



Unreasonable postponement in criminal trials

One of the rights afforded to South Africans in the Bill of Rights, is the right to a speedy trial, as encapsulated in section 35(d). Section 35 states:

“Every person has the right to a fair trial, which includes the right- (d) to have their trial begin and conclude without unreasonable delay.”

The rights afforded to the accused is mere theoretical and idealistic, if such rights cannot be enforced.

Unreasonable postponement of criminal matters, usually due to the fact is that the criminal justice system is overburdened, may lead to an accused’s Constitutional rights being violated. More causes to unjust postponement can be slow administration or uncooperative police officials.

One of the predominant cases in South Africa, and an example of delay in the criminal justice system, is the Arms Deal case.¹

In December 2007, Mr Jacob Zuma was charged with corruption, money laundering and fraud. Thereafter, and in April 2009, the Acting Director of Public Prosecution withdrew all the charges. The withdrawal was opposed and an astonishing seven years later the High Court of Pretoria ruled that the fact that prosecution as discontinued was detrimental to the preservation of the integrity of the National Prosecuting Authority. The charges were reinstated in 2018.

Since then, our former president’s legal representatives have postponed the matter on every occasion that were presented to them. The legal representatives also brought a number of interlocutory applications, consequently causing the further delay of the trial.

Further to the above, Mr Zuma switched his legal representation in April 2020 and in May 2021, he insisted that the Prosecutor, Mr Billy Downer be removed from the case.

When a wealthy accused frustrates the judicial process in order to defer the trial, it is called the Stalingrad strategy.

¹Large-scale bribery and corruption leading to the procurement of contracts in finalised in 1999, initiated by Jacob Zuma and his former financial adviser Schabir Shaik.

This is based on an assumption that once enough time has passed, the defence team may raise the defence that the accused's right to a fair trial, as previously discussed, is being undermined. The defence might ask that permanent stay of the prosecution is granted.

To determine if the prosecution can be stayed, is at the discretion of the court. The court will consider if the accused has suffered unreasonable prejudice due to the delays.

In which circumstances can prosecution be stayed?

In the case of *Sanderson v Attorney General, Eastern Cape*² guidelines were given of when delay may warrant permanent stay of prosecution.

The appellant in the case was a deputy principal of school and had been charged with committing sexual offences against pupils. His first court appearance was on 2 December 1994 and almost two years after his first appearance, he had still not yet been brought to trial.

In *casu*, the appellant applied to a High Court for a permanent stay of the prosecution, on the basis that the delay had been unreasonable caused an infringement of his Constitutional right to a fair trial. On the dismissal of the application, Mr Sanderson appealed to the Constitutional Court.

In the judgment, the Constitutional Court considered rights needed protection and concluded the following:

1. There is a clear difference between trial-related prejudice and other forms of prejudice. Trial related prejudice will be that delay impede the accused's defence. Other forms of prejudice were defined as pre-trial incarceration, unfavourable bail conditions to the accused, the anxiety and/or stress the accused experienced by the accused, the fact that the accused is precluded from working either to being incarcerated or having to attend court on a regular basis, and the possible exclusion from the community.
2. The court concluded that Section 35 was aimed at not only trial related, but also other forms of prejudice, as discussed above - even those not related to the conduct of the trial itself – the consequences resulting from the trial not being held within a reasonable time.
3. The Court held that in deciding what a reasonable time is, a court must make a value judgment, considering:
 - a. The kind of prejudice suffered by the accused; and
 - b. The nature and complexity of the case and lack of state resources which hamper the investigation or prosecution of the case.

Applying these principles to the facts, the Court found that the only prejudice suffered by Sanderson had been social embarrassment. Because this social prejudice had not been seriously aggravated by the delay, the right in question had not been infringed. Consequently, the appeal was refused.

It is important to remember that society benefits from the criminal justice system and therefore have to tolerate the burdens it imposes. However, pre-trial delay should never be seen as a form of punishment.

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² 1998 (2) SA 38 (CC)