ABUSE OF PROCESS: ITS PLACE IN THE CRIMINAL JUSTICE SYSTEM, AND REMEDY OR REMEDIES?

OPSOMMING

Misbruik van proses: Plek in die strafregstelsel, en remedie of remedies?

Die doel van hierdie aantekening is om ondersoek in te stel hoe die leerstuk van misbruik van proses in die bestaande Suid-Afrikaanse strafregstelsel inpas. Dit bespreek ook of opskorting van die vervolging steeds die enigste remedie in die strafregtelike verband is. Daar word aangevoer dat die leerstuk uitdruklik deur artikel 173 van die Grondwet van die Republiek van Suid-Afrika, 1996 getroef is. Daar word ook aangedui dat die beskerming van die Handves van Menseregte nie absoluut is nie en dat die beskerming van die leerstuk nie in artikels 12, 34, of 35(3) van die Handves vasgelê word nie. Die leerstuk bied nie beskerming waar die optrede van die Staat onregverdig is nie, maar waar daar wyer kommer oor die behoorlikheid van die strafverrigtinge is. Daar word daarop gewys dat die opskorting van die verrigtinge reeds vir 'n geruime tyd nie meer die enigste remedie vir die misbruik van proses is nie. In hierdie aantekening voer ek aan dat te veel tipes gedrag losweg as misbruik beskryf word, en dat die hoër howe in hulle uitvoering van hulle inherente magte om sake te bestuur, die grense van die leerstuk oorskry het. Daar word ook aangevoer dat daar te maklik versoek word dat die verhoor nie moet plaasvind nie, of gestop moet word.

1 Introduction

In recent years there have been a number of cases where South African superior courts have held that court processes have been manipulated by various role players, which constituted an abuse of process in the criminal justice system. In a previous article I discussed whether the common-law doctrine could have been applied in these cases (De Villiers "Application of the abuse of process doctrine in criminal proceedings" 2025 *THRHR* 300). The purpose of this note is to examine how the doctrine fits into the existing South African criminal justice system. In this examination section 173 and the Bill of Rights in the South African Constitution, 1996 are of specific interest. I also discuss whether a stay of prosecution is still the only remedy for an abuse of process in the criminal justice context.

For purposes of this note, one should remember that in certain other common-law jurisdictions, notably the United Kingdom and Canada, the doctrine of abuse of process developed to apply only against abuse by the executive in the criminal context. In South African law, in the criminal justice context, it developed to apply to abuse by the executive (*S v Moussa* 2021 2 SACR 378 (GJ) para 94 (abuse by prosecutor)), an accused (*S v Le Roux* 1995 2 SACR 613 (W) 622 (repeated bail applications); *S v Murphy* 2023 JDR 2832 (WCC) paras 32–61 (*subpoenas duces tecum* issued by accused)), and a private prosecutor (*Soloman v Magistrate Pretoria* 1950 3 SA 603 (T) 606–608; *Phillips v Botha* 1999 1 SACR 1 (SCA); *President of the Republic of South Africa v Zuma* 2023 1 SACR 610 (GJ); *Maughan v Zuma* 2023 2 SACR 435 (KZP)).

A reminder that in these other notable jurisdictions the doctrine has developed to two categories of abuse – in the first instance, where the accused's right to a fair trial is at risk, and, secondly, where there are broader concerns regarding the

propriety of the criminal justice process. In South African law, the doctrine applies only to the second category of abuse.

2 How does the common-law doctrine of abuse of process fit into the existing South African criminal justice system?

2.1 *Introduction*

It is trite that the Constitution came into effect against the background of an existing legal system. Many principles of the existing system were incorporated into the Constitution, which gave them greater substance. Provision was made in the Constitution for, *inter alia*, the control of public power, and fundamental rights were identified and entrenched (see also *Pharmaceutical Manufacturers Association of SA: In re ex parte President of South Africa* 2000 2 SA 674 (CC) paras 40 41).

As a consequence, one system of law came into effect, with the Constitution as the supreme law. All law is shaped by the Constitution and subject to constitutional control; any law inconsistent with the Constitution is invalid. This means that even where the common law continues to apply in matters not expressly dealt with by the Constitution, the common law has to be developed to be consistent with the Constitution (s 2 of the Constitution; *Pharmaceutical Manufacturers Association* paras 44 45 50). It also means that where there is a common law principle which is expressly dealt with by the Constitution, the common law principle cannot have application if it is in conflict with the Constitution (see also *Pharmaceutical Manufacturers Association* para 50).

2.2 *Relationship with section 173 of the Constitution*

Yet, after the adoption of the Constitution, the superior courts have, until now, dealt with the abuse of process in terms of the common-law doctrine of abuse of power, and not in terms of section 173 of the Constitution. Section 173 provides for all situations where the inherent power of a superior court applies, including with regard to an abuse of process. The principles underpinning the common-law doctrine have accordingly been subsumed into section 173. The common-law doctrine and section 173 furthermore follow different approaches and may yield different outcomes for litigants. I submit, therefore, that the common-law doctrine of abuse of power has expressly been trumped by section 173.

However, this does not mean that the common-law doctrine has been abolished forever. If, for whatever reason, section 173 is repealed in future, or amended not so as not to cover all the situations in which the common-law doctrine applies, the doctrine will revive (*Rand Bank v De Jager* 1982 3 SA 418 (C); Botha *Statutory interpretation: An introduction for students* 6 ed (2022) 46).

2.3 *Relationship with the Bill of Rights*

Were one to assume that the common-law doctrine continues to apply, as has been accepted by the South African superior courts, the question arises – what is its relationship to the Bill of Rights?

It is firstly common cause that the Bill of Rights has transcended the common law as the prevalent means to scrutinize and redress improper executive conduct. It is also common cause that the rights enshrined in the Bill of Rights are, to a large extent, inspired by, and premised on, the fundamental values of the common law.

The fair trial rights in the Bill of Rights are furthermore not only concerned with the protection of individual rights but also with the protection of the integrity of the criminal justice system. However, although the Bill of Rights is a powerful tool, the protection is not absolute.

It can also not be said that the abuse of process doctrine has been enshrined in sections 12, 34, or 35(3) of the Bill of Rights.

The Constitutional Court has found that section 12, which provides for the freedom and security of the person, primarily protects an individual's physical integrity and is not deemed broad enough to provide for a general right to procedural fairness at every stage of the criminal process (regarding the similar provision in s 11 of the (interim) Constitution of the Republic of South Africa Act 200 of 1993, see *De Lange v Smuts* 1998 3 SA 785 (CC); *Ferreira v Levin; Vryenhoek v Powell* 1996 1 984 (CC)). Notwithstanding, in *De Lange* and *Ferreira*, the Constitutional Court also found that section 12 might protect freedoms of a fundamental nature not expressly protected elsewhere in the Bill of Rights (paras 16 and 184, respectively). Even if it is accepted that section 34, headed "Access to Courts", applies to the criminal justice process (like it has not always been (see, *eg*, *S v Pennington* 1997 4 SA 1076 (CC)), it provides protection only insofar as one is entitled to adjudicate a dispute in a fair public hearing. If one is an accused, procedural fairness at trial is ensured by section 35(3).

Therefore, if an individual establishes that his physical integrity, freedoms not protected elsewhere in the Bill of Rights, hearing rights, or trial rights have been violated, constitutional remedies can be sought under sections 12, 34, and 35(3), respectively. However, there are many situations where the abusive conduct is beyond the reach of the Bill of Rights.

Under South African law the doctrine does not provide protection against unfair executive conduct not proscribed by the Bill of Rights – it provides protection where the conduct by the executive cannot be said to be unfair, but there are broader concerns about the propriety of the criminal justice proceedings. (Under Canadian law it has been accepted that one such situation which falls outside the protection of the Charter of Rights and Freedoms (Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), c 11) is where individuals are subject to undercover operations. During these operations individuals are not afforded the right to remain silent or the protection against self-incrimination, because they were not detained by the police (Lafrate "Unleashing the paper tiger: How the abuse of process doctrine can overcome Charter limitations" 2017 *Criminal LQ* 147).) Consequently, the focus is not on restoring an accused's right to a fair trial. The remedies are directed towards the prejudice to the integrity of the criminal justice system beyond the reach of the Bill of Rights.

The doctrine also offers protection against abuse of process by an accused and a private prosecutor. In the preceding article, I pointed out that the expansion of the doctrine to abuse by an accused was in direct contrast to modern constitutionalism in terms of which it is understood that it is the accused who needs protection against the executive, and not the other way around (De Villiers 9). An accused in a private prosecution is also not in need of protection against an overpowering executive. The development of the doctrine in this regard is, therefore, not aligned with the Bill of Rights or the ethos of the Constitution. Nonetheless, here the remedies for abuse of process by an accused or a private prosecutor are also directed towards the prejudice to the integrity of the criminal justice system.

3 Is a stay of proceedings still the only remedy for an abuse of process in the criminal context?

3.1 *Introduction*

The traditional remedy in all the common-law jurisdictions was a stay of proceedings. It allowed the courts to dissociate from the abusive conduct and was the only remedy (*R v Maxwell (Paul)* [2010] UKSC 48 para 13; *R v Norman (Robert)* [2017] 4 WLR 16 (2016) CA para 21; *R v Jewitt* [1985] 2 SCR 128 136–137 (England); *R v Babos* 2014 SCC 16 paras 44, 31, referring to *R v Connor* [1995] 4 SCR 411 para 68 (Canada)); *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA); *Fox v Attorney General* [2002] 3 NZLR 62 (CA) para 37 (New Zealand)).

3.2 *United Kingdom*

However, it had already been suggested in the early 1990s that a stay of proceedings was not necessary or desirable in all cases where abuse was found; judges were admonished to look at lesser remedies before issuing a stay of proceedings. (*Attorney General's General Reference (No 1 of 1990)* [1992] 3 All ER 169 (CA); Stuesser "Abuse of process: The need to reconsider" (1994) 29 *CR* (4th) 92 99).

This understanding appears to have found application in the Human Rights Act 1998 (c 42) (HRA). It provided for the implementation of the rights and freedoms of the (European) Convention on Human Rights and Fundamental Freedoms (4 Nov 1950) Eur TS no 5, 213 UNTS 221 (ECHR) in domestic law (see, *eg*, Emmerson et al *Human rights and criminal justice* 3 ed (2012) para 3-79).

Under the HRA it is unlawful for a public authority, including a court or tribunal at any level, to act in a manner that incompatible with a ECHR right, unless required to do so by primary legislation which cannot be interpreted in a manner that is compatible with the ECHR (s 6). As a result, Convention rights takes precedence over the common law and may shape the common law (*Ghadian v Godin-Mendoza* [2002] AC 557; *Campbell v MGN Ltd* [2002] AC 457; *X v Y* [2004] UKHRR 1172; *R v Mushtaq* [2005] 1 WLR 1513).

Article 6(1) of the ECHR provides that everyone facing a criminal charge is entitled to have the charge determined in a fair public hearing. Section 8 of the HRA, in turn, states that a court which finds that an individual's fair hearing rights in terms of article 6 of the Convention have been violated, may grant any remedy, or make such order within its powers, which it considers to be just and appropriate (see also *Attorney General's General Reference (No 2 of 2001)* [2004] 2 AC 72 para 24). Section 2(1)(*a*) of the HRA further requires that the court must have regard to a judgment, decision, declaration, or advisory opinion of the European Court of Human Rights. The courts may further have regard to the obligation in article 13 of the Convention to provide an effective remedy (Emmerson *et al* para 3-80).

It follows that where an accused's fair hearing rights have been violated, a stay of proceedings is not the only available remedy under article 6 of the ECHR, read with section 8 of the HRA. Yet, whether the submissions are made under article 6, read with section 8, or under the first category of abuse, the court in both instances will be concerned with restoring fairness to the trial. Both courts may also grant a stay of proceedings only where it will be impossible to give an accused a fair trial (*R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] AC 42 74G; *Latif* [1996] 1 WLR 104 112F; *R v Maxwell (Paul)* [2010] UKSC 48 para 13; *R v Norman (Robert)* [2017] 4 WLR 16 (2016) CA para 21). Convention rights,

furthermore, take precedence over the common law and may shape the common law. It is accordingly expected that the other remedies will also be available where the submission is made under the first category of abuse.

Fair trial rights are furthermore fundamental to the criminal justice system. If lesser remedies than a stay of proceedings are available where these rights are at risk, it would be non-sensical for the remedies not to be available where the propriety of the criminal justice system in the second category is at risk. It is expected, therefore, that the other remedies will also be available where the submission is made under the second category of abuse.

3.3 *Canada*

Under Canadian law it has long been recognized that a stay of proceedings is not the only remedy where State conduct constitutes an abuse of process. In *R v Xenos* (1991) 70 CCC (3d) 362 (CA Que), the Quebec Court of Appeal agreed with the trial court that State conduct had compromised the fairness of the accused's trial and that a stay of proceedings was not the only available remedy. The court ruled that the appropriate remedy was the exclusion of the testimony, and a new trial before a new judge.

In *R v Regan* [2002] 1 RCS 297, State conduct impinged on the integrity of the criminal justice system. The accused sought a stay of all charges based on the cumulative effect of the police and Crown behaviour. The police had identified the accused to a reporter, and the Crown had interviewed the victims before charges had been laid. The Crown had also done "judge shopping". The Supreme Court held that a stay of proceedings was only one of the remedies for an abuse of process (para 53).

This sentiment was echoed by the Supreme Court in *R v Babos* [2014] 1 SCR 309. The court held that the second part of the question whether a stay of proceedings was warranted, was whether any other remedy short of a stay of proceedings was capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial, or whether it relates to the integrity of the criminal justice system. Where the concern is fairness of the trial, the focus is on restoring an accused's right to a fair trial. Here procedural remedies, such as ordering a new trial, are more likely to address the prejudice. Where the abuse risks undermining the integrity of the criminal justice system, remedies must be directed towards that harm (para 39).

3.4 *South Africa*

In *S v Porrit* 2016 2 SACR 700 (G) para 30, it was submitted that the delay by the prosecution amounted to an abuse of process. The court, referring to *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC), held that where the prejudice suffered by the delay is not trial related, there are a range of remedies available short of barring the prosecution (para 31). The court also held that a bar to a prosecution is very unlikely, and available only in one scenario – where there is irreparable trial prejudice as a result of the delay (*ibid*). The court found that there were no extraordinary circumstances to warrant a permanent stay.

As would be expected, the remedy applied for by the executive for an abuse of process by an accused has never been a stay of proceedings. The remedies applied for and considered were directed at addressing the specific abuse. In these cases, the courts had no issue with ordering a remedy other than a stay of proceedings (see, *eg*, *Le Roux* where the court held that unnecessary and repeated bail

applications could amount to an abuse of process and should not be allowed (622). In *S v Hoabeb* 2013 1 NR 222 (HC), the court found that the accused had embarked on an exercise of delaying tactics that amounted to an abuse of process. The court ordered that the plea of not guilty be set aside and that the case be referred back and finalised before another magistrate. In *Murphy*, the court set aside two *subpoenas duces tecum* issued by the accused as an abuse of process. The court found the subpoenas to be a fishing expedition, manifestly unsustainable, and vexatious in the particular circumstances (paras 32–61).

Where abuse by a private prosecutor was alleged, the courts found that the process was not used to bring an accused person to justice, but to achieve a totally different object (*Soloman v Magistrate Pretoria; Phillips v Botha*; *President of the Republic of South Africa v Zuma*; *Maughan v Zuma*). Such prosecution amounted to an abuse of process. A prosecution that was unsustainable also constituted an abuse of process. Some courts have held that in such instances they were duty bound to stop the proceedings (*Phillips v Botha* 565E–G; *Maughan v Zuma* para 179).

3.5 *Evaluation*

Clearly a stay of proceedings is not the only remedy available to a court when a finding of abuse of process under the common law is made. This has predominantly been brought about by the advent of fundamental rights. In other notable common-law jurisdictions, the fundamental rights reflected and accommodated all the protections afforded by the first category of the abuse of process doctrine. Since fundamental rights take precedence over the common law, they shaped the common law to allow for alternative remedies.

Under South African law, the High Court, when faced with an allegation of abuse by reason of prosecutorial delay, applied the principles with regard to an unreasonable delay in terms of section 35(3)(*d*) of the Constitution, allowing for alternative remedies. Where abuse by an accused was found, the courts had no problem applying an alternative remedy.

The application of the doctrine has consequently also evolved to detach the abuse of process test from the stay of proceedings test. In the past the abuse of process test has been intermixed with the stay of proceedings test with "the clearest of cases" being the threshold for finding an abuse of process. The courts have since acceded to the notion that the "clearest of cases" test is the threshold for a stay of proceedings.

I submit that this approach makes much more sense. Abuse of process takes many forms. A stay of proceedings is not necessary, or desirable, in all cases where abuse is found. Where an application is brought for the stay of a public or private prosecution under South African law, a two-stage approach is appropriate. In the first instance, the aggrieved party has to prove the abuse on a balance of probabilities. Secondly, once proved, an inquiry must be held into whether a lesser remedy than a stay could cure the prejudice caused by the abuse. A stay of proceedings is the most drastic remedy and is reserved for the clearest of cases – where a stay is the only remedy capable of remedying the prejudice.

4 Conclusion

The doctrine of abuse of process is a well-established common-law principle under South African law. However, too many types of conduct have loosely been labelled as abusive, and the superior courts have overstepped the limits of the

doctrine in the execution of their inherent case management powers. The submission that the trial should not take place, or be stopped, is furthermore made too easily. The submission should only be made in exceptional circumstances, where there is incurable trial prejudice to the accused.

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A SOCIOLINGUISTIC PERSPECTIVE ON THE MEANING AND SCOPE OF "PUBLIC INTEREST" AND ITS ALIGNMENT WITH THE PUBLIC'S INTEREST IN PROPERTY EXPROPRIATION

OPSOMMING

'n Taalsosiologiese perspektief op die betekenis en omvang van "openbare belang" en die belyning met die publiek se belange in grondonteiening

Wetgewing het verskeie funksies, insluitend om 'n aantal bekommernisse te hanteer wat deur die staat, die mark, en die samelewing in die algemeen ervaar word. Dit kan wees om maatskaplike gedrag te reguleer of om die regering te help met die uitvoering van sy pligte. Die Onteieningswet 13 van 2024 is 'n goeie voorbeeld van wetgewing wat poog om 'n kombinasie van administratiewe regulering en sosio-ekonomiese voordeel te bereik. Soos uitgedruk deur die lang titel en aanhef, identifiseer die Wet nie minder nie as drie doelwitte: Eerstens bied dit 'n manier om die skade te herstel wat veroorsaak is deur die Naturellengrondwet 27 van 1913, wat grondbesit deur swart Suid-Afrikaners erg beperk het. Tweedens laat dit die staat toe om eiendom te onteien tot voordeel van die algemene publiek. Derdens sit dit die administratiewe apparaat uiteen wat nodig is om eiendom te onteien, met of sonder vergoeding. 'n Belangrike wyse waarop wetgewing hierdie doelwitte kan bereik, is deur middel van die definisies wat in artikel 1 van die Wet vervat word. Die definisie van "openbare belang" kom egter vaag en potensieel problematies voor. As sodanig neem die huidige studie pertinent die betekenis en omvang van die woorde "openbare belang" onder die loep en verbind dit met die gesproke data van die openbare verhore vir die onlangse Grondonteieningswetsontwerp (B23D-2020). Wanneer ons die gesproke data vanuit 'n sosiolinguistiese perspektief bestudeer, vind ons 'n sigbare ooreenstemming tussen die publiek se belange en die wetgewer se definisie van "openbare belang". Terselfdertyd oorweeg die onderhawige ondersoek die bydrae wat 'n taal-sosiologiese perspektief op regsdefinisies en die wetskeppingsproses kan bied.

1 Introduction

Legislation has various functions. Despite the debated differences between legislation and regulation (Voermans "Legislation and regulation" in *Legislation in Europe: A comprehensive guide for scholars and practitioners* (2017) 17), statutes aim to address various concerns experienced by the state, the market, and society at large (Crabbe *Understanding statutes* (1994) 90). On one hand, the aim could be to regulate societal behaviour or to assist government in the administration of its duties (Van der Burg "The expressive and communicative functions of law, especially with regards to moral issues" 2001 *Law and Philosophy* 31; Rubin "Law and legislation in the administrative state" 1989 *Columbia LR* 369).