procedure Act be codified so as to include the element of the interest of justice. This is important aspect so that the court will consider the interest of justice in conjunction with the expedient and necessary requirement before it grants a postponements. Case law has shown that the courts in South Africa consider the interest of justice when deciding on whether or not to grant a postponement. The provision could read as follows it is suggested: 'A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient or finds that it is in the *interest of justice*, adjourn the proceedings to any date on terms which to the court may seem proper and which are not inconsistent with any provision of the Act'.

Secondly, it is suggested that s342A be extended to include extra curial delays, to be apply in respect of proceedings that occur before the criminal proceedings occur. According to the judgment of *S v Naidoo* the section currently only deals with unreasonable delays in trials once the criminal proceedings have commenced, intra-curial.<sup>358</sup> The Act can be extended to include delays that occur prior to the commencement of criminal proceedings. An example would be the moment the accused is charged and there are delays occurring the court may invoke the provision of s342A (3).<sup>359</sup>

Thirdly, it is suggested as an overall that the remedies that are granted should have finality to them and should not be seen as temporary relief. It is suggested that where the accused has been in

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<sup>358</sup>*S v Naidoo* 2012 SACR 12 (WCHC), at para 14.

<sup>359</sup> Act 51 of 1977, S342A.

custody and there has been unreasonable delay in the proceedings the court investigate and hold an enquiry into the reasons for the delays and if the court thereafter finds that there has been unreasonable delays, it is suggested that the court may find that person in contempt of court or deal with such conduct according to the law.

It is then suggested that the court may then release the accused on warning pending the finalisation of criminal proceedings. This remedy will enable the accused to enjoy his right to a fair trial and at the same time not to avoid criminal prosecution. This is fairness, it is submitted.

However it should be noted that this application is not an application of bail on new facts, it's a remedy arising from the fact that there has been unreasonable delay in trial, and this affords to the principle of fairness (the right to fair trial) its respect.<sup>360</sup> This remedy will enable the accused to re-apply for bail irrespective of whether his/her bail had been refused initially, and irrespective of the fact that he/she had abandoned his bail application. This application is made however because the accused is suffering actual prejudice because he/she is in custody. It is suggested that if there has been prolonged delays then a bail application should be revisited by the courts.

Fourthly, it is recommended that a permanent stay of prosecution be codified and be included in the Criminal Procedure Act 51 of 1977 under s342A (3) as one of the remedies, it has been considered by various jurisdictions including Canada where it was held in *'R v Rahey (1987) 1 S. C. R. 588 (Canada), paragraph 9, the Canadian Supreme Court pointed out that if a court finds that there has been a contravention of the right to a trial within a reasonable time, then the sole acceptable and minimum possible remedy would be a stay in proceedings'*.<sup>361</sup> Hugo J with Combrink J, concurring held that 'in the event of an inordinate delay in bringing prosecution the remedy is a permanent stay of prosecution'.<sup>362</sup>

The Act could be codified to add the common law remedy and it could read s342A (3) that 'if the court finds that the completion of the proceedings is being delayed unreasonably, the court may

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<sup>360</sup>The Constitution of South Africa, 1996, s35(3) (every accused person has the right to a fair trial(d) which includes the right to have your trial begin and end without unreasonable delays).

<sup>361</sup> Gopaul (note 268 above; 73).

<sup>362</sup> Gopaul (note 268 above; 73).

issue any such order as it deems fit in order to eliminate the delay or any prejudice arising from it or to prevent further delay or prejudice<sup>363</sup>, including an order (g) of granting a *permanent stay of prosecution*, where it clear to the court that there is trial-related prejudice.

Even though the remedy of a permanent stay of prosecution is a common law remedy, this remedy has been seen to be effective , although it is not granted often but sparingly, it is recommended that magistrate courts have jurisdiction over the granting this drastic application as most delays are prevalent in the magistrate courts. Considering that the magistrate court is a creature of statute perhaps it would be most appropriate to amend and extend jurisdiction to the magistrate courts.

Although the wording of the CPA states that ‘a court’ may grant the remedies listed therein, however the magistrate court would only be able to grant such remedy as stated in section 342A(3) and not any other common law remedy such as a permanent stay.<sup>364</sup> Such remedy may only be considered by the high court as case law suggests.

This application for a permanent stay is expensive and in order for it be within the means of ordinary citizens it is suggested that the justice centres or law clinic and firms that deal with indigent people be able to assist such persons to make such an application at their expense.

It is not suggested that all permanent stay be made in the magistrate court, because magistrate courts have certain matters the can preside over, and matters that they cannot preside over. It is suggested that magistrates be able to grant a permanent stay in matters which it already has jurisdiction over, it is submitted.

It is recommended that the judicial committee makes provisions for investigations into the reasons for unreasonable delays. ‘The Judicial Matters Second Amendment Act 55 of 2003 requires that every six months the national prosecuting authority submit a report to the minister of justice and constitutional development, whose trial has not commenced or who is custody for a continuous period exceeding<sup>365</sup>:

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<sup>363</sup> Act 51 of 1977, s342A (3).

<sup>364</sup> Act 51 of 1977.

<sup>365</sup> Gopual (note 268 above; 84).



1. 18 months from date of arrest where the trial is conducted in the high court,<sup>366</sup>
2. 12 months from date of arrest where trial is conducted in the regional court,<sup>367</sup>
3. 6 months from date of arrest where trial is to be conducted in the magistrate court,<sup>368</sup>

This Act as has been stated by ‘Academics argue that this Act is isolated from undue delays enquiry and serves little purpose other than to indicate the extent to which court processes are being delayed’.<sup>369</sup> It is suggested that such provision be included in the Criminal Procedure Act but must serve as a mechanism of investigating into the reasons. If it is served as investigative mechanism, this will decrease delays in criminal proceedings as defence attorneys and prosecutors would be held accountable and will take the court into their confidence.

s342A (3) (d) of the Act provides fairness only to one party, whether it be the Accused or the State or the society.<sup>370</sup> The problem with this remedy is for instance if it is an assault, the matter is being adjourned for the doctor to be in court, to confirm the content and the doctor does not appear in court, the court may refuse a further postponement and grant a remedy of closing the State’s case. It does provide finality however, and stops further delays in trials.

The State will be left with no option but to close its case, the question is this justice? The accused may be acquitted as the court may find that not all the elements of the offence have been met. The consequence of this however is that the evidence of the doctor would not be confirmed or before court to show that he did make that report. The J88 will not be confirmed, especially if the defence is disputing the content thereof.

This is fairness to the accused because a matter cannot be postponed indefinitely. Although it is not fairness to the society and the victim, this is an example of ‘where right is not the same as what is fair’

In ‘*Hunter v Chief Constable of the West midlands Police*’ the court noted that inherent power

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<sup>366</sup> Gopual (note 268 above; 84).

<sup>367</sup> Gopual (note 268 above; 84).

<sup>368</sup> Gopual (note 268 above; 84).

<sup>369</sup> Gopual (note 268 above; 84).

<sup>370</sup> Act 51 of 1977.

which any court of justice must possess is to prevent misuse of its procedure in a way which although not inconsistent with literal application of procedural rules would nevertheless manifestly be unfair to one party'.<sup>371</sup> S38 of the Constitution stipulates that where there has been a violation of fundamental 'right an appropriate relief must be given, the right to a fair trial is such a fundamental right'.<sup>372</sup>

s342A (3) (e) of the CPA, in regards to the cost order, people must expect to pay some costs because of litigation, and the mere fact that there has been a delay should not then be seen as an invitation to everybody who suffers delays in trials to claim for cost orders. This provision should be enforced even though it does not remove the delay complained of it enforces the right to a fair trial by holding someone accountable. If the accused has suffered delay upon finalisation of trial the accused can claim for costs like in civil courts.

It is recommended that a person who alleges that there has been an unreasonable delay in trials should have a civil claim against the party who is causing that delay. It is suggested like in civil proceedings that a cost order such as '*costs de bonis propriis*- where the court in appropriate circumstances award *costs de bonis propriis* against a person acting in a representative capacity, an attorney, counsel, liquidator and trustees, this award is awarded as a penalty for improper conduct, or bringing a frivolous application when you fully know you do not have a valid defence in law and the representing person must pay such costs out of his own pocket'.<sup>373</sup>

Such an order can be made as between party and party, attorney and client or attorney and own client depending on the court and the circumstances. It is suggested that the party who has caused unreasonable delays in trial be ordered to pay *cost de bonis propriis*, if the court is satisfied that the party contributed and it is because of their misconduct that the delays had occurred.

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<sup>371</sup> *Hunter v Chief Constable of West Midland Police* [1982] AC 529-536.

<sup>372</sup> The Constitution of South Africa, 1996 s38.

<sup>373</sup> Merriam Webster 'Definition of DE BONIS PROPRIIS available at' <https://www.merriam-webster.com/dictionary/de%20bonis%20propriis> accessed on 2016.

This will make all the criminal law role players to be more attentive and aware as they will know not to make a superfluous application for postponements or contribute to unreasonable delays in trials. The parties will know that if they do contribute towards unreasonable delays in trials, there is a cost order, specifically – *cost de bonis propriis* that a court may grant against them.

The sole purpose of having remedies is to fix or remedy a problem of undue delays in trials, which the state or the defence has contributed, yet on the other hand it is to ensure that the party who alleges such receives a remedy that responds to his/her complaints.

*Cost of the day* is a civil principle where the party that asks for a postponement is ordered to pay the other party wasted costs. It is suggested that should be included as another remedy the court may be able to grant where it is clear that the State or the Attorney of the accused is asking for frivolous postponement and is contributing to delays. The court could order that the other party pay the other party for wasted costs.

If Attorneys and the State know that there are costs orders will be granted against them, they will not be so inclined to ask for frivolous or superfluous postponement and furthermore the other party to the criminal proceedings will learn to object and not to accept every postponement for the fear that the court may grant an cost order against them as well.

The remedies with due respect it is submitted should not be a hindrance on substantive law but should rather try and actually achieve the goal of removing the delay rather than giving remedies that have no direct correlation to remedying the prejudice that has suffered. The most practical way of avoiding delays is to eradicate the reasons for the delays, as it has mentioned that the reason for the delays in trials is caused by the postponement for further investigation.

It is suggested that before a person is arrested and they become an accused person that further investigations should be completed. The idea of keeping an accused person in custody for 2 months for further investigations is not only tantamount to a violation of the presumption of innocence but encroaches on the ‘accused right not to be arbitrarily deprived of freedom’.<sup>374</sup> In *Wild v Hoffert* the

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<sup>374</sup> The Constitution of South Africa, 1996 s12 (1) (a).

court held that should a delay occur unreasonably against the accused, his or her release can be considered by the court.<sup>375</sup>

These sentiment are shared as an accused person should not be kept in custody as anticipatory punishment as held in In ‘S v *Acheson* Mahomed J remarked that an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court’.<sup>376</sup> ‘Release on bail is no substitute for an accused’s right to be tried within a reasonable period as academics have started’.<sup>377</sup>

Unreasonable delays in trials adversely affect the accused person, especially those that are in custody. The accused persons that are out on bail or warning are affected as well because they spend money coming to court, some lose their employment and some are held off from work pending finalisation of criminal proceedings.

It is recommended that remedies that are used in different parts of the world be considered, such as ‘*Williams v R* the reduction of sentence was an appropriate remedy for the undue delays in trial.’<sup>378</sup> If the accused had been in custody pending outcome of trial and unreasonable delays have contributed to him staying in custody longer. The court could reduce his sentence and consider the time spent in custody as a result of delays. This would be the case if the court grants a custodial sentence.

Justice Burns stated in the case of *R v Dennis Michael* ‘a right to a trial without undue delay is not the right not be tried after the delay has occurred’.<sup>379</sup> Remedies that are granted should not be seen as if the accused will not be tried at all. A balance must be made to ensure that the right to a fair trial is respected. It is suggested that other remedies used across the world be used in South Africa, one remedy is that there should be a committee in place to monitor to see if the remedies in place are effective and whether they are serving it intended purpose.<sup>380</sup>

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<sup>375</sup> *Wild and Another v Hoffert NO and Others* 1998 (6) BCLR 656, 11.

<sup>376</sup> *Ibid.*

<sup>377</sup> E Du Toit et al *Commentary on the Criminal Procedure Act* 2ed (1997) 6-9.

<sup>378</sup> *Williams v R* (2009) NZSC 41.

<sup>379</sup> *R v Dennis Michael* 730 F.2d 550 (8th Cir. 1984).

<sup>380</sup> FH Monek ‘Court Delays: Some Causes and Remedies’ available at [https://www.iatlnet/files/public/82\\_court\\_i4a.pdf](https://www.iatlnet/files/public/82_court_i4a.pdf), accessed on 2014.

It is further suggested that to decrease the number of delays, unnecessary procedural delays should be combatted and furthermore legislation can revisit the issue of delays. Preventative measures should rather be enforced to minimize and avoid the delays. One remedy that has been tried and tested in Canada is that where there has been a delay in trial, there are ‘mechanisms which allow a party to judicial proceedings to request a higher court to order the lower trial court to take a particular procedural step or to set a time limit to the proceedings’.<sup>381</sup> This will ensure the principle of accountability and each party will ensure that they decrease the delays in trials as they will be held accountable. The remedies of unreasonable delays in trials should be more effective in the future and should serve its intended purpose of resolving delays in trials.

The Criminal Justice has progressed and due process rights are now afforded to citizens, it is important that trials begin and end without unreasonably delays. The available remedies should be in line with the ethos of the constitution and should serve its intended purpose which is to decrease delays. The available remedies are effective however there is always space for growth and improvement. The available remedies are effective, however other remedies can be considered by the courts. It is suggested that these remedies be revisited and reconsidered, for the better and proper functioning of the criminal justice system, for a failure to remedy this issue will lead to society mistrusting the criminal process and this will ultimately lead to the breakdown of the criminal justice system.

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<sup>381</sup> M Kuijher ‘The right to a fair trial : effective remedy for excessively lengthy proceedings’ (2013) *ECHR* 1.

23 July 2014

Ms Londeka Zandile Ngalo (209513110)  
School of Law  
Howard College Campus

Protocol reference number: HSS/0839/014M

Project title: A Balancing Exercise: Upholding the rights to a fair trial and the remedies of unreasonable delays in trials

Ms Ngalo,

**Full Approval – No Risk / Exempt Application**  
response to your application dated 18 June 2014, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

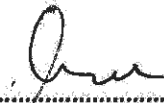
Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.**

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....  
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Mr Eben van der Merwe  
Cc Academic Leader Research: Dr Shannon Bosch  
Cc School Administrator: Mr Pradeep Ramsewak

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