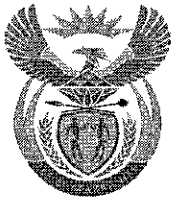

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1186/2019

In the matter between:

JOAO RODRIGUES	**APPELLANT**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	**FIRST RESPONDENT**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**SECOND RESPONDENT**
THE MINISTER OF POLICE	**THIRD RESPONDENT**
IMITIAZ AHMED CAJEE	**FOURTH RESPONDENT**

Neutral citation: *Rodrigues v The National Director of Public Prosecutions and Others* (1186/2019) [2021] ZASCA 87 (21 June 2021)

Coram: MAYA P, CACHALIA and DLODLO JJA and LEDWABA and POYO-DLWATI AJJA

Heard: 6 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h30 on 21 June 2021.

Summary: Right to a fair trial – s 35(3)*(d)* of the Constitution – whether a lengthy delay in commencing criminal prosecution of charges, including murder, allegedly caused by political interference caused the appellant trial-related prejudice justifying a permanent stay of prosecution.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Kollapen, Moshidi and Opperman JJ sitting as a court of appeal):

The application for leave to appeal is granted and the appeal is dismissed.

JUDGMENT

Ledwaba AJA (Maya P, Dlodlo JA and Poyo-Dlwati AJA concurring):

Introduction

[1] The appellant, Mr João Rodrigues, was indicted in the Gauteng Division of the High Court, Johannesburg on a charge of murder and defeating and/or obstructing the administration of justice. The murder charge related to the death of the late Mr Ahmed Essop Timol, on 27 October 1971, at John Vorster Square Police Station. The appellant has not yet pleaded in the criminal trial. He filed an application, which was heard by a Full Court of the Division, seeking:

'1. A declaratory order that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is envisaged in section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.

2. A declaratory order that the criminal proceedings instituted against the Applicant constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(5) of the Constitution read with section 342A of the Criminal Procedure Act, Act 51 of 1977.

3. That the Applicant is granted a permanent stay on the charge of murder in the criminal proceedings against the Applicant relating to the death of the late Ahmed Essop Timol on or about the 27th of October 1971.

4. That the First and/or Second Respondents are prohibited from proceeding with the criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol.

5. That the First and/or Second Respondents are ordered to withdraw the criminal proceedings against the Applicant relating to the death of Ahmed Essop Timol.'

[2] The Full Court (Kollapen J and Moshidi and Opperman JJ concurring) dismissed the application and refused leave to appeal. The appellant then brought an application for leave to appeal in this Court, which was referred to oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The parties were further directed to address the court on the merits.

Amici Curiae

[3] The Southern Africa Litigation Centre and certain former Commissioners of the Truth and Reconciliation Commission (the TRC), namely Yasmin Sooka, Dumisa Buhle Ntsebeza, Mary Maria Burton, Wendy Orr, Glenda Wildschut and Fazel Randera, successfully applied to this Court to be admitted in the proceedings as amici curiae. In addition to filing heads of argument, they were also granted leave to make oral submissions during the hearing of the matter.

Condonation

[4] The appellant sought condonation for the delay in the filing of the record. In his application he ascribed the delay to the effects of the Covid-19 lockdown and the peculiar nature of his funding arrangement with the State. He explained that he is not allowed to incur any litigation costs or expenses without the prior authorisation of the State Attorney and that his attorney's request for authorisation to obtain the record was not answered, probably due to the Covid-19 lockdown. His attorneys ultimately procured the record at their own cost. But by then the period within which it should have been filed had already expired.

[5] The application was not opposed, and given the somewhat unusual circumstances relating to the funding arrangements of the appellant's litigation costs, as well as the effect of the national state of lockdown, I am satisfied that the appellant gave a full and proper explanation for the delay, which justifies granting the condonation application.

Application for leave to appeal

[6] The application for leave to appeal was advanced on the basis that the Full Court erred in concluding that the delay in bringing the prosecution will not taint the fairness of the trial and violate the appellant's right to a fair trial. The appellant submitted that the court erred in finding that he was not being prosecuted for an improper motive and that the court erred in not finding that the alleged political interference by the Minister of Justice and the State President, by stopping the prosecution of TRC cases, caused the unreasonable delay and had the effect of tainting the fairness of the trial he is required to face. He argued that a substantial number of further prosecutions of similar cases involving alleged offences perpetrated during the apartheid-era by police officers, who did not seek amnesty for the offences from the TRC, would follow in future. They would raise the same issues relating to fairness of such prosecutions, as in this case, and it was therefore imperative to get clarity and finality on the approach to be followed by courts in such matters. These factors, he contended, were sufficient to convince the court to grant him leave to appeal.

[7] The Full Court dealt with these contentions when it refused the application for leave to appeal. In my view, the issue of the alleged political interference by the Executive and the State President in the prosecution of crimes such as the present one and its ongoing impact and relevance for prosecutions that may still be instituted in future is certainly relevant. It, inter alia, raises the important

question of what effect, if any, political interference, as a matter of principle, has on the operations of the criminal justice system. For that reason, I think that there is a compelling reason to grant leave to appeal.

[8] The merits of the matter should therefore be considered. But in doing so, this Court should exercise the caution expressed by Ponnan JA in *Hattingh v Furman and Others N.O.*,[1] that the granting of leave to appeal does not suggest in any manner whatsoever that an appellant in such circumstances has made out a case for success on the merits of the appeal because different considerations come into play in the determination of an application for leave to appeal, as opposed to an appeal on the merits.

The merits

[9] In considering the merits of the appeal, I will briefly set out some of the relevant factual background. The late Mr Timol, a political activist and member of the South African Communist Party (SACP), was arrested on 22 October 1971 at a roadblock after the South African Police found pamphlets of the then banned SACP in the boot of his car. He died whilst in detention, on 27 October 1971. In the inquest held in 1972, the appellant's testimony was that Mr Timol opened a window of Room 1026 on the 10th floor of John Vorster Square and jumped out to his death before he could be stopped. The Presiding Magistrate concluded that Mr Timol committed suicide and that no person was responsible for his death.

[10] A second inquest was held in 2017 before Mothle J after recommendations were made to the second respondent, the Minister of Justice and Correctional Services, for the re-opening of the inquest of the deceased in terms of s 17A of the Inquests Act 58 of 1959. In October 2017, Mothle J concluded that Mr Timol

[1] *Hattingh v Furman and Others NNO* [2020] ZASCA 123 (SCA).

was pushed from Room 1026 of John Vorster Square with the necessary intent to kill him and that his death was preceded by torture at the hands of the police, resulting in serious injuries to Mr Timol. He further found that the appellant participated in a cover up to conceal the crime of murder and ordered that he be investigated with a view to being prosecuted.

[11] The appellant was thereafter arrested and charged with the murder of Mr Timol, on 30 July 2018, and then released on bail in the amount of R1 000. His first appearance in the Gauteng Division of the High Court, Johannesburg was on 18 September 2018. The trial court is awaiting the final outcome of this application.

Period before appellant indicted

[12] The period between the death of Mr Timol and the arrest of the appellant is about 47 years. The Full Court aptly divided this period into three sub-periods. The first period is the period from 1971 to 1994 related to the time when the former apartheid government was still in power and when the inquest findings of 1972 concluded that no one was responsible for the death of Mr Timol and immunised the appellant from prosecution. There was no will in the Office of the Attorney General of the day to challenge the inquest ruling and it cannot be ruled out that the Government could have also ensured that the truth about Mr Timol's death was suppressed.

[13] The second period, 1994 until 2002, was characterised by the transition to democracy and the work of the TRC. This included the amnesty mechanisms which were open to those who may have committed political crimes in the past. They had the opportunity to come forward and apply for amnesty. If they were successful in their applications for amnesty they would be insulated from future

prosecutions, but if they were unsuccessful or chose not to apply for amnesty, the risk of future prosecution remained open.

[14] The third period is the period from 2003 until 2017. This is, in my view, the most crucial period, because it relates to the period when the alleged political interference by the Executive, the alleged amnesty granted by the State President and the alleged agreement between Government and other interested parties occurred.

Grounds of appeal

[15] The main grounds of the appellant's appeal, which were also raised before the Full Court and comprehensively addressed by it, were that the envisaged prosecution will infringe the appellant's rights in terms of s 35(3) read with s 12 of the Constitution of the Republic of South Africa, 1996 (a) to have a trial that is procedurally fair and is not instituted and/or prosecuted with an unlawful and/or improper motive; (b) to have the trial begin and be concluded without unreasonable delay; (c) to be informed of the charge against him with sufficient detail to answer it; (d) to adduce and challenge evidence effectively; and (e) to remain silent and not incriminate himself. The appellant further alleged that he was granted amnesty and that there was an agreement that he would not be prosecuted.

[16] In supporting his grounds of appeal, the appellant, who is now an octogenarian, contended that it was unfair to charge him some 47 years after the death of Mr Timol. He further argued that the reason for the delay not to prosecute him was a deliberate decision of the National Prosecuting Authority (NPA), because of the interference by the Executive and the State President.

[17] According to the record, Advocate Vusi Pikoli, who was the National Director of Public Prosecutions (NDPP) during the second period, complained about the interference of the Government when he wanted to prosecute apartheid-era perpetrators who had not applied for amnesty or were denied amnesty. It was not contested that from 2003 to 2017, investigations into the TRC cases were stopped as a result of an executive decision. This was indeed interference with the NPA.

[18] On the issue of whether or not there was undue delay before the appellant was charged, he contended that the delay should be calculated from 1971. The NPA, on the other hand, argued that the period should be calculated from 2018 when the appellant was charged.

[19] It should first be noted that before an accused person can be charged, a police docket is opened and the matter is investigated. Thereafter the Office of the Director of Public Prosecutions (DPP) determines if the accused person should be charged, or if charges should be withdrawn, or if they decline to prosecute.

[20] To determine whether or not there was any undue delay or if, as happened in this case, an inquest should be held, all relevant factors, including the time when the accused person is charged, should be considered. The period before the accused person is charged is important and cannot be ignored. The court should carefully consider whether any delay could be calculated to infringe the accused's right to have his trial begin and be concluded without unreasonable delay under s 35(3)*(d)* of the Constitution.

[21] The Full Court dealt with the first period (1971 to 1994, totalling 23 years), in detail. I agree with its finding for the reasons it gives that the said period, which

was a pre-democratic era, should not be taken into account in the determination of the delay.

[22] It should be noted that the appellant did not apply for amnesty during the second period (1994-2002) and that it is common cause that those who did not apply for amnesty accepted the risk of future criminal prosecution. This was also the view expressed in the final TRC report that made reference to the need to put in place a bold prosecutions policy to avoid suggestions of impunity or of the South African Government and the NPA not complying with their constitutional mandate to police and prosecute crime.

[23] It is clear, therefore, that if there was any delay in the second period of eight years, it was beyond the control of the prosecution and was largely due to the operation of the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) and the political circumstances that existed at the time.

[24] As I have said, any person who may have been involved in politically motivated crimes of the past and who elected not to use the mechanisms of the TRC to seek and obtain amnesty, could face the risk of prosecution in the future. There is nothing unfair or inequitable about such a policy. In any event, this accords with what was described as the constitutional obligation upon the State to prosecute crimes in *S v Basson* 2005 (1) SA 171 (CC) paras 31-33, where the Court said:

'The question that arises is whether the quashing of the charges gives rise to a constitutional matter. In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the rights to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime.

The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. The effect of the High Court's judgment in this case, given the interpretation of s 319 by the SCA and its previous jurisprudence, is that the State will be prevented from prosecuting the accused on the charges which were quashed, without the State being given an opportunity to appeal the correctness of that decision. This case is different from those in which a charge is quashed, but where the State is able to supplement the charge-sheet in a manner that enables the prosecution to take place. This course is not open to the State here.

The importance of the State's duty to prosecute crime is implicit in s 179(2) of the Constitution, which provides that:

"The prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings."

By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the State cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the State, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the State is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter.'

[25] In my view, the Full Court correctly summed up the effect of the period spanning 1994 to 2002 in paras 52-53 of its judgment, where it said:

'Accordingly, this part of the timeline, to the extent that it constituted a delay, was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism – flawed, but the product of a historical compromise – to seek and find closure.

It could not, in my view, be said to be a part of the delay when, by operation of the law, it was a period of hiatus that was contemplated by the TRC Act. Even if it could be regarded as a period of delay, then there are meritorious reasons why it was the kind of delay that could hardly be regarded as culpable. It was a historic and unique time in the history of South Africa.

A difficult political compromise was being given effect to. The nation was collectively prevailed upon to give the process an opportunity to succeed in the hope that it would advance the twin objectives of reconciliation and reconstruction. It was imperative that South Africa embrace this process if it were to have any chance of growing as a new nation and overcoming the deep distrust and suspicion that characterised the relationship between its people for so long.'

The period 2003 - 2017

[26] It was during this 14 year period that the Executive adopted a policy position conceded by the State parties that TRC cases would not be prosecuted. It is perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes.

[27] All these considerations, either viewed individually or collectively, should have stood in the way of any such a moratorium on the prosecution of TRC era cases. That it happened despite the constitutional, legal and other considerations suggests disdain for those important considerations and interests. The Full Court rightly recommended a proper investigation into these issues by the NDPP and a determination whether any action in terms of s 41(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was necessary.

[28] Section 179(2) of the Constitution vests exclusive power to the NPA to institute criminal proceedings on behalf of the State and s 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.

[29] That legislation is the NPA Act which provides in relevant part:

'32 Impartiality of, and oath or affirmation by members of prosecuting authority -

(1)*(a)* A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.

(b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

. . .

41 Offences and penalties

(1) Any person who contravenes the provisions of section 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.'

[30] The ineluctable conclusion in all the circumstances is that political decisions were taken by the Executive which may have affected the investigation and prosecution of the TRC cases. Be that as it may, however, whether the nature of the political decisions amounted to a lawful pardon or amnesty – an issue which was not raised in the Full Court and which the appellant can still raise during the plea proceedings in the trial – remains unclear on the available evidence. I agree entirely with the Full Court's finding that while the issue of political interference is a matter of great seriousness, the absence of detail as to why it occurred was not an impediment to the determination of the matter. There is simply no evidence showing how the political interference impacts on factors relating to whether the substantial fairness of the trial is tainted.[2]

[31] It is firmly established that an application for the permanent stay of prosecution should not be easily granted. In *Sanderson v AG Eastern Cape*,[3] the Constitutional Court pointed out that such an application has the effect of

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[2] *Bothma v Els* [2009] ZACC 27; 2010 (2) SA 622 (CC) para 35.
[3] *Sanderson v AG Eastern Cape* 1998 (2) SA 38 (CC).

depriving society of presenting a complaint against someone who has transgressed its rules. This is such a central feature of any functioning democracy that it should never become diluted or distorted. On the contrary, any application for a stay must be considered in the context of how it impacts on the ability and the imperative of the State to carry out this important function.

[32] In *Bothma v Els*,[4] the Constitutional Court reiterated the approach taken in *Sanderson*. It held that in determining relief for a permanent stay of prosecution, the court is required to engage in a balancing exercise in which the conduct of both the prosecution and the accused are weighed and the following considerations examined: the length of the delay, the reasons the government assigns to justify the delay, the accused's assertion of a right to a speedy trial and prejudice to the accused. The Constitutional Court, however, did not regard these factors as constituting a closed list and indicated that the nature of the offence and the public policy considerations that may be attached to it would also be a relevant consideration. It is ultimately a value judgment the court brings to bear after a proper consideration of the evidential material relating to the relevant factors.

[33] The Full Court dealt with each of these factors in some detail. I do not intend to repeat what is contained in its judgment and its conclusions in this regard as the appellant did not take issue with that analysis, with which I agree. I cannot find that the Full Court erred in exercising the value judgment that it did or that it misdirected itself in any manner justifying the interference of this Court.

[34] There is another important factor to consider. In *Zanner v Director of Public Prosecutions, Johannesburg*,[5] this Court said:

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[4] Footnote 2.
[5] *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA) para 21.

'The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay.'

These comments apply with equal force in this case.

[35] The appellant did not complain that there was a delay to charge him after the ruling of Mothle J in the inquest and did not contend that any evidence upon which criminal charges against him could be formulated before those proceedings. Neither did he complain that after his first court appearance in July 2018, the NPA unreasonably delayed in proceeding with the trial. The provisions of s 342A(1) and (2) of the Criminal Procedure Act 51 of 1977 [6] are, therefore, not applicable. Ultimately, there is no evidence that the 47 years pre-trial delay would inevitably taint the overall fairness of the trial.

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[6] Section 342A. Unreasonable delays in trails:
'(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
(a) The duration of the delay;
(b) the reasons advanced for the delay;
(c) whether any person can be blamed for the delay;
(d) the effect of the delay on the personal circumstances of the accused and witnesses;
(e) the seriousness, extent or complexity of the charge or charges;
(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
(g) the effect of the delay on the administration of justice;
(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
(i) any other factor which in the opinion of the court ought to be taken into account.'

[36] The appellant has been furnished with copies of the police docket, a summary of substantial facts and the indictment. His version of the events of 27 October 1971 in the inquest in no way suggests that his memory has faded due to old age as he contended before us. In any event, as the Full Court pointed out old age and infirmity would be relevant at the sentencing stage and are not grounds upon which the appellant can rely upon as a form of prejudice.

[37] The right to adduce evidence and challenge the State's evidence can best be dealt with during the trial proceedings. The appellant testified at the second inquest proceedings and challenged the evidence led there. He knows exactly what case the State intends to put forward. Furthermore, the fact that he has been charged with premeditated murder whilst Mothle J, in his judgment, referred to him as an accessory does not, in my view, assist the appellant because the Judge did not prescribe the charges to be preferred against the appellant. The NPA has the prerogative to formulate charges based on the available evidence.

[38] In passing, it is interesting to note that the appellant seeks a permanent stay of the proceedings in respect of the murder charge only. However, the evidence that would be presented by the State in respect of the second charge of defeating the ends of justice or obstructing justice is inextricably interwoven with the death of Mr Timol. One is left wondering as to the appellant's stratagem in this regard.

[39] For all these reasons, I am not persuaded the appellant has established that he has or will likely suffer trial-related prejudice if he is not granted a permanent stay of prosecution and is brought to trial. The trial court will be best suited to deal with any issue of potential prejudice. The appeal must, accordingly, fail.

[40] Regarding the issue of costs, based on the nature of this case, it is not appropriate to make an order of costs against the appellant.

[41] In the result, I make the following order:

The application for leave to appeal is granted and the appeal is dismissed.

A P LEDWABA

ACTING JUDGE OF APPEAL

Cachalia JA

[42] I have read the judgment of Ledwaba AJA (the first judgment). The facts pertaining to this appeal and much of the law have been set out in detail by the court a quo, and recounted in the first judgment. I agree with the conclusion in the first judgment that the court a quo correctly dismissed the appellant's application for his prosecution to be permanently stayed. My reasons differ slightly. I, however, disagree with the first judgment that the appellant has made out a proper case for the appeal to be entertained by this Court. There were no compelling reasons to entertain this appeal, much less reasonable prospects of success. I would accordingly dismiss the application for leave to appeal against the order of the high court. My reasons follow.

[43] It is apparent that even though the appellant sought broadly formulated and overlapping relief in the court a quo,[7] what he wanted in substance was a permanent stay of his prosecution. This is how the court a quo understood it and, which counsel, who appeared on his behalf in this Court, confirmed.

[7] Paragraph 1 above.

[44] Before I deal with what appear to be the main grounds for the stay application, the appellant advanced two other grounds, also to support the stay application. First, he contended that the President had granted him a pardon or amnesty in terms of s 84(2)*(j)* of the Constitution.[8] Secondly, he argued that there was an agreement by the Government involving the President, the Minister of Justice and the NPA not to prosecute apartheid-era crimes. There is no merit in either of these complaints.

[45] As regards the pardon or amnesty allegedly granted by the President, the appellant did not make out any case, much less provide any facts to support this startling written submission in his heads of argument. In addition, because the President is the sole bearer of all obligations pertaining to pardons under s 84(2)*(j)* he had to be joined in these proceedings because of his legal interest in the matter, but was not.[9] The court a quo therefore correctly rejected this ground.

[46] The same criticism may be made regarding the second equally astonishing ground, ie that there was an agreement by senior State officials, including the President, not to prosecute politically motivated apartheid-era crimes. This argument was advanced for the first time in the appellant's written heads of argument in the present application. It must fail for the same reasons as the first ground. In addition, if there was any such secret agreement, it would probably be unlawful and unconstitutional, and would fall to be set aside on multiple grounds. It is unnecessary to explore this question further in the judgment.

[47] It bears mentioning, as I pointed out earlier, that the appellant seeks only a stay of prosecution. But what he has done is simply merge these arguments

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[8] Section 84(2)*(j)* of the Constitution provides that the President is responsible for 'pardoning or reprieving offenders and remitting any fines, penalties or forfeitures'.

[9] *Minister of Justice and Constitutional Development v Chonco* [2009] ZACC 25; 2010 (4) SA 82 (CC) paras 40 and 44.

regarding an agreement or pardon, which are not supported by any facts, to buttress the case for a permanent stay of his prosecution. If there was a pardon or *lawful* agreement pertaining to the prosecution of apartheid-era crimes that would be the end of the matter. There would be no need for a stay application. Put differently, the speculative amnesty or agreement not to prosecute these crimes are irrelevant to the stay application and were advanced for no reason other than to add colour to the stay application.

[48] I now turn to the appellant's main grounds in support of the application for a permanent stay of the prosecution. These were: firstly, the unreasonable delay of 47 years in instituting the prosecution; secondly, the alleged political interference and pressure on the NPA from senior government officials not to prosecute apartheid-era crimes, which contributed to the delay; thirdly, that the decision to prosecute the appellant on a charge of murder was made for an improper purpose, as it was not supported by the findings of the Inquest Court; fourthly, the alleged infringement of his right to adduce and challenge evidence occasioned by the delay and the State's failure to respond properly to his request for further particulars to the charges against the appellant; and finally, that the NPA and the Minister of Justice allegedly withheld relevant information from the court a quo in response to the stay application.

[49] Before I deal with these grounds it is noteworthy that the law regarding stays of prosecution is settled and straightforward. The court a quo dealt with the important cases on the topic and applied them, as did the first judgment. I shall not burden this judgment by referring to them. The appellant does not suggest that the court a quo – constituted by three judges – misdirected itself either in regard to the applicable legal principles or the facts. He simply wants this Court to grant his application for leave to appeal on the grounds that this Court may come to a different conclusion.

[50] The cases on this topic have all been concerned with delays in the commencement of a trial where reliance has been placed on the constitutional right of an accused, in s 35(3)*(d)* of the Constitution, to have his trial begin and conclude without unreasonable delay. Briefly stated, where there has been an unreasonable delay – and there can be no quibble that in this case the delay was extraordinary – the central enquiry is whether the accused's trial-related interests have been prejudiced by the delay. For the courts have made clear that an unreasonable delay does not per se infringe the accused's right to a fair trial.

[51] Permanent stays are almost never granted following delays in the commencement and conclusion of a trial.[10] This is because a permanent stay is an exceptional remedy. It may only be granted where the delay is egregious and has resulted in irreparable trial-related prejudice. Moreover the trial-related prejudice must be demonstrably clear ('definite not speculative'). More often than not, where there is a delay, but no clear trial-related prejudice, there are a range of less drastic remedies available to ameliorate any broader prejudice an accused may suffer. These include a mandamus requiring the prosecution to commence the trial forthwith, denying it a postponement of the trial or awarding damages to an accused following an acquittal.

[52] Apart from the delay and the consequent prejudice to the appellant that may have resulted therefrom, the other grounds relied upon by the appellant to support the stay are either speculative or amenable to being ameliorated through less drastic remedies. The first is the accusation of political interference that resulted in the initial decision not to prosecute apartheid-era crimes, including the present case, and contributed to the delay. The NPA disclosed this interference

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[10] The exception is *Broome v Director of Public Prosecutions, Western Cape and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town and Others* 2008 (1) SACR 178 (C). That case turned on its narrow facts where the court held that the loss of evidence occasioned by the delay of 7 years had caused irreparable prejudice to the accused in preparing a proper defence.

but insisted there was no trial-related prejudice. Allied to this ground is the contention that the prosecution is being pursued for an improper purpose, which overlaps with the case of political interference being made. The court a quo rejected both contentions. Its conclusions cannot be faulted.

[53] I should add that the fact of this political interference in the decision not to initially prosecute apartheid-era crimes was the main ground advanced by the appellant to argue that this was a compellable reason for this Court to grant leave. The first judgment inclines to granting leave on this ground, but in the absence of any demonstrable trial-related prejudice I am constrained to disagree that a proper case for leave was made out. And this Court has already dealt with the problem, as I point out below.

[54] The contention that political interference has tainted a decision to prosecute – or not to prosecute – has gained increased currency in recent years as individuals who wield political power seek to shield themselves from being held to account for their actions in criminal courts. One such case, is that of the erstwhile President of the Republic, Mr Jacob Zuma, who has sought to avoid being prosecuted on, inter alia, the ground that there was political interference in the original decision not to prosecute him, which tainted the subsequent decision to prosecute him.

[55] The issue arose pertinently in *National Director of Public Prosecutions v Zuma*,[11] even though it did not concern a permanent stay specifically. In dealing with Mr Zuma's allegation that there had been political interference with a prosecutorial decision not to prosecute him, which he claimed had tainted the subsequent decision to prosecute him, the court said the following:

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[11] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 37.

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

[56] Applying this dictum to the present matter, it is apparent that the political interference that admittedly happened did not make the decision to prosecute the appellant wrongful. If, therefore, the prosecution is not wrongful, and no trial-related prejudice has occurred as a result of this interference, the remedy of a permanent stay is simply not competent. The fact that the NPA and the Minister did not disclose the full extent of the political interference when it filed its first set of answering affidavits, is to be deprecated, but is not a ground to grant a permanent stay. There is, therefore, no reason to revisit this question in this case.

[57] The allegation that the prosecution for murder is being pursued for an improper purpose is similarly groundless. The appellant contends that the Inquest Court found that there was sufficient evidence for him to be prosecuted as an accessory after the fact to murder, but not for murder. The NDPP is not bound by findings of an Inquest Court. It has a discretion to charge an accused with any crime, the only qualification being that there is reasonable and probable cause for the prosecution on a charge. If there is not – a matter that can only be decided if the appellant is acquitted on the murder charge – he will be entitled to pursue a damages claim against the NDPP. He, therefore, has a remedy and is not entitled to a permanent stay on this ground either.

[58] The contention that the appellant's right to adduce and challenge evidence is being infringed by the failure of the prosecution to provide him with further particulars to prepare for trial is utterly hopeless. He complains that in having to respond to the charge of murder allegedly committed in the execution of a

common purpose, he requested further particulars regarding the precise acts he is alleged to have committed in furtherance of the common purpose. The NDPP, he says, has refused to answer the questions insisting that the case is based on circumstantial evidence. It also refuses to provide clear answers to questions pertaining to the alleged torture that Mr Timol endured before his death and the acts allegedly committed by the appellant in this regard.

[59] The appellant is represented by experienced counsel. He would therefore be aware that this is a complaint that can only be entertained by a trial court. He has a remedy to object to the charge and apply to the trial court to compel the production of the particulars under s 85 of the Criminal Procedure Act 51 of 1977.[12] If the court is persuaded that the application is well-founded, and orders that the particulars be furnished to the appellant, he may apply for the charges to be quashed, if the prosecutor fails to do so. That would have the same effect as granting a permanent stay. The appellant therefore conflates a possible remedy for the delivery of further particulars with the drastic remedy for a permanent stay. This complaint is, therefore, irrelevant to his present application for a permanent stay. The court a quo rightly rejected it.

[60] What remains is the delay itself. The first judgment, with respect, correctly holds that there is no basis to interfere with the court a quo's conclusion that there is no evidence that the delay in this case will result in any trial-related prejudice. The fact that there was political interference that contributed to the delay takes

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[12] Section 85. Objection to charge:
'(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground –
(a) . . .
(b) . . .
(c) . . .
(d) that the charge does not contain sufficient particulars of any matter alleged in the charge . . .
(e) . . .
(2)*(a)* If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.
(b) Where the prosecution fails to comply with an order under paragraph (*a*), the court may quash the charge.'

the matter no further. The Timol family have also been victims of this delay; they have waged what can only be described as a heroic struggle with dogged determination to bring the alleged perpetrators of these crimes to trial. The public interest demands that their efforts are not in vain.

[61] It must be mentioned that once the appellant pleads and his trial proceeds, it shall be the duty of the trial judge to ensure the fairness of the trial. The court will be aware that because the trial is proceeding many years after Mr Timol's death, the evidence available to the State and the defence may be less than satisfactory. As the Canadian Supreme Court has observed with regard to an accused's difficulties caused by an inordinate delay:

'Difficulty may well be experienced by an accused in gathering rebuttal evidence . . . [T]he potential for such difficulty is likely one of the reasons why the prosecution bears the heavy onus of *proving all aspects of guilt beyond reasonable doubt.* In that regard the criminal [justice] system has always taken into consideration that it will occasionally be difficult for an accused to demonstrate innocence, and has removed the need to do this, by putting a high onus of proof on the Crown.'[13]

The trial court will thus have to be astute to whatever deficits there may be in the evidence because of the passage of time, and which may have prejudiced the appellant in conducting his defence. And, if it appears that there are shortcomings in the evidence as a result of which the appellant has been prejudiced in preparing or conducting his defence, this will redound to his favour. He will also have an opportunity to appeal against the judgment if the trial court misdirects itself in this regard.

[62] In conclusion, the appellant has not demonstrated any legal or factual basis that he has any reasonable prospects of success in an appeal. Neither has he

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[13] *R v Carosella* [1997] 1 SCR 80 para 105, cited with approval in *Bothma v Els* [2009] ZACC 27; 2010 (2) SA 622 (CC) para 81.

advanced a compellable reason for this Court to entertain the appeal. The order I would thus make is that the application for leave to appeal is dismissed.

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

For the appellant:	J G Cilliers SC (with S J Coetzee SC)
Instructed by:	Ben Minnaar Attorneys, Pretoria
	Hill McHardy & Herbst Inc,
	Bloemfontein
For the 1st, 2nd and 3rd respondents:	K Tsatsawane SC (with T Seboko)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
For the 4th respondent:	H Varney SC (with T Scott)
Instructed by:	Legal Resources Centre, c/o Webber
	Wentzel, Johannesburg
	Webbers Attorneys, Bloemfontein
For the 1st amicus curiae:	B Meyersfeld (with S Nakhjavani)
For the 2nd amicus curiae:	K Pillay SC (with K Premhid)