THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 104/2024

In the matter between:

MARC VAN VEEN **APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS WESTERN CAPE **FIRST RESPONDENT**

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **SECOND RESPONDENT**

THE FINANCIAL SECTOR CONDUCT AUTHORITY **THIRD RESPONDENT**

Neutral citation: *Van Veen v Director of Public Prosecutions and Others* (104/2024) [2025] ZASCA 46 (17 April 2025)

Coram: MOKGOHLOA ADP and WEINER and SMITH JJA and MOLITSOANE and NORMAN AJJA

Heard: 5 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 17 April 2025.

Summary: Application for permanent stay of prosecution – whether the appellant's medical condition is linked to the extra-curial delays of 11 years to warrant a permanent stay – whether the appellant's right to a fair trial in terms of s 35(3)(*d*) of the Constitution was infringed – whether the processes outlined in ss 77 and 79 of the Criminal Procedure Act 51 of 1977 constitute adequate remedy to deal with the appellant's medical condition and his capacity to stand trial.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Norman AJA (Mokgohloa ADP and Weiner and Smith JJA and Molitsoane AJA concurring):

[1] This is an appeal against a judgment of the Western Cape Division of the High Court (the high court), dismissing the appellant's application for a permanent stay of prosecution. The appellant was granted leave by the high court on a limited basis. Thereafter, he sought and was granted full leave to appeal by this Court.

Factual background

[2] The appellant was an investment manager and a director of Evercrest Capital (Pty) Ltd (Evercrest), a management company of a hedge fund, the Evercrest Aggressive Fund (the EA Fund). In 2019, the appellant, together with Evercrest were indicted in the Specialised Commercial Crimes Court (the SCCC), sitting in Bellville, on a variety of charges, namely, fraud and in the alternative various common law crimes involving dishonesty. There are five other charges, based on the contraventions of, inter alia, the Financial Institutions Protection of Funds Act 28 of 2001; the Financial Advisory and Intermediary Services Act 37 of 2002; and the Inspection of Financial Institutions Act 80 of 1998.[1] The charges

[1] All these statutes have been repealed and replaced with the Financial Sector Regulatory Act 9 of 2017.

relate to investigations undertaken by the Financial Services Board (FSB) and to the loss or potential loss that was suffered by the EA Fund in 2007, in the amount of approximately R146 million.

[3] On 16 August 2019, the charges mentioned above were preferred against the appellant. He first appeared in the SCCC on 27 September 2019. He was legally represented. He made representations to the first respondent and thereafter entered into formal plea negotiations in terms of s 105A of the Criminal Procedure Act 51 of 1977 (CPA). He appeared on numerous occasions before the SCCC, with his last physical appearance being 2 March 2021. The matter was on the court roll for more than a year and six months before the appellant, in March 2021, was diagnosed with a brain tumour known as a pituitary adenoma.

[4] An application for a stay of prosecution was brought after the criminal case had been on the court roll for two years and three months. That was the first time a complaint based on his right to a speedy trial was raised by the appellant. Due to medical reasons, the appellant was unable to attend court on several occasions and was represented by his legal representatives. According to a confidential psychiatry report by the appellant's psychiatrist, Dr Konrad Czech, dated 18 January 2022, the appellant sustained permanent damage to his brain resulting from a brain tumour, which caused long-term disabling deficits. These deficits, according to Dr Czech's report, are associated with loss of memory, the capacity to retrieve information and to deal with complex intellectual tasks which require high cognitive demands. Such deficits resulted in brain freeze. Dr Czech also stated that the appellant developed, and was treated for, anxiety and depression during 2007 because of the FSB investigation.

[5] Dr Czech, in his report, found that whilst the appellant can understand the charges against him, he is unable to recall relevant information from 2007 and is

unable to convey it logically. The appellant's legal representatives informed Dr Czech that the appellant fully understood the charges against him but could not cope with questions posed, especially when under pressure. Dr Czech found that the appellant's inability to retrieve or present information coherently prevents him from meaningfully interacting with his legal team. Whilst the criminal case was pending before the SCCC, the appellant, on 8 February 2022, approached the high court and sought a permanent stay of his prosecution.

In the high court

[6] The appellant submitted that the extra-curial delay caused him irreparable pre-trial prejudice. If he were to stand trial in those circumstances, he would not receive a fair trial. The application was anchored on three factors, of which two were pursued on appeal in this Court. Those are: (i) the unreasonably long delay of 11 years prior to prosecuting him violates his right to a fair trial as envisaged in terms of s 35(3)(*d*) of the Constitution; (ii) that he was diagnosed with a brain tumour during the delay, which has caused him to lose certain faculties. The result is that he is unable to properly adduce and challenge evidence, in breach of s 35(3)(*i*) of the Constitution. If subjected to trial, he contended, he would suffer irreparable trial prejudice.

[7] The application was opposed by the first respondent only. The first responded conceded that there was an extra-curial delay of approximately 11 years but denied that it caused the appellant any trial prejudice. According to the first respondent, and given the process that unfolded before the SCCC, the appellant had clearly given comprehensive instructions to his legal team before suffering from the medical condition.

[8] The first respondent submitted that despite the long extra-curial delay, the appellant did not suffer significant prejudice to justify an order for a permanent

stay of prosecution. The medical condition is a *novus actus interveniens* (a new intervening event) and cannot be blamed on any of the systemic delays caused by the state. The first respondent further submitted that the question of the appellant's capacity to stand trial in the light of his medical condition fell to be dealt with in terms of ss 77(1) and 79 of the CPA. The first respondent submitted that a s 79 enquiry will afford the trial court an independent, unbiased mechanism to determine whether the appellant is fit to stand trial or is in a position to provide instructions to his legal representatives.

[9] The high court rejected the explanation by the first respondent for the delay as being weak and perturbing. It found the delay to be manifestly inordinate and palpably unreasonable. It remarked that the uncontroverted medical evidence suggests that the appellant's medical condition and its sequelae have resulted in him being intellectually disabled to the extent that he will not be able to participate in and put up a proper defence in the criminal trial. The high court, among others, found that: the unreasonableness of the delay is not by itself enough to grant the relief sought. The appellant had to show that he suffered resultant and material prejudice but failed to do so; the appellant had failed to establish that he suffered trial-related prejudice as a result of the delay; an application for a permanent stay of prosecution is in essence a final prohibitory interdict and the appellant has failed to satisfy the requirements thereof; and the process outlined in ss 77 and 79 of the CPA provide the appellant with an adequate alternative remedy.

In this Court

[10] The central questions for determination in this appeal are: (a) whether there has been an infringement of the appellant's right to a fair trial in terms of section 35 of the Constitution; (b) whether the processes outlined in ss 77 and 79 of the

CPA constitute an adequate remedy to deal with the appellant's medical condition; and (c) whether a permanent stay of prosecution can be granted.

[11] The appellant submitted that the high court, although finding that he is intellectually disabled and consequently unable to make a proper defence and that the pre-trial delay of 11 years was inordinate and unreasonable, declined to grant a permanent stay of his prosecution. This, the appellant contends, is a material misdirection.

[12] The appellant further submitted that the effects of the brain tumour are that he will not be able to recall events that took place in 2007; give meaningful instructions to his legal representatives; and adduce or challenge evidence due to the unreasonable delay. This has resulted in an infringement of his right to have his trial begin and conclude without unreasonable delay in terms of s 35(3)*(d)* of the Constitution. According to the appellant, the jurisdictional facts that trigger the operation of ss 77 and 79 do not apply to him because he is able to understand the criminal proceedings, albeit that his medical condition renders him unable to put up a proper defence. The appellant contends that no adequate remedy exists other than a permanent stay of prosecution.

[13] The first respondent submitted that the appellant's right to a fair trial has not been infringed in any way. Furthermore, that the appellant is not left without a remedy. According to the first respondent, the high court was correct in finding that the provisions of ss 77 and 79 of the CPA provide an adequate remedy.

Infringement of section 35 of the Constitution

[14] Sections 35(3)*(d)* and 35(3)*(i)* of the Constitution provide that every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay; and to adduce and challenge

evidence. As a starting point one has to find on the facts, a nexus between the appellant's brain tumour and the extracurial delay of 11 years.

[15] The appellant's submission is that had the pre-trial processes been finalised speedily, his trial would have been concluded by the time his medical condition developed or was diagnosed. He would therefore, by now, if he was found guilty, probably have served any sentence that would have been imposed on him and would probably have been released on parole. There are no facts upon which the appellant relied for this assertion. The date of the onset of the tumour is unknown but it was diagnosed in March 2021. The onset of the appellant's illness therefore has no link whatsoever to the delay. In my view, such a contention is speculative and is not supported by Dr Czech's findings.

[16] The appellant does not allege any unreasonable delay from the time that he was charged until he was unable to attend court due to his medical condition. As soon as charges were preferred, the appellant and the first respondent engaged in, among others, plea negotiations. The events that took place after the appellant was charged are also relevant for the consideration of irreparable trial-related prejudice to the appellant. Those events, in my view, will inform an enquiry regarding whether the appellant will suffer irreparable harm in respect of the fairness and integrity of the trial. They are therefore crucial in determining whether a permanent stay of prosecution should be granted.

[17] The appellant does not complain about the conduct of the state after the charges were brought against him. I am of the view that an enquiry that completely severs the extracurial delay from the conduct of the state after the charges were brought would be disjointed. The high court found that there was a distinct absence of substantiating particularity concerning the appellant's alleged trial prejudice because of the delay. That means that there were no facts to support

the fact-based enquiry that the high court had to embark upon. That situation has not changed before us. It follows that this Court has no ground to interfere with the findings of the high court in this regard.

[18] In *Wild and Another v Hoffert No and Others (Wild v Hoffert)*,[2] the Constitutional Court referred to the judgment in *Sanderson v Attorney-General, Eastern Cape*,[3] where attention was drawn to the balance to be struck between competing societal and individual interests once a finding has been made that the delay was indeed unreasonable (such as in this case) and the consideration of an appropriate remedy. A careful value judgment is required whenever a court considers the kind of relief that would be appropriate in each case. The Constitutional Court held that a court can tailor a snug fit between infringement and remedy. More particularly a court need not resort to drastic relief such as a permanent stay of prosecution to remedy an infringement of the right to a speedy trial that does not entail trial-related prejudice. In the ordinary course, and absent irreparable trial-related prejudice, a stay would seldom be the appropriate remedy.[4]

[19] The high court correctly found that despite the unreasonable delay in instituting the prosecution, the appellant failed to establish that such delay has caused him material trial prejudice. The high court, in my view, was justified in its finding that even though there was an unreasonable delay, that, on its own, is not sufficient to justify a permanent stay of the appellant's prosecution.

The ss 77 and 79 of the CPA remedy

[20] Section 77(1) of the CPA provides:

'77. Capacity of accused to understand proceedings

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[2] *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC) para 9.
[3] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC).
[4] *Wild v Hoffert NO* para 9.

'(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings *so as to make a proper defence*, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'(Emphasis added.)

If an enquiry is directed in terms of s 77(1) of the CPA, a report must include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence, as envisaged in s 79(4)*(c)* of the CPA.

[21] Section 79(1) of the CPA provides:

'79. Panel for purposes of enquiry and report under sections 77 and 78

(1) Where a court issues a direction under section 77(1) or 78(2), the relevant enquiry shall be conducted and be reported on-

(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned; or

(b) '

The offences listed under paragraph *(b)* are those that relate to murder or sexual offences, where violence is involved.

[22] There are certain facts that militate against dealing with the appellant's alleged intellectual disability and his contended inability to understand the proceedings in order to put up a proper defence, through civil proceedings by means of an application for a stay of prosecution. First, s 77 of the CPA deals with the mental state of the accused at the trial.[5] There is only one trial contemplated and that is the criminal trial. Second, the reason for the enquiry is linked to the 'triability' of the appellant. Third, the accused must be able to follow the proceedings (the appellant contends he is able to) and must play a useful and constructive role during his trial by giving proper instructions to his legal representatives.[6] Fourth, there must be circumstances compelling the court to

[5] E Du Toit et al *Commentary on the Criminal Procedure Act* (loose-leaf service 69, 2022) at 13-8.
[6] Ibid (loose-leaf service 62, 2019) at 13-10A.

exercise its discretion when directing that an enquiry must be held. None of that could happen in civil proceedings.

[23] One of the advantages of embarking on the processes provided for in ss 77 and 79 of the CPA is that all previous and relevant psychiatrist reports, including that of Dr Czech, would be placed before the SCCC. This is irrespective of whether the issue is raised by the appellant's legal representatives or by the court itself. Those reports will no doubt form the basis of the court's directive for the enquiry into the appellant's mental capacity in terms of s 79 of the CPA.

[24] The appellant contended that the remedy provided by ss 77 and 79 of the CPA will not preclude him from being charged again if he recovers from his medical condition. Those processes will not result in a permanent stay of prosecution and can therefore not constitute a satisfactory alternative remedy. This contention goes against the case presented to the high court that the damage to his brain is permanent.

[25] The processes provided for in ss 77 and 79 of the CPA, apply equally to everyone who is an accused, and where there is a legal basis for their invocation that is consistent with the interests of justice. I am satisfied that the appropriate remedy for the appellant, does not lie in civil proceedings but in ss 77 and 79 of the CPA.

Stay of prosecution

[26] In *Zanner v Director of Public Prosecutions, Johannesburg,*[7] this Court stated:

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[7] *Zanner v Director of Public Prosecutions, Johannesburg* [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA); 2006 (11) BCLR 1327 (SCA) para 21.

'The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instill public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime.'

Although these remarks were made in the context of a violent crime, they apply equally herein.

[27] A stay of prosecution, where it is not warranted, may become an encroachment into the terrain of the prosecutorial powers. In *S v Ndlovu*,[8] the Constitutional Court stated:

'When even the most heinous of crimes are committed against persons, the people cannot resort to self- help: they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently.' (Citation omitted.)

[28] This enormous responsibility on the prosecution authorities goes hand in glove with the right of victims of crime, namely, a general right to know why their cases are not being prosecuted by the state. The appellant stated that because the crime he is charged with does not involve violence, it ought to count in his favour. However, charges of fraud or forgery are serious by their nature because they involve some level of dishonesty.

[29] In Canadian law, a stay of prosecution is given in rare circumstances, such as when the integrity of the justice system is implicated. This test is employed in international jurisdictions. In *R v O'Connor*[9] the Supreme Court of Canada held:

'The discretion to order a stay may be exercised only in the "clearest of cases", meaning that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process.'

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[8] *S v Ndlovu* [2017] ZACC 19; 2017 (2) SACR 305 (CC); 2017 (10) BCLR 1286 (CC) para 58.
[9] *R v O 'Connor* [1995] 4 SCR 411 (SCC) para 53.

[30] The finding of the high court that the delay was manifestly inordinate and palpably unreasonable, ought to concern the first respondent. Extracurial delays should be avoided. They must be accounted for in detail because they occur before a matter is brought before judicial officers. In the case of *intracurial* delays judicial officers can enquire into delays and exercise their discretion whether, for example, further remands should be allowed or not. That is not the case with extracurial delays. The investigations that are guided by the prosecution, such as this one, require constant monitoring of progress by prosecutors. It does not assist the cause of justice to explain an 11-year long delay in some ten paragraphs. All criminal investigations must be timed in such a way that they either culminate into criminal charges or in a certificate of *nolle prosequi* within a reasonable time. The high court was justified in making the findings that it did in relation to the explanation proffered by the state.

[31] Having said that, the explanation for the delay does not evince any abuse nor was there any suggestion that there was such an abuse of the state's powers. This is one of those cases, where, as the Constitutional Court found in *Bothma v Els and Others,*[10] that there exist strong public policy reasons for allowing the nature of the crime to weigh heavily in favour of allowing the charges to be heard in court.[11]

[32] A permanent stay of prosecution is an exceptional remedy. It may only be granted where the delay is egregious and has resulted in irreparable trial prejudice. Moreover, the trial prejudice must be 'demonstrably clear (definite not speculative)'.[12] The appellant failed to prove irreparable trial prejudice.

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[10] *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC).
[11] *Bothma v Els* paras 37-38; 65.
[12] *Rodrigues v National Director of Public Prosecutions of South Africa & Others* [2021] ZASCA 87; 2021 (2) SACR 333 (SCA); [2021] 3 All SA 775 (SCA) para 51.

[33] Nothing turns on the reliance on the requirements for a prohibitory interdict by the high court, because the effect of a stay of a prosecution is to prohibit or bar the first respondent from continuing with the prosecution. The Constitutional Court in *Wild v Hoffert,*[13] referred to the relief for a stay of prosecution as 'injunctive relief'.

[34] In conclusion, the appellant has failed to demonstrate that he has or would suffer irreparable trial-related prejudice if the trial continues. I am satisfied that there are no grounds to interfere with the decision of the high court. It follows that the appeal must fail.

Costs

[35] The first respondent did not seek costs against the appellant in this Court. The high court also did not make any costs orders against the appellant. There is therefore no reason why this Court should take a different approach.

Order

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

The appeal is dismissed.

T V NORMAN

ACTING JUDGE OF APPEAL

[13] *Wild v Hoffert NO* para 10.

Appearances

For the appellant:	FSG Sievers SC (with K Perumalsamy)
Instructed by	Gunston Strandvik Mlambo Inc., Cape Town
	Honey Attorneys, Bloemfontein
For the respondents:	JA Agulhas
Instructed by:	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein.