

Judgement dated 17 April 2024

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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

Case number: 441/2024

In the matter between:

MA MATHEBULA

Applicant

and

NATIONAL PROSECUTING AUTHORITY

1st Respondent

TSWANTSO PHILLEMONT MELATOR

2nd Respondent

CORAM: ERASMUS, J

JUDGMENT BY: ERASMUS, J

HEARD ON: 12 APRIL 2024

DELIVERED ON: 17 APRIL 2024

- [1] This is an application for a permanent stay of prosecution on charges proffered against the Applicant in the regional court. The Applicant is a sitting Judge of the Free State Division of the High Court, and is accused no. 2 in a criminal matter that currently serves before the Specialised Commercial Court in Kroonstad.

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- [2] He is charged with three charges that include theft, money laundering and contempt of Court. He now seeks the relief stated above, and an attendant cost order against the First Respondent, who is the only Respondent opposing the relief, on an attorney and client scale.
- [3] The Applicant avers that the underlying basis for the application is the constitutional guarantee to fairness and that conducting a criminal proceeding may not be premised on the correct circumstances of fact and that it will bring the administration of justice in disrepute. Further, to continue with the prosecution will militate against the principle of a fair trial.
- [4] The prosecution and the charges against the Applicant stems from a period when he practiced as an attorney prior to his elevation to the bench. It is based on an alleged misappropriation of funds paid into his trust account by the Road Accident Fund in a matter where the applicant had successfully prosecuted a claim on behalf of a guardian to a minor child who was five years old at the time of the injury.
- [5] It is alleged that a total amount of R3 142 089.70 was paid to the Applicant. These monies were received by the Applicant between 6 July 2012 and 13 June 2014. It should be noted that the amount of R2 200 000.00 was received on 5 September 2013. On 20 August 2013 an order was granted by the High Court which ordered the Road Accident Fund to pay an amount of R2 200 000.00 on or before 28 September 2013, so this must relate to the amount paid on 20 August 2013. That amount was to be kept in an interest-bearing account in his trust account for the sole benefit of the client until a trust was formed. The monies then had to be transferred into the trust.
- [6] It is instructive to note that no such trust was ever formed which forms the basis of the contempt of charge. Although the Applicant deals with the non-registration of the trust, I shall refrain from commenting thereon as it is the basis of a criminal charge in the Regional Court. At the time when the Applicant was elevated to the bench an amount of R1 258 110.13 was paid over by the Applicant to the accounts of accused no 1 in the criminal matter.

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- [7] The State therefore alleged that there was a general deficit and shortfall of R1 329 092.44 and he is therefore charged for the theft of that monies. The Applicant was initially summoned to the Criminal Court on 17 February 2023 to be arraigned on the charges. Shortly thereafter he made representations to the Provincial Director of Public Prosecutions requesting the withdrawal of the charges on the basis that the charge does not disclose a crime, and the evidence will not sustain the charges. I pause to note that subsequently the indictment and the charge sheet was amended.
- [8] Much has been made of the fact that the Applicant was entitled to recover fees, and it is suggested in these representations that the difference in the amounts could be ascribed to the recovery of fees on different scales. The Applicant argues that his fee lists were never taxed by a taxing master and no complaints were lodged through the prescribed channels of the Legal Practice Council or the Law Society as it was then.
- [9] The Director of Public Prosecutions in the province declined the request whereafter representations were made to the National Director of Public Prosecutions. During the consideration of the representation a panel of experts were convened to advise on the representations, which report was considered by the Director of Public Prosecutions.
- [10] However, the expert report was never made available to the Applicant nor his legal representatives. This now forms the basis of a further argument of the unfairness of the process and prejudice attendant thereto. The relief as structured and the basis, it was argued and made out on the papers relates to fair trial prejudice as well as the fact that the Applicant herein would be treated unfairly and would suffer irreparable harm.
- [11] Whilst it is correct that section 38 of the Constitution grants a party to approach a competent Court on the grounds that a right in the bill of rights, which include fair trial rights had been infringed or threatened for appropriate relief. Our Courts have cautioned against an undesirable development of an unnecessary parallel system of law, where the Criminal court that conducts the trial can be approached.

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[12] In the Constitutional Court matter of Sanderson, Kriegler, J remarked as follows:

"It is appropriate that at this juncture to make some brief observations about the remedies sought by the Appellant. Even if the evidence he had placed before the Court had been more damning the relief the Appellant seek is radical, and philosophically and sociability, barring the prosecution before the trial begins, and consequently, without any opportunity to ascertain the real effect of the delay and the outcome of the case is far reaching. I pause to note that in this instance the delay is not an issue but rather the substratum of the charges. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. This will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this, is determined by section 7(4)(a) of the Interim Constitution. In interpreting that provision, *Fose v Minister of Safety and Security* we adopted a flexible approach that is certainly inconsistent with the availability of a single remedy as in North American jurisdictions."

[13] It is trite that the relief sought is drastic and should only be granted in very compelling circumstances, and sparingly so. Turning to the society's right to have a complaint adjudicated, the nature of the offence becomes relevant.

[14] In the instant matter it cannot be overlooked that the applicant is a sitting Judge that is charged with the misappropriation of trust monies whilst he was an attorney. The Claimant in the Road Accident Fund matter was a minor child and an elderly guardian, which falls within a vulnerable group and it would be a very drastic approach if the relief is granted and they would also not have their day in Court.

[15] Furthermore, an Applicant that seeks a permanent stay of prosecution, in essence apply for final interdictory relief. The requirements for such relief has been settled as far back as 1914 in *Setlogelo v Setlogelo*, 1914 AD page 221, and one of the requirements is that it includes the absence of an alternative remedy. So firstly, the complaints raised by the Applicant herein, can be dealt with and best be dealt with by the trial court, but more importantly he has an alternate remedy.

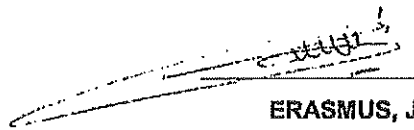
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- [16] In the event that it turns out that the prosecution was based on an incorrect interpretation of the facts and the law. It will be open to the applicant to institute an action for damages. There is a further compelling reason why, as a matter of principle, applications for a permanent stay of prosecution should not be granted lightly and only in the exceptional circumstances, because it would undermine the legislative structure of our society in the constitutional make up.
- [17] The National Director of Prosecutions and the entity as such has been constitutionally mandated to direct the prosecutions of criminal matters in the country. Therefore, special legislation was done for that purpose. I was referred to recent matters, including the *President of the Republic v Jacob Zuma and others*. It must be noted that there is a distinct difference between private prosecutions and prosecutions on behalf of the State by the Prosecuting Authority.
- [18] The circumstances are very different and therefore to my mind it does not find application herein. It will further undermine the principle of separation of powers where a Court without facts and evidence being tested, too easily interfere with a decision to prosecute particularly where alternative relief is available. For these reasons, to my mind, the application cannot succeed. Turning to costs, I raised the issue in argument with counsel that the Respondents have not sought a similar cost order that was sought by the Applicant.
- [19] In preparation for this matter, I noted different approaches were taken by different Courts in an application for a stay in prosecution where it was clear that it was in defence of a constitutional right that was based in all cases, the delay. The Courts were cautious in not granting cost orders.
- [20] In this particular case it is different. This matter, in my view, had no merit from the start. It was an opportunistic application that should never have been brought. It would have been easy for the Applicant to stand trial, and if he was correct, he would have been acquitted. He sought a punitive cost order, the Respondent only sought the costs of two counsel, and although I have considered the circumstances of this case, to exercise my discretion and order costs on a punitive scale, as this type of litigation should be discouraged if it has no merit. As I have indicated

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above, it has the potential of creating a parallel system of law. There is however no reason why costs should not follow the result, and the matter and the profile of it justified the employment of two counsel, and therefore the following order is made:

[21] The application is dismissed with costs, including the costs of two counsel where so employed.


ERASMUS, J

On behalf of the Applicant:

Adv. N Jagga
Instructed by:
Phalatsi Attorneys
Bloemfontein

On behalf of 1st Respondent:

Mr Nazeer Cassim
with Boyisile Yawa
Instructed by:
The State Attorney
Bloemfontein

On behalf of 2nd Respondent:

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