THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

***Van Heerden & another v NDPP & others* (145/2017) [2017] ZASCA 105 (11 September 2017)**

From: The Registrar, Supreme Court of Appeal

Date: 11 September 2017

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) upheld an appeal brought by the appellants, Mr Pienaar Van Heerden and his wife Ms Anthea Lynette Van Heerden (the appellants), against a judgment of the Western Cape Division of the High Court, Cape Town (court below). The issue at the centre of this appeal concerned the question as to whether the appellants are entitled to what they themselves acknowledge is the 'extraordinary relief of an order permanently staying a criminal prosecution', instituted against them by the first respondent, the National Director of Public Prosecutions (the NDPP).

The appeal stemmed from the following factual background. The appellants were both employed by the third respondent, British American Tobacco South Africa (Pty) Ltd (BATSA), a company that manufactures and sells cigarettes. After the appellants returned from holiday in January 2010, Mr Van Heerden was accused by BATSA of the theft of cigarettes. He was summarily suspended and subjected to disciplinary proceedings by BATSA after which his services were terminated. During March 2010 Ms Van Heerden's services were also terminated.

On 18 August 2011 the NDPP, in anticipation of criminal charges to be preferred against the appellants, applied for and obtained a provisional restraint order in terms of the provisions of s 25(1)(b) of the Prevention of Organised Crime Act 121 of 1998 (POCA) . The provisional restraint order was made final on 5 October 2011, which prevented the appellants from dealing in any manner with virtually all their property.

The appellants appeared in the Magistrates Court, Cape Town on 29 August 2011, where they were charged with the theft of hundreds of boxes of cigarettes. On 25 November 2011, the magistrates' court was informed that the investigation was incomplete and that the State required a postponement for three months. The matter was postponed until 2 March 2012 with a note indicating that the postponement was 'final'. The court noted that the matter had been postponed to enable a decision by the NDPP and to finalise investigations. The investigations had not been finalised and there was no decision by the NDPP in relation to the POCA charges, which the State intended to include in the charge sheet. Shortly thereafter the prosecutor informed the court that the State was not in a position to complete the charge sheet and after enquiry he was instructed by his seniors to proceed only with the theft charge. He would not require the approval of the NDPP to proceed on the POCA charges and on that basis requested the matter to be transferred to the Khayelitsha Regional Court (Priority Court)

The appellants appeared for the first time on 23 March 2012 in the Khayelitsha Regional Court before magistrate Venter, in order to enable the State to proceed with the prosecution on the theft charge as a matter of priority. On that day and immediately, the court was informed that the State intended to include racketeering charges in terms of s 2 of POCA. To that end the matter was postponed to 4 May 2012. On that day the magistrate was informed that authorisation had been obtained from the NDPP for the inclusion of racketeering charges. The matter was then postponed to 27 September 2012.

The matter continued to be postponed on several occasions and during February 2014, shortly before the trial was due to commence, the appellants served a lengthy and comprehensive document requesting further particulars and documentary evidence and gave written notice of an intention to object to the charge sheet, relying on a judgment delivered in the KwaZulu-Natal Division of the High Court, Durban, namely, *Savoi & others v National Director of Public Prosecutions & another* [2013] ZAKZPHC 19; [2013] 3 All SA 548 (KZP). In the notice the appellant indicated that the judgment was on appeal to the Constitutional Court and that judgment by the Constitutional Court was pending. It was thus inevitable that the trial would not commence as scheduled. On 10 February 2014 the matter was postponed to 14 April 2014, awaiting the judgment in the Constitutional Court. On 20 March 2014 the Constitutional Court delivered judgment in *Savoi & others v National Director of Public Prosecutions & another* 2014 (1) SACR 545 (CC), confirming the constitutionality of the provisions of s 2(1) of POCA.

The State responded to the appellant's request for further particulars on 11 April 2014. On 14 April 2014 the appellants requested a postponement to consider the State's reply to their request for particulars and documentation. On the day on which the trial was scheduled to start, the appellants presented written submissions concerning the State's response to the request for further particulars, which it was alleged was wholly unsatisfactory and formed the basis for the contention that the charges against the appellants should be quashed. It is common cause that no documentation was in fact attached to the response. Nothing appears to have come of the State's request to BATSA to provide the required documentation. The State required a postponement in order to reply to the

appellants' written submissions. The matter was postponed to 17 November 2014. Without adjudicating on the objection to the charge sheet and dealing with the respective submissions of the parties, magistrate Venter refused a 'postponement' and struck the matter from the roll without indicating why.

The appellant's attorney addressed a letter to the State on 13 March 2015, seeking the release of their assets from the restraint order and wrongly declaring that the charges against them had been quashed. The State's response was that the charges had not been quashed and that the NDPP had undertaken to have the charge sheet amended and it would be submitted to the appellants on 17 April 2015. The deadline was not met by the State. The authorisation by the NDPP to amend the charge sheet was only issued on 30 July 2015.

Advocate Appels, who appeared for the State, arranged with the clerk of the court for a date on which the State would proceed with the prosecution, namely 4 September 2015. An 'amended' charge sheet was presented to the appellants before that date, to which they once again objected on the basis that it was virtually the same as the one that been previously objected to. It appears to be common cause that the changes were minimal. On 4 September 2015 magistrate Harmse was incorrectly informed on behalf of the appellants that the matter had been removed from the roll by magistrate Venter in terms of s 342A of the Criminal Procedure Act 51 of 1977 and that the matter could only be re-enrolled with the authorisation of the DPP in terms of s 342A(3) thereof. The State contended before magistrate Harmse that no enquiry in terms of s 342A of the CPA had been conducted. The magistrate disagreed and struck the matter from the roll.

In December 2015 the appellants launched the application, which is the subject of this appeal, in the Western Cape Division of the High Court, Cape Town. The matter was argued during March 2016 and judgment delivered on 16 March 2016, in terms of which the application was dismissed with costs. The court in deciding the matter referred to an earlier application by the appellants in that division; for an order varying the restraint order, which it considered to be crucial. In that application, Rogers J had dismissed the application for a variation of the restraint order, essentially on the basis that it was clear that the appellants had not made full disclosure of all their assets.

On appeal, the appellants contended that the court below had failed to consider relevant factors in relation to the application for a permanent stay of prosecution and treated it as if it was an application for the release of funds in terms of s 26(6) of POCA. They complained that a period of six years had elapsed since the opening of the police docket and a period of five and a half years after the arrest of the appellants and the seizure of all their property. They further submitted that this is in conflict with their rights to a trial within a reasonable time guaranteed in terms of s 35(3) of the Constitution. That section of the Constitution also entrenches the rights of arrested and accused persons to be informed with sufficient detail of charges so as to answer them. They contended that the restraint order 'which has deprived the appellants of virtually all their assets (including the first appellant's pension), has the effect of materially exacerbating the prejudice suffered by them. In support of their contention that

their constitutional rights have been infringed, the appellants relied on *Sanderson v Attorney General Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC).

The SCA noted that the right to a trial within a reasonable time is fundamental to the fairness of a trial. It went on to consider how a determination is to be made of whether a particular lapse of time is reasonable. In arriving at a conclusion the court warned that regard should be had to the imperfections in the administration of criminal justice in our country, including those of law enforcement and correctional agencies. It acknowledged that they were all under severe stress.

The SCA also noted that it is clear that substantial and material parts of the delays were occasioned by the inertia and vacillation of the prosecutors involved on behalf of the NDPP. The court further noted that State was disingenuous. It had no intention to proceed on the restricted basis of the theft charge as indicated to the magistrate when it sought a transfer to the Khayelitsha Regional court on a priority basis. It gave that assurance to the court to prevent the matter from being struck from the roll.

The SCA held that it is quite clear from what is set out above that inadequate consideration, if any, was given by the State to the appellants' rights to a trail within a reasonable time and that a material substantial part of the delay was due to the State's tardiness and lack of application and concern. The SCA further noted that it does not appear as if the State made any serious attempt to obtain the documents they had undertaken to request from BATSA. Having given the undertaking, they adopted a rigid position that their case was not founded on documentation and that whatever information was sought was in BATSA's possession.

The SCA also noted that the appellants' assets, including pension benefits have been under severe restraint since August 2011 until it was relaxed by Gamble J in 2016 for purposes of funding the appeal. The greater parts of the assets have now been dissipated. The SCA further noted that the remaining though diminished parts of their assets, remain under restraint. At the time of the application in the court below they appear to have been living from hand-to-mouth, burdened with the care of their daughter and an infant granddaughter. The lapse of time also has to be considered in relation to their mature years.

Consequently, having had regard to the applicable factors set out in *Sanderson,* the SCA held the appellants' right to a trial to begin and conclude without unreasonable delay has been infringed and that the appropriate relief in terms of s 38 of the Constitution is the principal relief sought by them.

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

As a result, the appeal was accordingly upheld with costs and all the restraint orders related to the appellants' assets were set aside.