**IN THE HIGH COURT OF SOUTH AFRICA,**

**NORTHERN CAPE HIGH COURT,KIMBERLEY**

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|---|---|
| **Reportable:** | **Yes** |
| **Of Interest to other Judges:** | **Yes** |
| **Circulate to Magistrates:** | **No** |

Case number: KS 21/2015

In the matter between:

| | |
|---|---|
| **ASHLEY MARK BROOKS** | First Applicant/Accused |
| **PATRICK JOHN MASON** | Second Applicant/Accused |
| **MANOJKUMAR DAYABHAI DETROJA** | Third Applicant/Accused |
| **KOMALIN PACKIRISAMY** | Fourth Applicant/Accused |
| **AHMED ISHABHAI KHORANI** | Fifth Applicant/accused |
| **ANTONELLA NATASCIA FLORIO-POONE** | Sixth Applicant/accused |
| **KENYADITSWE MCDONALD VISSER** | Seventh Applicant/Accused |
| **WILLAM JAN WEENINK** | Eighth Applicant/Accused |
| **JOSEPH SAREL VAN GRAAF** | Ninth Applicant/Accused |
| **CARL STEVE VAN GRAAF** | Tenth Applicant/Accused |
| **KEVIN TREVOR URRY** | Eleventh Applicant/Accused |
| **TREVOR PIKWANE** | Twelfth Applicant/Accused |

**FRANK SAMUEL PERRIDGE** Thirteenth Applicant/Accused

and

**THE STATE** Respondent

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**HEARD ON:** 28 - 29 AUGUST 2018

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**JUDGMENT BY:** DAFFUE, J

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**DELIVERED ON:** 10 SEPTEMBER 2018

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## I INTRODUCTION

[1] This is an application by thirteen applicants for permanent stay of their prosecution by the State which application was triggered by the recusal of the trial judge on 13 August 2018. Several serious, emotional allegations have been made by the parties and some of those will be dealt with.

[2] Whatever my final decision, it will have far-reaching consequences. If the application is granted persons that might have been convicted of serious crimes will get off scot-free. If the application is dismissed, the State will start the trial *de novo* in its search for the accused persons' convictions. Such a criminal trial may last another two or three years which will have further detrimental effects on the estates and lives of the accused persons and their families.

## II THE PARTIES

[3] The thirteen applicants are cited in the order as cited in the criminal trial. They are Messrs Brooks, Mason, Detroja, Packirisamy, Khorani, Me Florio-Poone, Messrs Visser, Weenink, JS van Graaf, CS van Graaf, Urry, Pikwane and Perridge. Adv E Sithole represents 1st applicant, Mr S Ebrahim the 2nd and 5th applicants, Adv MM Hodes SC the 3rd and 8th applicants, Adv LM Hodes the 4th and 6th applicants, Adv CF van Heerden the 7th, 9th, 11th and 12th applicants and Adv JJ Schreuder the 10th and 13th applicants.

[4] The State is represented by Advv JW Roothman, M Makhaga and T Barnard.

## III THE RELIEF SOUGHT

[5] In three separate applications all applicants seek an order in terms whereof an order of permanent stay of their prosecution under case KS 21/15 is sought. It is not my intention to deal with all the allegations contained in the different affidavits of the applicants and the State's response thereto in any detail. I shall endeavour to summarise the important and most relevant issues and evaluate those to come to a conclusion.

[6] I may just mention that applicants 1 to 6 and 8 brought one application, although I allowed all their respective legal representatives to address me fully. Mr Van Heerden's clients brought one application and the same applies to Mr Schreuder's clients. The individual applicants deposed to affidavits wherein

they set out all facts specifically pertaining to them. Mr Barnard of the DPP's office responded to all applicants' affidavits in one answering affidavit. The parties presented what they regarded as the timeline of the trial and although there are some differences of opinion, I was provided with a reasonable background of the matter.

## IV POINTS IN LIMINE

[7] Mr Roothman raised two questions to be considered *in limine*. These are the following: (1) Can the defence apply for a permanent stay of prosecution after the trial has indeed commenced and only a *de novo* trial ordered? (2) If the answer is yes and taking into account that the trial must now again start *de novo,* can the court take into consideration the merits in the "previous" trial before the recusal of the presiding judge to decide whether or not there is an unreasonable delay or not?

[8] I ruled that the points *in limine* should not be considered on their own, but be dealt with by all the parties as part of the submissions on the merits of the application. Therefore I intend to deal with these two questions when the submissions of the parties are evaluated i*nfra*.

## V MATERIAL BACKGROUND

[9] In order to get a clear picture of the events leading to the present application it is necessary to provide a concise background. During March 2013 to February 2014 an operation was embarked upon in terms whereof a State agent acted as a trap in order to

secure transactions with various individuals pertaining to illicit dealing in diamonds. Several transactions were allegedly concluded with *inter alia* the present applicants. The entrapment process was apparently authorised in terms of s 252A of the Criminal Procedure Act, 51 of 1977 ("the CPA") by Adv Botha, the Acting DPP for the Northern Cape. It will be shown *infra* that the admissibility of evidence obtained during the entrapment was a bone of contention, resulting in a trial within a trial being ordered.

[10] The trap, a certain Mr Jeptha, was introduced to some of the applicants by one Mr Erasmus, a relative and/or close friend of one or more of the applicants. Mr Jephta's handler was W/O Potgieter, who was known as the "Boss" and he was also the initial investigating officer ("IO") in the case. The State attempted to show that the alleged illicit dealing in diamonds and further action by the applicants resorted within the ambit of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") as is apparent from the indictment. In order to do so, it came up with a novel, outrageous argument – bordering on fiction – that an enterprise has been established by the agent, the Boss and Erasmus (the s 204 witness), as the members of the criminal association so formed. This was alleged in an attempt to bring the alleged illicit dealing in diamonds by the individual applicants within the purview of POCA. Although I raised my eyebrows in disbelief when I read this in the summary of substantial facts, I was not addressed on the issue and will not say much more, save for some final remarks *infra*.

[11] Several persons, including the thirteen applicants, were arrested, mostly between 22 and 25 August 2014. The high-handed and robust approach of the SAPS during arrest and thereafter as explained by all applicants in their affidavits, which have not been contested, is sickening. Exorbitantly high amounts of bail were set at the request of the State and some of the applicants were compelled to bring formal bail applications. Bail was reduced significantly over time to R50 000.00.

[12] Bearing in mind the planned operation, one would have expected the State to have had its ducks in a row and ready to proceed with the trial without delay, but alas, the record shows that the first witness in the criminal trial testified only two years later, *i.e.* on 10 August 2016. I do not intend to put all the blame on the State for the delay as it is clear that some delay can be ascribed to systemic delay and even caused by legal representatives of the accused not ready to proceed. Further trial particulars were also requested during the course of 2016 whilst there was an agreement pertaining to time frames for such requests and replies to be exchanged during 2015. There was also a delay caused by some of the original accused persons who indicated that they wanted to enter into plea and sentence agreements, some against whom the State did not proceed eventually. The indictment had to be amended accordingly.

[13] The trial within a trial started in the beginning of 2017 and several witnesses testified. Some of them have not finished their testimony as they allegedly fell sick during cross-examination. The main State witness, Mr Jephta, did not testify. It is not for the

accused or a court to prescribe to the State the order in which it should call its witnesses, but *in casu* and with the knowledge that we have, it is clear as daylight that Mr Jephta is an unwilling witness. The State was supposed to continue with the leading of evidence in the trial within a trial on 31 July 2018 – eighteen months since the start of the trial within a trial - when Mr Jephta would have testified. This did not materialise due to the disclosure of vital information to the defence by the State at a late stage and the consequent application for recusal to which I shall return soon.

[14] Although the matter dragged on for two years during pre-trial procedure and another two years on trial in the High Court, and notwithstanding postponements caused by various factors, there is no indication or suggestion that applicants intended to bring an application for permanent stay of prosecution or rely on the provisions of s 342A of the CPA prior to 31 July 2018. There was an application in terms of s 342A(3)(c), brought earlier in the Magistrate's Court before the start of the trial, which was dismissed. As mentioned, the parties provided me with separate timelines. Although there are differences of opinion as to the reasons for postponements and delays, it is not necessary to scrutinise these differences and I do not wish to make credibility findings against any of the legal representatives. As stated, there was no application in terms of s 342A for the closure of the State's case or permanent stay of prosecution prior to the recusal of the presiding judge. This does not mean that I can close my eyes for the time that has lapsed and I shall consider it in order to arrive at a decision.

## VI ALLEGED THREATS AND ATTEMPT TO BRIBE

[15] On 16 August 2016, whilst the second State witness was still on the witness stand, the presiding judge wrote an email to the Assistant Director: Security in the Office of the Chief Justice. I regard it as apposite to quote the whole email:

> "On Sunday, 14 August 2016 I was at home around 20h00 to 21h00 when Mr Phumelele Gugu, my home boy, arrived. He is a captain in the South African Police Services and is stationed in Kimberley. He told me that he was phoned by one Khaya (surname unknown), a diamond dealer, in Kimberley. Khaya informed him that he knows that he (Capt Gugu) is close to me. They also know that I drive a black Jeep with a GP registration number. He said that I give the accused hard time in the diamond case that I am handling. Therefore he should talk to me and find out what I would want him to do for me so that I do away with it. He told me further that he told this Khaya that he was not in Kimberley and could not discuss such matters over the phone. The said Khaya wanted to know from him when he would return. He indicated that he would return on Tuesday, which is today. Capt Gugu then told me that he is concerned of what would happen to me after he tells the said Khaya that I want nothing from them. He suggested that I stop using my car for a while, if I can, for my and my children's safety. I felt scared that my life and my children's lives are at risk. I think Capt Gugu is unsafe too."

[16] The presiding judge did not disclose the contents of the conversation with Capt Gugu and her email to the Office of the Chief Justice to the legal representatives of the parties appearing before her in the trial. The Office of the Chief Justice instructed the

Director of Public Prosecutions in Kimberley to ensure that a docket be opened and an investigation undertaken. Affidavits were obtained from Capt Gugu as early as 15 and 23 August 2016 and from Khaya on 23 August 2016. However it took the SAPS and the DPP's office nearly two years to finalise the matter and for the DPP to conclude that no prosecution was warranted. Consequently a *nolle prosequi* certificate was issued in May 2018.

[17] The office of the DPP in Kimberley was also fully aware of the fact that the star witness and trap in the case, Mr Jephta, made four statements, three of them between June and August 2016, wherein he indicated that there were attempts from third parties to bribe him as well and thereby ensuring that he does not testify on behalf of the State. Mr Jephta's last statement was made on 6 March 2018 and around the same time when the last statement in the docket pertaining to the trial judge's complaint was obtained.

[18] I do not wish to criticise my colleague for not informing the legal representatives of the conversation with Captain Gugu and her fears in that regard. However, I believe that I would probably have acted differently, accepting though that hindsight is perfect sight. Mr Roothman relied on the Code of Judicial Conduct published in the Government Gazette of 18 October 2012 which provides as follows in note 13(iv) to article 13 dealing with recusal:

> "If a judge is of the view that there are no grounds for refusal but believes that there are such facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the

> parties, either by informing counsel in chambers or in open court, and the parties are to be given adequate time to consider the matter."

This does not support the State *in casu*. The DPP in Kimberley was well aware of the situation and even instituted investigations. I personally believe that the trial judge should have informed the parties immediately in order to obtain assurances that none of the applicants were responsible for the alleged threat and/or attempt to bribe.

[19] In my view the prosecution team was under an ethical duty to take their colleagues for the defence in their confidence and inform them of the alleged threats and attempts to bribe the trial judge and a crucial State witness. If the matter was openly discussed there and then, that is in August 2016, the trial would in all probabilities not have become a nullity in August 2018, two years down the line and after numerous witnesses have testified. Mr Roothman conceded that the so-called "homeboy" incident "could never have been an irrelevant fact." Yet, the State did not disclose it to the defence in August 2016, but waited two years. The argument why the alleged bribery of Mr Jephta was not disclosed in 2016 is also without substance.

## VII <u>THE ORDER OF RECUSAL</u>

[20] I summarised the relevant background *supra,* but in order to indicate what in my view triggered the present application, I shall briefly deal with the recusal application and the order of recusal.

[21] On 31 July 2018 an application for recusal of the trial judge was moved for on behalf of accused 1 - 6 and 8. Mr LM Hodes SC brought it to the trial court's attention that they received a letter from the DPP's office dated 12 June 2018 which was read into the record. I quote partially from the letter:

> "1. This office received information from the Assistant Director, Security, attached to the Office of the Chief Justice, that there was an attempt to unduly influence or bribe the Honourable Judge Pakati in relation to the Brooks matter and that her safety might have been endangered.
> 2. An enquiry docket .... was opened and investigated by the Serious Corruption Investigations Unit, South African Police Service.....
> 4. After a protracted investigation, the Enquiry docket was finally submitted to this office for a decision. This office declined to prosecute on 21 May 2018 based on the available evidence.
> 5. In the interest of justice and transparency you are accordingly informed."

[22] The docket was requested by the defence which was forwarded on 23 July 2018. It appears from the docket that the State had in its possession the two aforesaid statements of Captain Gugu. The docket also contained a statement of one Tubane @ Khaya dated 23 August 2016 and a statement by W/O Mogalie, the IO in that docket, who stated on 27 September 2016 as follows and I quote *verbatim*:

> "The cellphone records was studied and according to Captain Gugu records it shows that he was in the Eastern Cape and Khaya was in De Beers Kimberley. According to Gugu statement he said that Khaya told him that he was with the suspects in Kirstenhof and they discuss the case. Captain Gugu is not a truthful witness and did not want to tell the whole truth. During investigation it was found that he is also friends with some of the accused in

> the diamond case. There are also no other witness in the case to confirm that they spoke about the diamond case."

[23] The fact of the matter is that the DPP issued a *nolle prosequi* certificate in May 2018. Mr LM Hodes then informed the presiding judge that the accused were given four statements by Mr Jephta, the State's prime witness who acted as the trap in the illicit diamond dealing case. Two statements are dated 27 June and 26 August 2016 respectively, one is undated and the final statement is dated 6 March 2018. These statements were handed to the accused persons' legal representatives the morning of the recusal application. It is clear from the contents of the first statement that Mr Jephta was offered money to make a statement that he "was forced by the handler to make false statements" and that this statement would be provided to a journalist of the DFA. He also said:

> "I did these discussions with these people as I could not stand it that they are still busy with illegal activities. I did not in any circumstances provoke any of these people to attempt to bribe me to not testify."

[24] The IO in the illicit diamond dealing case, W/O Potgieter, is also the commissioner of oaths in respect of the June and August 2016 statements by Mr Jephta. Clearly the prosecution team should have been fully aware of the allegations pertaining to bribery as long ago as June 2016, but kept this information for themselves. Mr Roothman on behalf of the State submitted that he was not bringing the application for recusal and that he was not ready to argue the application which was brought in an informal manner. Mr MM Hodes also argued in favour of the application for recusal as

did Mr Sithole and Mr Ebrahim. Accused 7, 9, 10, 11, 12 and 13 did not support the application for recusal, but made it clear that they would argue at the end of the State's case, or at the end of the trial that the accused did not receive a fair hearing for the reasons advanced, but that this did not have any bearing on the presiding judge at all. Once the legal representatives of the accused had argued, Mr Roothman requested an adjournment to the next day in order to consider the State's position and prepare argument. The next day he extensively referred to and quoted several authorities. However, the State did not oppose the application for recusal, but merely tried to shift any blame put on the State by the accused's legal representatives during argument.

[25] In her ruling the presiding judge stated that she was not aware that the email was forwarded to the office of the DPP for decision and/or investigation by the SAPS. She was also not informed of the decision not to prosecute. In paragraph 21 of her ruling the presiding judge said the following:

> "I am of the view that a reasonable person in the position of the accused would in the circumstances reasonably think that I would be biased, taking into account the affidavits by Jafhta (sic) which were only given to them in the morning of the 31 July 2018 just before he testified."

I do not agree with the reason for her decision to recuse herself, but that is beside the point. I am not sitting as a review or appeal court. The State is in the invidious position that it could not take the decision on appeal as it did not oppose the application for

recusal, but actually provided ammunition to the accused to launch their application.

[26] The authorities are clear. Once a presiding officer has recused him- or herself, the trial becomes a nullity, opening the way for a fresh trial. This applies to civil and criminal trials. I refer to *Erasmus, Superior Court Practice*, 2nd ed at A2-26 and further and *S v Suliman* 1969 (2) SA 385 (AD) at 390 and further. In *Suliman* it was held that the *de novo* trial, a consequence of the recusal of the first trial judge, although causing hardship and financial prejudice to the accused, could not be regarded as irregular or a failure of justice.

## VIII SECTION 342A OF THE CRIMINAL PROCEDURE ACT, 51/1977

[27] Section 342A of the CPA must be considered. The relevant portion reads as follows:

> **"342A Unreasonable delays in trials**
>
> (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.

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

*(a)* refusing further postponement of the proceedings;

*(b)* granting a postponement subject to any such conditions as the court may determine;

*(c)* where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;

*(d)* where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;

*(e)* .....

*(f)* ....

(4) *(a)* An order contemplated in subsection (3) *(a)*, where the accused has pleaded to the charge, and an order contemplated in subsection

> (3) *(d)*, shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.
> *(b)* ..... (emphasis added)

[28] The public interest must also be considered in concluding as to what is fair. I refer to *National Director of Public Prosecutions v King* 2010 (7) BCLR 656 (SCA) at paragraph [5] which was quoted with approval in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3 at paragraph [71]. According to the SCA in *King,*

> "(f)airness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State....the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country.... Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution." (emphasis added)

Similar comments were made in *S v Shaik* 2008 (1) SACR 1 (CC) at paragraph [43] where the court reiterated that

> "(i)t (a fair trial) has to instill confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror of crime."

[29] Du Toit *et al, Commentary on the Criminal Procedure Act,* service 59 at 33-29 and further deal with relevant authorities and also rely on the case law mentioned *infra.* I do not intend to repeat any of the comments made by the authors, save to state that the principles laid down in *Sanderson infra* are accepted also to apply in considering relief in respect of s 342A(3). Although an analogy can be drawn between applications in terms of s 342A(3) and those for permanent stay of prosecution, it is apparent from the wording of the section that in the first instance the applications are sought during pending proceedings. There is no such requirement in respect of applications for permanent stay of prosecution, although Mr Roothman argued that the present application is premature as there is no pending action.

## IX THE CONSTITUTION

[30] Section 38 of the Constitution states that anyone, especially those acting in their own interest, is entitled to "approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

[31] The right relied upon *in casu* is the applicants' right to a fair trial entrenched in s 35(3) of the Constitution and in particular the right to have their trial begin and conclude without unreasonable delay (s 35(3)(d)). It is clear that the relief embodied in s 38 is not restricted to constitutional rights being infringed during a criminal

trial. This aspect will be dealt with *infra* when the *Phillips* judgment is discussed.

## X AUTHORITIES ON PERMANENT STAY OF PROSECUTION

[32] The Constitutional Court held in *Wild and another v Hoffert NO and others* 1998 (2) SACR 1 (CC) at paragraph [11] that an application for a permanent stay of prosecution is an extraordinary remedy. It prevents the State from proceeding with a worthy cause, *i.e.* the prosecution of an accused in the public interest, especially where the alleged crimes are serious and comprehensive. *In casu* the total value of the illicit diamond transactions alone is alleged to be in the vicinity of R28m.

[33] In *Zanner v DPP, Johannesburg* 2006 (2) SACR 45 (SCA) the court accepted that compelling reasons for granting permanent stay of prosecution would normally relate to trial-related prejudice such as the unavailability of witnesses or fading memory in consequence whereof the accused may be prejudiced in the conduct of his or her trial. See paragraph [12]. In *Zanner* there was a delay of ten years between the first and second decision to indict the appellant. It is so that the SCA found that the accused had to show definitive and not speculative prejudice; it is not good enough to rely on vague allegations of prejudice resulting from the passage of time and the absence of witnesses. See paragraph [16].

[34] In *DPP and another v Phillips* [2012] 4 All SA 513 (SCA) the SCA dismissed an appeal by the State against an order of permanent

stay of prosecution of an appeal following upon an acquittal of the accused in the Regional Court and the DPP's unsuccessful appeal to the High Court. The DPP's appeal to the High Court was struck from the roll due to an inordinate delay in prosecuting it. Mr Phillips brought an application in the High Court in terms whereof the appeal should be permanently struck from the roll, but later added relief to the effect that a permanent stay of prosecution of the appeal be ordered. The High Court ordered a permanent stay of prosecution and this order was confirmed by the SCA. Navsa JA, writing for a unanimous court, stated the following at paragraphs [54] and [55]:

> "[54] ..... One would have expected the DPP, allegedly concerned with the issues thrown up by the evidence already adduced, would act with greater purpose and commitment. Should a court, without an end in sight in respect of the proposed appeal and therefore no indication of when the trial might resume, in the event of a successful outcome for the DPP, expect an accused to continue to be in limbo? In the totality of the circumstances of this case, I think not. [55] .....She (Satchwell J) was correct in laying the fault for the delay at the door of the DPP. She was correct to conclude that the inordinate delay was inexcusable."

In my view this case is on all fours with the present matter. Although I do not deal with an appeal, the dismissal of the application will have the same result which Navsa JA believed should be prevented if the appeal eventually succeeds, *i.e.* another trial to be conducted in the Regional Court on the merits of the case, the initial prosecution having failed on a technicality. In this case another High Court judge will be confronted with a hearing that may last two or three years. Also, in *Phillips* as here, there

was no pending case before the High Court when the application for permanent stay was granted.

[35] The most recent authority on the topic is *Van Heerden v NDPP* 2017 (2) SACR 696 (SCA). Navsa JA, writing for a unanimous court, did not mince his words. He was extremely critical of the prosecution's approach to the litigation. It would serve no purpose to repeat what was said in this regard, but I shall bear in mind the logical remark by the learned judge that "(w)hether a breach of a right to an expeditious trial has occurred and relief is justified, are to be determined by a court after having been apprised of all of the facts on a case-by case-basis."

[36] Kriegler J's judgment in *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) – a unanimous judgment of the Constitutional Court - was referred to extensively in *Van Heerden supra*. I deem it apposite to do the same. It is apparent from the Constitutional Court judgment that a balancing act must be performed by a court considering an extraordinary remedy such as a permanent stay of prosecution. Kriegler J mentioned three factors to be considered, to wit (1) the right to a trial within a reasonable time is fundamental to the fairness of the trial and the consequent prejudice suffered by an accused if this does not materialise - see now s 35(3)(d) of the Constitution; (2) the nature of the case and (3) so-called systemic delay such as effectiveness of police investigation or prosecution of the case and delays caused by congested court rolls.

[37] Kriegler J said at paragraph [38] the following about the remedy sought by the appellant:

> "Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."

The learned judge then continued at paragraph [39] and mentioned the less drastic measures available to an accused in the event of a delay.

[38] Mr Roothman relied particularly on *Bothma v Els* 2010 (1) SACR 184 (CC) and the passages in respect of trial prejudice by Sachs J in paragraphs 67 to 87 which he quoted in full. The CC specifically found that Mr Els, the accused in a private prosecution case pertaining to alleged rape that was committed many years earlier, was presumed innocent and that the trial court would be "obliged to give due weight to the evidential deficit facing Mr Els." The trial court should therefore ensure that the accused has a fair trial. It could not be said that the trial prejudice to which the accused would be subjected would be insurmountable, although it would be a significant factor to be taken into consideration when considering the guilt or innocence of the accused. He also relied on other judgments such as *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA) at paragraphs [41], [45] and [46], *Porritt and another v The State*, case number SS 40/2006 delivered by Spilg J in the Gauteng Local Division on 22 April

2016. In both these matters the delaying tactics of Messrs McCarthy and Porritt were recognised. They held the State at bay for a considerable time and then claimed prejudice as a result of delays.

## XI MONETARY REWARD PAYABLE TO WITNESSES

[39] Mr Roothman relies on s 3 of the Finance and Financial Adjustmentments Acts Consolidation Act, 11 of 1977 for the submission that the State was fully entitled to agree to pay the agent/trap millions of Rands. Based on the value of the diamonds of approximately R28m, an amount of R5m is not an excessive reward, so he argued, if one considers the amounts already paid by applicants to their legal representatives.

Section 3 reads as follows:

> "**3 Rewards to informers in respect of precious metals and precious stones**
>
> (1) Notwithstanding anything in any other law contained, any person, other than a person in the service of the State, upon whose information any precious stone or precious metal or any money paid in respect of the illicit purchase of any precious stone or precious metal is seized under any law, may, at the discretion and under the written authority of the Commissioner of the South African Police, be paid out of the revenues accruing to the State from the sale of such precious stone or metal or from the seizure of such money a monetary reward not exceeding one-third of the amount realized by

such sale or of such money seized, as the case may be, and, where the said Commissioner is of the opinion that such a reward is inadequate, may in the discretion of the said Commissioner be paid out of moneys appropriated by Parliament for the purpose, such additional amount as **together** with the said reward **does not exceed the sum of one hundred rand**.

(2) Every payment under subsection (1) shall to the extent to which it does not exceed one-third of the amount so realized or of the money so seized be made by the Secretary for Inland Revenue by way of refund from the revenue in question, and any refund so made by him shall be deemed to be a drawback for the purposes of section 3 (2) *(a)* of the Exchequer and Audit Act, 1975 (Act 66 of 1975). (Emphasis added)

[40] An informer is *inter alia* defined in the Shorter Oxford English Dictionary as a person who gives information or intelligence; an informant; and also a person who informs against another for reward.

[41] The monetary reward and the additional amount referred to in s 3(1) shall not exceed R100.00. The wording of the section is clear and unambiguous. Mr Roothman failed to appreciate this when he quoted the section to me. Furthermore, every payment under s 3(1) shall be made by the Secretary for Inland Revenue, (now known as SARS (the South African Revenue Service), by way of a refund from the revenue in question. It did not happen *in casu.* It is significant to state that the Exchequer and Audit Act, 66 of 1975, mentioned in s 3(2), save for ss 28 to 30 thereof, has been repealed in 1999. Unlike as Mr Roothman wanted this court to believe, s 3 so heavily relied upon, is really a red herring and could never have been intended to allow the South African Police

Service ("SAPS") to pay millions of Rands to traps. How much should a witness be paid to come to court and tell the truth? How will justice be served if an unsavoury and avaricious character is allowed to be paid vast amounts of money to testify for one party and later accepts huge sums of money from the opposition not to testify? The concept of "buying" witnesses is reprehensible, although it is apparently an accepted practice in the SAPS and police forces of other jurisdictions. I deal with this again *infra*. The trial court would in normal circumstances be best suited to consider this when evaluating the evidence in its totality after a full trial. Therefore, I do not intend to come to any conclusion in the present application based on this aspect in isolation.

[42] Stegmann J dealt with s 3 of Act 11 of 1977 in *S v Ohlenschlager* 1992 (1) SACR 695 (T) at 720 and 721, referring to some old authorities and also to Hiemstra, *Suid-Afrikaanse Strafproses*, 4th ed at 446. The authorities relied upon is indicative of relatively small amounts paid out to police-traps. An eminent judge like Innes CJ, to whom Stegmann J referred, made it clear that entrapment has some "distasteful features." Stegmann J went on to deal in great detail with entrapment and his comments on the trapping system probably assisted the legislature in drafting s 252A of the CPA. See also Kruger A, *Hiemstra's Criminal Procedure*, issue 10, at 24-120. The author refers to an unreported judgment of 1968 wherein criticism was levelled at the payment of a trap only in the event of a conviction. Kruger holds the view that the basis for payment of the trap "is merit of the evidence, irrespective of the outcome of the case." Clearly, payment, if it is to be made at all, should be effected at the end of the trial. Kruger continues to say

that the "trap should be kept in sight as much as possible in order to prevent the fabrication of evidence." He also deals with ethical aspects and states with reference to the *Katz* judgment of 1959 that although trap evidence is admissible in certain circumstances, "it must be viewed with caution and that every case should be decided according to its own circumstances".

[43] I accept, as Mr Roothman submitted, that the credibility of the trap and other aspects pertaining to compliance with the DPP's authorisation should normally be left for the trial court to decide. Contrary to his submission that I shall not consider this issue at all, I believe that it is of cardinal importance to take it into consideration together with the other aspects to be dealt with.

## XII CONSIDERATION OF THE APPLICATION FOR PERMANENT STAY OF PROSECUTION: A BALANCING ACT

[44] The prejudice of applicants which is not trial-related plays a relatively insignificant part in evaluating an application of this nature. No doubt, the public is obsessed with sensation and the media thrive on that. Therefore much publicity is afforded to the prosecution of prominent members of society while crimes committed by unknown persons hardly reach the newspapers, unless their crimes were directed at prominent citizens. Having said this, I deem it apposite to briefly indicate the uncontested prejudice relied upon by the applicants in the next paragraph.

[45] 1st Applicant – He is a registered diamond dealer. His house was declared forfeited on application of the Asset Forfeiture Unit ("AFU") and he had to appeal to the Supreme Court of Appeal which court upheld his appeal. Business associates do not want to do business with him anymore and this had a crippling effect on his business. His legal costs are in excess of R1.5m.

2nd Applicant – He is a licenced diamond miner. Several of his deals have been put on hold, including those with key players such as De Beers. He spent more than R2m on legal fees.

3rd Applicant – He is a foreigner who has built a career in South Africa, but has lost his clients as a result of negative publicity. His legal costs are in excess of R1.5m.

4th Applicant – He had to pay R346 400.00 as security for the release of his 20% interest in a family home. According to him, he is a respected businessman whose reputation has been tarnished to the extent that Absa Bank closed all his accounts without providing reasons.

5th Applicant – To date no witness has been able to attribute any suspicious conduct to him. Adv Botha was unaware of any allegations that had been levelled against him.

6th Applicant – She had to pay R500 000.00 to the AFU to release her motor vehicle. She paid R700 000.00 in legal fees. Her husband was also charged, but all counts were withdrawn against him. Her diamond businesses have been hampered due to negative publicity.

7th Applicant – He could not renew his diamond dealer's licence as a consequence of the prosecution. His business came to a stand-still. He was earmarked to serve on the board of the Department

of Economic Development, but he withdrew due to the case against him.

8th Applicant – He is also a licensed diamond dealer. His father-in-law was a former Chief Magistrate and the negative publicity had an adverse effect on the whole family. He spent R1.25m on legal fees.

9th Applicant – He is also a registered diamond dealer. Cash and diamonds in the amount of R3 240 000.00 unrelated to the prosecution were attached and to this day the uncut diamonds valued at R505 920.32 have not been handed back to him. He had to sell a building to sustain his business and to pay legal fees. He could not carry on with his export business due to the pending matter.

10th Applicant – He got divorced as a result of the prosecution. He is a registered diamond dealer and also a mechanic on the mines. As a result of the case, he does not get any work as mechanic on the mines. He is receiving Legal Aid.

11th Applicant – Diamonds valued at R3m were seized as well as cash. Cash in the amount of R97 000.00 was paid back at the end of July 2018 only. Adv Botha conceded that there was no authorisation granted for his entrapment.

12th Applicant – He was requested to step down as member of Umnotho Wesiswe, a mining company, due to negative publicity. His bank issued summons against him and brought a liquidation application against the close corporation of which he is a member due to the prolonged criminal proceedings. More than a thousand carats of diamonds confiscated, are still in police custody. He is 68 years old.

13th Applicant – He is also receiving Legal Aid. He is 67 years old and a registered diamond dealer. He sold his diamonds to purchasers in Belgium, but since the prosecution that business has dried up.

[46] I wish to make it clear that although I got the impression that the applicants to an extent caused delays insofar as the pre-trial procedures were not finalised as soon as should be the case, no submissions were made by the State, supported by evidence, that applicants are solely responsible for pre-trial or trial delays. This case is most definitely not on all fours with the facts in *S v Dalindyebo* 2016 (1) SACR 329 (SCA) or those in *McCarthy* and *Porritt supra*. In *Dalindyebo* the appellant tried his level best to delay the trial which he succeeded in achieving. He even intimidated witnesses. Eventually he argued that he did not get a fair trial, but the SCA found at paragraph [15] that he attempted to "turn his vice into a virtue."

[47] The recusal of a judge or other presiding officer is not a free pass for a successful application for stay of prosecution, even in the event of a long criminal trial that needs to start *de novo.* The same applies to the situation where the presiding officer passes away or becomes incapable during a long hearing. Recently one of my colleagues on the Free State bench passed away whilst another was medically boarded midstream of long criminal trials. The parties started proceedings *de novo* as these occurrences do happen from time to time. The delays in such instances could surely not be relied upon for successful applications for permanent

stay of prosecution, notwithstanding the fact that the accused suffered prejudice as a consequence. I refer to *S v Suliman supra*. I mentioned that the applications before me have no doubt been triggered by the presiding judge's recusal as *inter alia* Mr Sithole has conceded and the further delay that recusal will cause, but this application cannot be adjudicated on that basis only. I am mindful of the fact that accused persons may, especially during long and difficult trials deliberately orchestrate a ploy, leaving the presiding officer no option than to recuse and thereafter to apply for permanent stay of prosecution on the basis of inordinate delay and prejudice. Courts should be wary of this. There is no basis for such a finding against the applicants *in casu.*

[48] I referred to s 342A of the CPA *supra*. Clearly exceptional circumstances are required before a court may invoke s 342A(3)(a) – the refusal of further postponements or 342A(3)(d) - the closing of the State's case which is unable to proceed once the accused has pleaded. In such case the presiding officer makes the call and he/she is best suited to do so. *In casu* I did not preside over the trial and, contrary to the invitations of counsel for the applicants, I decided not to read the record which, together with exhibits, must be in excess of 8 000 pages. Three boxes containing 18 lever arch files were delivered to me. This does not include the voluminous application with which I was confronted of which over 200 pages were irrelevant and/or illegible. Having said this, the authorities referred to by Du Toit *et al* pertaining to s 342A(3) were considered as there is an analogy between the relief sought in that section and permanent stay of prosecution. I accept that if I grant permanent stay now, it will be the end of the matter. On the

contrary, in the case of orders granted in terms of either of the above subsections of s 342A(3), the State may still be able to prove its case beyond reasonable doubt.

[49] I perused the authorities quoted *supra* and do not intend to deal with all of them. I restrict myself to the following. In *Wild v Hoffert NO supra* the Constitutional Court was not prepared to grant a permanent stay of prosecution after having found that the appellants themselves were responsible for a considerable period of delay. In that case no trial prejudice was alleged and none was found. Also, no extraordinary circumstances existed to assist the appellants in their quest for a permanent stay of prosecution. See paragraphs [26] and [27].

[50] It is apparent from the Constitutional Court judgment in *Sanderson v Attorney-General, Eastern Cape* that a balancing act must be performed by a court considering an extraordinary remedy such as a permanent stay of prosecution. I am mindful of the clear *dicta* expressed by Kriegler J, but immediately need to point out that the facts in this case differ from *Sanderson.* Insofar as Mr Roothman heavily relied upon *Bothma v Els supra,* it should also be pointed out that that matter is totally distinguishable from the present matter. *In casu* we already know that two years flew by before the trial commenced in the High Court and that after a further two years the end was still not nigh. Further, unlike in *Sanderson,* the first IO and also the so-called handler of the agent (the trap), W/O Potgieter, did not turn up on several occasions to testify due to alleged illness which was never confirmed by medical evidence, that Potgieter is still under cross-examination, that he retired from

SAPS, that the new IO allegedly found further crucial real evidence on Potgieter's computer which was provided to the applicants rather belatedly in the form of CD's, as was the case with so many other documents and witness statements, and that Potgieter inexplicably received payments relating to the case in his personal bank account.

[51] Further worrisome issues, brushed aside by the State in its answering affidavit, are the following. The State included a charge of racketeering on the basis of a criminal enterprise and as indicated *supra*, the members thereof as alleged by the State is its star witness, Mr Jephta, former IO, W/O Potgieter and Mr Erasmus, the s 204 witness. Clearly, the State tried to blow up the case to something more serious than illicit diamond dealing. Col Serfontein conceded in his testimony that a forensic analysis of the cellphone records does not substantiate these allegations. Furthermore, two of the three persons forming the criminal association (enterprise), as the State wants everybody to believe, had access to eleven unregistered, unmonitored and unrecorded cellphones during the entrapment process. This is incomprehensible and it would be an exercise in futility to remedy such a flaw.

[52] The most damning aspect in respect of the State's case is the character and attitude of the State's star witness, Mr Jephta, who has yet to testify. On his own version he personally contacted at least one of the accused and allowed people to negotiate with him not to testify for the State and even to splash his "story" of being forced by his handler to make false statements in a local

newspaper. An amount of R500 000.00 was mentioned. A State witness with integrity would not even agree to meet with accused persons or people having connections with the accused, allowing them to make offers to him; yet he even came to Bloemfontein to consider offers made to him in this regard. His credibility is in tatters – even junior counsel will be able tear him to pieces within a few minutes. It would be the end of the State's case. The question to be asked is simply this: why must the applicants go through another trial to see whether Mr Jephta turns up eventually whilst the State elected to call all formal and other not so important witnesses at the previous trial, keeping the trap away from the witness stand.

[53] The person who authorised the whole entrapment, Adv Botha, will surely not be prepared to open his flanks to yet another round of cross-examination. He already made telling concessions.

[54] 1st applicant stated the following which is not denied by respondent:

"(t)he payments of significant amounts to witnesses must taint their testimony and renders the trial unfair. Linton Jephta is in effect blackmailing the State and there is no guarantee that he will ever come to Court or tell the truth. Both Col and Adv Botha have conceded that Linton Jephta was not an appropriate candidate to have been used as the agent because of his previous criminal conduct and bad character."

The State responded merely:

"that this is irrelevant for this application as it deals with the merits of the case that will be decided upon by the Presiding Judge."

I do not agree with the State's response, not only in this regard, but also in several other instances. The versions of the applicants were left unchallenged on several crucial issues.

[55] Not only did Mr Jephta receive R1m for his involvement in entrapment, but he demanded a further R4m to testify. This might have been inadmissible hearsay, based on a possibly incorrect version of him to a newspaper reporter in the DFA newspaper as early as 7 April 2016 (before the start of the trial), but credence can be placed on the essence of the report, *i.e.* that Mr Jephta wants more money to testify. Adv Botha testified that Mr Jephta approached him for more money, but that he referred him to SAPS. He and Col Botha confirmed under oath that an amount of R1m had already been paid to the agent, it being an exception in that the claim was submitted before the conclusion of the case. These allegations by the 1st applicant in his affidavit was met by the State by firstly submitting that they relate to the merits of the case to be considered by the presiding judge, and secondly, in stating that the agent was entitled to compensation based on the provisions of s 3 of the Finance and Financial Adjustments Acts Consolidation Act, 11 of 1977. The State did not file an affidavit by Mr Jephta to refute the allegations made to the DFA journalist and to confirm his willingness to testify. I have been informed from the bar my Mr LM Hodes, with reference to a particular passage in the record, that Col Botha conceded in his testimony that Mr Jephta demanded further payment in the amount of R4.2m. Mr Roothman did not object to this information and it must be accepted to be a true reflection of the evidence.

[56] Entrapment is acknowledged word-wide as a means of tracing the commission of various crimes and perpetrators of crime, especially organised syndicates involved in drug offences or the illegal trading in uncut diamonds and unwrought gold to name a few examples. See: Snyman CR, *Criminal Law* 5th ed at 146. That does not mean that a court may close its eyes to irregularities that may cause unfairness to the extent that an accused person's right to a fair trial is violated. The Constitutional Court has to the best of my knowledge not yet considered the use of traps, but I have little doubt that that court will not sanction the payment of traps to the extent as has taken place here, especially prior to the testimony of the trap or finalisation of the trial. I exclude here the payment of reasonable amounts for accommodation, travelling and the like. Where will we end up if "hire a witness" is resorted to by parties and especially the State? The argument of Mr Roothman that the amount of R5m is still much less than the fees paid by the applicants for their legal fees is irrelevant and does not hold any water. Having said all of the above, I need to mention that I am not so naïve to believe that police-traps are not paid certain fees depending on the nature of the case, although they will more often than not deny having been paid or that they expect payment. *In casu* the trap in actual fact bragged about the R1m payment received and openly declared that he would not testify if his demand for a further R4m payment is not met.

[57] In the *Sanderson* case the court did not focus on the general disadvantages suffered by the appellant in consequence of the serious charges preferred and the prejudice flowing from them, but rather on the delay and the prejudice caused by the delay. It did

not find any trial prejudice. I have shown herein that applicants should not be subjected to a further trial. Not only may the State try to rectify mistakes made, but as indicated during argument, the applicants will have even more ammunition to further cross-examine witnesses who have already testified, bearing in mind what others have testified about later. There can be no fairness in allowing the State a second proverbial bite at the cherry. Mr MM Hodes submitted that the State's case "is rotten" and although I am not prepared to accept that without reservation as I did not read the transcripts of the evidence and/or considered any evidential material, save those forming part of the application before me, I am satisfied that the camel's back has been broken.

[58] There are no suitable less drastic measures available to the applicants and those mentioned by Kriegler J in *Sanderson* are unrealistic *in casu* with the greatest respect. The applicants have suffered tremendous hardship. Some of them had to sell their properties to survive. Others have lost business deals and/or partners. Many of them are in a serious financial predicament and they may not be able to afford their lawyers anymore.

[59] Ponnan JA said the following in *Legal Aid Board v S and Others* 2010 (12) BCLR 1295 (SCA) at 1295C pertaining to the right to legal representation:

> "There are two component parts to that basic right: First, the right to choose counsel and to be represented by that person; and, second, the

> right to have a legal representative assigned by the State and at State expense if substantial injustice would otherwise result."

Ponnan JA relied on a quotation of Harms JA in *S v Halgreen* to the effect that the right to choose a legal representative is a fundamental one, but it is not an absolute right and it is subject to reasonable limitations. This view of Harms JA was endorsed by the Constitutional Court in *Fraser v Absa Bank* 2007 (3) SA 484 (CC) at paragraph [68] where the court found that the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced.

[60] The applicants elected to make use of the services of senior counsel and senior junior counsel thus far. Some say they will not be able to finance another hearing. There is a good possibility that they will not qualify for legal aid, but even should they obtain such aid, the State will have to pay for legal costs to fight an unnecessary and losing battle.

[61] It is unfair, as argued by the State, to expect the accused, after having been acquitted, to eventually institute civil action based on malicious prosecution or any other ground in order to claim damages. The State surely denies any maliciousness and will vigorously oppose any action to be instituted and will probably take any adverse order on appeal, even to the Constitutional Court. Another five years would have lapsed by then. Some of the

applicants are almost seventy years old. They might have been completely mulcted with legal costs in order to defend themselves in the criminal case in the High Court over a period that could be as prolonged as four to six years, whilst the matter should have been finalised within a year or two. It is extremely difficult for any successful accused to prove maliciousness as Mr Fred van der Vyver, who was unsuccessfully prosecuted for killing his girlfriend, found out when he instituted civil action after being acquitted once the SAPS' shenanigans were pointed out by the criminal court. See: Die Minister van Polisie (861/2011) [2013] ZASCA 39 (28 March 2013).

[62] I am of the view that it is sometimes necessary for a court to protect the integrity of its own processes and to take the required steps to avoid injustices such as unjustified delays caused by systemic failures and conduct of legal representatives and even presiding officers. The failure of a judge to consider an application for leave to appeal and the SCA's response thereto comes to mind. I refer to *Pharmaceutical Society of South Africa and others v Tshabalala-Msimang and another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005 (3) SA 238 (SCA) at paragraph [31].

## XIII CONCLUSION

[63] Although the application papers bear the case number KS 21/2015, some of the earlier records refer to case number KS 21/2014. Hopefully the order makes it clear what relief is granted.

[64] I indicated herein that a balance must be struck in considering the three factors set out in *Sanderson*. I considered the societal demand that an accused should stand his trial, particularly in the event of serious crimes such as *in casu,* but I weighed that with the prejudice already suffered and to be suffered, both trial-related and not trial-related, if a *de novo* trial is allowed to proceed, together with the apparent serious flaws in the State's case. I also considered the State's *in limine* submission that the application is premature in that there is no pending case as the *de novo* trial has not started yet. This is a red herring. The indictment still stands and the State has made it clear that it wants to start *de novo.* All applicants are still on bail and no charges have been withdrawn. There was no reason for the applicants to wait any longer. The second point raised *in limine* has been dealt with. I did not consider the merits of the "previous" trial, save insofar as the parties expressly dealt with particular aspects thereof in this application.

[65] Consequently, I have come to the conclusion, may I say with some reluctance, that the applicants should not be subjected to further prosecution.

## XIV ORDER

[66] The prosecution against all thirteen applicants instituted by the Director of Public Prosecutions, Northern Cape under case number KS 21/2015 as set out in the latest indictment dated 5 August 2016

containing 139 counts, encompassing all relevant dockets pertaining to the case, is permanently stayed.

J P DAFFUE, J

On behalf of applicant 1: Adv E Sithole
Instructed by: Saleem Ebrahim Attorneys

On behalf of applicants 4 and 6: Adv LM Hodes SC
Instructed by: Saleem Ebrahim Attorneys

On behalf of applicants 2 and 5: Mr S Ebrahim

On behalf of applicants 3 and 8: Adv MM Hodes SC
Instructed by: Saleem Ebrahim Attorneys

On behalf of applicants 7,9,11 and 12: Adv CF van Heerden
Instructed by: Towell &
Groenewald Attorneys

On behalf of applicants 10 and 13: Adv JJ Schreuder
Instructed by: Legal Aid SA

On behalf of the respondent: Adv JW Roothman, Adv M Makhaga and
Adv T Barnard
Instructed by:
Director of Public Prosecutions
KIMBERLEY