SCHOOL OF LAW

SATELLITE LITIGATIONS AND THE RIGHT TO FAIR TRIAL IN CRIMINAL PROCEEDINGS

BY

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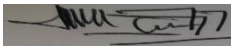
DECLARATION

I, Masindi Emmanuel Ndivhudzannyi of Student Number 11572289, hereby declare that this mini dissertation for LLM (Human rights) at the University of Venda, hereby submitted by me, has not previously been submitted for a degree at this or any other University and that it is my work in design and execution, and that all reference materials contained therein have been duly acknowledged.

Signed:  Date: 27 June 2023

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR:	African Charter on Human and Peoples' Rights
AFCHPR:	African Commission on Human and Peoples' Rights
CPA:	Criminal Procedure Act
CVRA:	Crime Victims' Rights Act
ICCPR:	International Covenant on Civil and Political Rights
ICTY:	International Criminal Tribunal for the Former Yugoslavia
IR:	Immigration and Refugee
JUS:	Justice Canada (Department of)
NDPP:	National Director of Public Prosecutions
NPA:	National Prosecuting Authority
OHCHR:	Office of the United Nations High Commissioner for Human Rights
SAPS:	South African Police Services
SARS:	South African Revenue Services
SCA:	Supreme Court of Appeal
USA:	United States of America

ABSTRACT

South Africa has a constitution and statutory provisions that protect individuals against unreasonable delays and unreasonable adjournments in court. The problem lies when an accused person institutes satellite litigations to delay and avoid justice. Satellite litigation is a tactic used by accused persons to delay and evade justice, violating their rights to a fair trial. It further suggests measures to curb satellite litigation. The study begins with the background to the research topic. It explores what the law says about delays in court. It further analyses the impact of delays on the justice system. In conclusion, it recommends measures to curb satellite litigation. The research is both library and desktop based, utilising library materials like textbooks, legislation, reports, regulations, law journals, charters, policies, articles, case laws, the Constitution of the Republic of South Africa, and international and national legal resources. This study therefore aims to find a feasible solution to the problem. It also examines current laws and policies that prevent unreasonable court delays. Thus, it investigates the common reasons for satellite litigation.

Keywords: Satellite litigations, Speedy trials, Court hearings, Unreasonable delays, Legal proceedings, Criminal courts, Vexatious proceedings, Complainants, Victims' rights

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CHAPTER 1: INTRODUCTION

1.1 Background

The rule of law is the foundation of any constitutional democracy.[1] It ensures that everyone receives equal protection and benefits from the law, and no one is above it.[2] The Bill of Rights further protects everyone's right to access courts and solve their disputes fairly in a court of law.[3] The right to equal protection and the benefits of the law should be considered together with the right to a fair trial in Section 35.[4] Section 35(3)(d) envisages that "every accused person has the right to have their trial begin and conclude without unreasonable delay". Justice must be achieved without any unreasonable delay.[5] There are many law reports and articles regarding the right of an accused to have a fair and speedy trial, though it's constitutionally guaranteed. Less is being said about the rights of the complainants and victims of crimes.[6] Courts are constitutionally mandated to safeguard the rights of both victims and the accused person.[7] Section 34 of the Constitution states that "Everyone has the right to have any dispute that the application of law can resolve decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[8] This study makes a reference to the Vexatious Proceedings Act[9] to ascertain steps that the court may take in combating unnecessary delays within criminal trials and analyses the extent to which the Act can assist aggrieved litigants.

1.2 Problem statement

People avoid courts, hearings, and inquiries by instituting satellite litigations with the intention to delay and avoid justice. As a result, some accused persons institute satellite litigation to prevent courts from fulfilling their constitutionally mandated role and function

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[1] Constitution of the Republic of South Africa Act 108 of 1996, Preamble.
[2] ('Constitution') Sec 9.
[3] ('Constitution') Sec 34.
[4] ('Constitution') Sec 35.
[5] S Crichton 'Justice delayed is justice denied: Jamaica's duty to deliver timely reserved judgments and written reasons for judgment' (2016) 44 *Syracuse Journal International and Commerce* 1.
[6] *Carneiro v S* [2019] ZASCA 45 (29 March 2019); *Levenstein v Estate of the Late Sydney Frankel* 2018 (2) SACR 283 (CC); *S v Coetzee* 1997 (3) SA 527 (CC).
[7] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.
[8] Constitution (none 3 above).
[9] Vexatious Proceedings Act, 1956.

of deciding disputes fairly and expeditiously.[10] For instance, on the 15th of July 2019, Mr. Zuma requested to be given questions in advance so that he could prepare for the cross-examination at the Zondo Commission. Mr. Zuma did not institute satellite litigation in this instance, but it is one of the ways by which the accused delayed the court proceedings, hiding behind access to a fair trial. Mr. Zuma ought to have known that there was no such provision in the South African law. Requesting for questions in advance by Mr. Zuma had the implications of delaying the hearing of the Zondo Commission of Inquiry. Fortunately, the Commission declined such a request.[11] Again, Mr. Zuma attempted to avoid answering more than thirty questions during the 15th of July 2019 inquiry. He stated reasons such as fading memory and other flimsy reasons, which suggest that it was intended to delay and avoid justice.[12]

The right to a fair trial may be compromised if trials or proceedings are delayed excessively. In *R v Askov,*[13] it was said that:

> Witnesses are likely to be more reliable in testifying to events which are still fresh in their memories as opposed to events that transpired many years before the trial commences. Witnesses are people; they also sometimes face problems in their working environments; or face family-related problems or work; they move from one place to another; they become sick and be unable to testify in a court of law. Witnesses also get concerned that their evidence be taken as quickly as possible. Testifying in open court is challenging for witnesses, especially about events many years ago, as it is human nature to lose memory.[14] The right to a fair trial and access to courts also protects the rights of witnesses and complainants to finalise their cases within a reasonable time.

Therefore, many people avoid facing justice by instituting satellite litigations with the intentions to delay and prevent justice through the delay of criminal trials.

The case of *S v Zuma,*[15] *is a case in point.* Mr Zuma's corruption, fraud, money laundering, and racketeering charges were reinstated against him in March 2018. He was charged again after the Supreme Court of Appeal (SCA) upheld a ruling that the decision

[10] Constitution (note 3 above).
[11] ANA Reporter 19 July 2019 We have not promised to give Zuma questions, Says Zondo Commission, https://www.iol.co.za/news/politics/we-have-not-promised-to-give-zuma-questions-says-zondo-commission-29524180 (accessed 23 July 2019).
[12] Bhengu C 'Four must-read stories on Jacob Zuma's corruption case' 22 May 2019, https://www.timeslive.co.za/politics/2019-05-22-four-must-read-stories-on-jacob-zumas-corruption-case/ (accessed 03 July 2021).
[13] Constitution (see note 10 above) Sec 34.
[14] *R v Askop* 1991 (49) CRR1, 20.
[15] *S v Zuma* 2022 (1) SACR 575.

by the National Director of Public Prosecutions (NDPP) to drop the case against him was irrational.[16] He has been arguing for a permanent stay of prosecution since November 2018 with his legal team intending to delay his trial.[17]

Mr. Zuma is very determined to delay the proceedings; he applied for a permanent stay of prosecution at the Pietermaritzburg High Court, which was dismissed due to a lack of proper basis. After the court dismissed his application, he challenged the High Court's decision by appealing to the Supreme Court of Appeal. The Supreme Court of Appeal also rejected his application on the 13th of March 2020 and referred the matter to the Pietermaritzburg High Court for trial to proceed.[18] Also, in *Mamase v NDPP,*[19] Judge Roberson indicated that:

> proceedings could only stay if it is in the interest of justice and argued further that it must be proven that prejudice was from the side of the accused because of the failure to commence and finalise the trial within a reasonable time.

However, the application was denied since the accused was somewhat to blame for the delay. In the foreign case of *S v Ntwa*,[20] the applicant brought an application under section 18(3) of the Botswana Constitution Act of 1966 requesting that the matter be referred to the High Court to determine whether the applicant's right to a fair trial within a reasonable period under Section 10 (1) of the Constitution has been violated, and to order a permanent stay of prosecution.[21] The State based its argument on Section 26 of the Criminal Procedure Evidence Act, which states that any time lapse for murder cases shall not bar the state. However, the prosecution's right for any other offence may become proscribed after 20 years.[22] The State countered by arguing that they still acted within a reasonable time if the case was completed on time within 20 years at most. The right of murder proceedings to be instituted after the expiration of 20 years is constitutional.

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[16] G Nicolson'' Jacob Zuma's attempt to have corruption charges against him dropped is a tall order, but that doesn't mean he'll go on trial any time soon, 21 May 2021, https://www.dailymaverick.co.za/article/2019-05-21-prosecute-the-prosecutors-zuma-puts-npa-on-trial/ (4 July 2021).
[17] Same as above.
[18] ANA Reporter (note 11 above).
[19] *Mamase v NDPP* [2013] ZAECGHC 27; 2013 (2) SACR 491 (ECG).
[20] *S v Ntwa* 2001 (2) BLR 212 (HC).
[21] Constitution (note 13 above) Sec 18.
[22] Sec 26 (same as above).

The right to a fair and speedy trial was also examined in *Rodrigues v NPP.*[23] The applicant argued for a permanent stay away from prosecution, indicating that his right to a fair and speedy trial in terms of Section 35 of the Constitution Act 108 of 1996 has been violated.[24] His argument was based on the continuous delay in that the state only charged him for the crime committed during apartheid time and charges were nearly forty seven years old. He further argued that such lengthy period cannot be ignored.[25]

Justice that comes too late is meaningless to the complainants and victims of crimes. An urgent solution is therefore needed to curb the problem of unreasonable delays in criminal proceedings, as it has severe ramifications to the justice system. The main concern is that witnesses and evidence get lost due to the delayed trial.[26] Delayed trials are of great concern as courts are constitutionally mandated to safeguard or promote fair and expeditious justice for all.

Victims' and complainants' rights are protected by several international human rights law instruments; they are protected against sexual abuse, torture, and other types of violations. The problem, however, continues where the right to follow-up and get the matter placed in court for quick finalisation is not stipulated or outlined. The speed of the trial is mostly determined by the pace of the accused persons, and they end up abusing the right to a fair trial by instituting satellite litigation which is intended to avoid justice.[27]

Paul and Michael also researched the rights of the victims of crimes, and they found that the Crime Victim Rights Act (CVRA) affords victims of crimes the right to participate in the criminal justice system, the right to privacy, and the right to be treated with dignity. Prosecutors are also expected to explain the court process, the roles of victims, and the procedures to be followed in court by the victims of crimes. But they did not suggest any feasible solution to curb the accused persons who are abusing their rights to a fair trial while at the same time suggesting standalone provisions on the rights of the victims.

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[23] *Rodrigues v NPP* [2019] ZAGPJHC 159.
[24] Constitution of the Republic of South Africa, Sec 35.
[25] *Rodrigues v NPP* (note 23 above).
[26] *Democratic Alliance v President of the RSA* [2018] ZAGPPHC 836; [2019].
[27] Palmer, N., & Hamilton, T. (2022). Legal Humility and Perceptions of Power in International Criminal Justice, International Criminal Law Review, doi: https://doi.org/10.1163/15718123-bja10142 (accessed 01 June 2023).

In this context, this study investigates the problem of instituting satellite litigations which are intended to delay and avoid justice, its implications for the right to a fair trial and access to justice in South Africa, and how its wave can be stopped to protect the integrity of the justice system in South Africa.

1.3 Research questions

This study seeks to answer the overarching research question: how can the wave of satellite litigations be stopped to protect the integrity of the justice system in South Africa? In answering the core question, the following sub-questions will also be answered**:**

a) Which theories underpin the research problem this study seeks to solve?
b) What does satellite litigation entail, and what are its implications?
c) Are there lessons to be learned from other jurisdictions that have successfully addressed this menace, such as the USA, Italy, and Canada?
d) What practical solutions are available to curb the abuse of the right to a fair trial by instituting satellite litigation?

1.4 Significance of the study

South African courts have a constitutional mandate to resolve disputes fairly and expeditiously. In this context, the main objective of this investigation is to propose a feasible solution to eradicate the menace of satellite litigations intended to evade justice in South Africa. Therefore, this study seeks solutions to protect the complainant's and victims' rights to access courts and further answer the question of how the wave of satellite litigations can be stopped to protect the integrity of the justice system in South Africa. In addition, this research will also explore the theoretical underpinnings relevant to the thesis of this study and suggest other solutions that can be used to curb the menace of satellite litigations from other jurisdictions. This study will draw lessons from the USA, Italy, and Canada, which are developed countries with successful justice systems. [28]

[28] U.S News, These Countries Have the Most Well-Developed Legal Frameworks, https://www.usnews.com/news/best-countries/rankings/well-developed-legal-framework (accessed on 20 April 2023).

1.5 Aim

The study seeks to find ways of minimising the accused persons' abuse of satellite litigations in criminal matters without compromising their constitutionally enshrined rights.

1.6 Objectives

- To find a feasible solution to eradicate the problem of satellite litigations that are intended to delay and avoid justice,
- To analyse theoretical underpinnings with the view of eradicating intentional abuse of satellite litigations to delay justice,
- To suggest ways and solutions that can be used to curb the abuse of satellite litigations which are intended to delay criminal court proceedings.

1.7 Justification and significance of the study

This study is critical because it seeks to curb satellite litigations intended to delay and avoid justice and analyse the theoretical underpinnings with the view to suggest solutions to curb the problem of satellite litigations intended to avoid justice.

1.8 Methodology

The study is library and desktop based. It relies on reading resources such as case laws, textbooks, charters, policies, legislation, regulations, reports, article journals, the Constitution of the Republic of South Africa, national and international journals. It develops a clear understanding of the problem of satellite litigations intended to delay criminal court trials. It further clarifies why people intentionally delay justice in criminal cases. Finally, all solutions are proffered to limit the abuse of this constitutional provision.

1.9 Definition of concepts

Satellite litigations are court proceedings instituted by either party to the court proceedings to solve preliminary issues, while the main case stays before the finalisation of the preliminary issues. This litigation is usually brought when there is a disagreement between the parties to the proceedings, especially conflicts regarding the procedures to be followed in court or jurisdictions, which must be observed before the commencement of the primary matter.[29]

[29] *S v Zuma and Another* (CCD30/2018) [2021] ZAKZPHC 89.

A court hearing is a hearing in a court of law where two parties having a dispute can present evidence proving their case for the Presiding officer to determine who is wrong or right.[30] During the hearing, the Presiding officer is expected to listen to the evidence tendered and deliver a fair outcome.[31]

An unreasonable delay is a delay that is intentionally caused to avoid justice. In determining whether the delay is reasonable, courts should look at the nature of the crime committed, the crime's seriousness, and the prejudice that the party to the proceedings is unlikely to suffer.[32]

A vexatious litigant is a party to litigation that relentlessly keeps on instituting various legal proceedings against another party currently involved in a litigation process. These legal proceedings may be vexatious if they lack merit, but are instituted with the intention to irritate, distress, harass, annoy, or cause financial strain to the respondent or the other party to the proceedings. These proceedings are ordinarily instituted to delay the main proceedings.[33]

1.10 Literature review

A literature review is essential to a study because it enables the researcher to see the gaps between what has already been published on the subject and what needs to be written. A literature review supports the significance of the research effort by outlining how it fits into the larger discussion and considering prior research. It reduces the likelihood of repeating previous research that has already been done.[34]

Many academics have discussed satellite litigation as a tactic used by the accused to delay criminal proceedings. The challenge is that complainants and crime victims will

[30] Chalik & Chalik, Hearing: Legal Definition, https://www.chaliklaw.com/glossary/hearing/, (accessed on 07 May 2023).
[31] Same as above.
[32] *Sanderson v Attorney-General, Eastern Cape*,1998 (2) SA 38.
[33] Sharusha Moodley, dealing with a vexatious litigant? https://bregmans.co.za/2022/03/25/dealing-with-a-vexatious-litigant/#:~:text=In%20such%20circumstances%2C%20the%20Vexatious,legal%20proceedings%20against%20another%20person, (accessed 01 May 2023).
[34]M, Mahangwahaya, A critical analysis of the concurrent enforceability of restraint of trade agreements and garden leave in South African Labour Law, University of Venda,2017.

seek immediate justice, and satellite litigations are undesirable to them.[35] It has been established that it also strains the court`s resources.[36] The strain is in two-folds: more financial resources will be involved than in a case that does not include satellite litigation. It will take the courts more time before finalising the matter due to the time needed in most satellite litigations.[37] At the same time, courts are still focusing on issues raised that have no direct impact on the issues that underpin the main trial. In short, satellite litigation is undesirable since it distracts the court and frustrates the complainants. Thus, this study seeks ways to curb the abuse of instituting satellite litigations in South African criminal courts.

Throughout the world, efforts are being made to resolve issues efficiently without instituting satellite litigation.[38] Quick finalisation in criminal trials is always cost-effective for the government and the parties to the proceedings.[39] Interestingly, this approach minimises procedural miscarriages in the delivery of justice. As such, this will end the era of technical challenges based on arguments in the courts of law. It has long been established that continuous over-reliance on satellite litigation will taint even the integrity of the whole justice system in terms of social standing.[40] Thus, this approach must be dealt with to minimise abuse and build confidence in the judiciary system. Recently, Lord Justice Waller discouraged the unacceptable way in which satellite litigation has increased with its challenges.[41] This points to the exact issue raised by this study. As such, it becomes imperative to find reasonable and sustainable ways of dealing with this scourge, which has the potential to tarnish the whole South African Justice System. In his final judgement on the case of *Hollins v Russell,*[42] Lord Justice Waller then indicated that the court should discourage the abuse of technical points by the defendants intended to delay the main trials from finalisations.

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[35] Alicia Tew The Jackson Report and Judicial Review. *Judicial Review*, 2010. *15*(2), pp.118-124.
[36] Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388 (2016).
[37] Same as above.
[38] Tobias, C, Reassessing Rule 11, and Civil Rights Cases.1990. *Howard LJ*, *33*, p.161.
[39] Crowell, E.H. and Pou Jr, C, 1990. Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques. *Md. L. Rev.*, *49*, p.183.
[40] Green, B.A., 1996. Conflicts of Interest in Litigation: The Judicial Role. *Fordham L. Rev.*, *65*, p.71.
[41] Arthur, L., 2011. Reform of the civil justice system: The new meaning of justice and the mitigation of adversarial litigation culture. *Waikato L. Rev.*, *19*, p.160.
[42] Hollins v Russell [2003] EWCA Civ 718).

Despite this ground-breaking judgement, many accused people worldwide are instituting satellite litigations intending to delay the serving of justice and eventually evade trial. Thus, a consultative process has been initiated in the United Kingdom to create an understanding between lawyers and judges on curbing the abuse of instituting satellite litigation[43], mainly that aspect of raising technical points to evade trial and delay the whole process. In *Wild v. Hoffert and others,* [44] the learned judge held that:

> Section 342 A (1) vests criminal courts with a duty to take the initiative in investigating ostensibly unreasonable delays in the completion of cases pending before them; subsection (2) lists several factors to be considered in such investigation; the following subsection provides several remedies, including the unprecedented power to make costs in a criminal case.

Section 342 A addresses unreasonable delays caused by the state or the defence,[45] at the court where the matter is being heard; but does not clarify satellite litigation matters which are always new matters before the presiding officer.

Victims' advocates argued that the criminal justice system was becoming too focused on the rights of the accused while neglecting the rights of the victims.[46] They pushed for changes to ensure that victims are given more attention, including safeguarding their rights to be informed of court dates, and to be invited for hearings to ensure that there are no unjustified delays in the proceedings, and to take into account the victims' safety while they are being processed.[47] This study differs from other studies on victims' rights against unreasonable court delays as this study focuses only on satellite litigations intended to delay and avoid criminal trials.

Ngalo urged presiding officers, prosecutors, and lawyers in the criminal justice system to exercise caution and prevent unjustified delays. He indicated that society would lose trust in the criminal justice system if the right to a fair trial is not protected. He argued that

[43] Same as above.
[44] *Wild and another V Hoffert* and others [1998] ZACC 5; 1998 (6) BCLR 656 (CC).
[45] Criminal Procedure Act, Sec 342 A.
[46] Casell G.P, Crime Victims' Rights, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/11_Reforming-Criminal-Justice_Vol_3_Crime-Victims-Rights.pdf, (accessed on the 28 April 2021).
[47] Same as above.

unreasonable delays violate the rights of the accused persons.[48] In *Zanner v Director of Public Prosecutions*,[49] the court stressed that:

> the right of an accused to a fair trial requires fairness not only to him but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused and those distressed by the horror of the crime'. Dysfunction in the criminal justice process thus damages and undermines the rule of law by appearing to ridicule the entire legal system.

Many scholars have researched the protection of the rights of the accused against unfair and unreasonable delays. However, very little has been said about the rights of the complainants, which are violated by instituting satellite litigations intended to delay and avoid criminal trials. Thus, there is a gap in satellite litigations intended to delay and prevent criminal trials of the accused. Ngalo shares the same sentiments as Gopaul, who said that unreasonable delays in criminal trials by the state violate accused persons' rights to a fair trial.[50] The Vexatious Proceedings Act (VPA) was introduced in 1956 to guard against situations where a person will institute legal proceedings without reasonable grounds. The Act, however, has loopholes because it does not reflect urgent procedures to stop such abuses as instituting legal proceedings without reasonable grounds.[51]

In *Canadian Union of Public Employees v City of Toronto and Attorney General of Ontario*, [52] the judge of the Supreme Court of Appeal of Canada, Arbour J, stated:

> Judges have inherent and residual discretion to prevent court process abuse. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice and as unjust treatment, abuse of process may be established where: (1) the proceedings are oppressive or vexatious, and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the accused's interest in a fair trial. But the doctrine also evokes the public interest in a fair and just trial process and the proper administration of justice.

According to Section 233 of the Constitution, every court must prefer any reasonable interpretation of the law that is consistent with international law to any other interpretation

[48] Ngalo L.Z 'the right to a fair trial; an analysis of s342 (A), s168 of the Criminal Procedure Act & a permanent stay of prosecution, university of KwaZulu Natal, 2017.
[49] J 2006 (2) SACR 45 (SCA) at para 21.
[50] A Gopaul, the impact and constitutionality of delayed trials on the rights of a suspect or accused person during criminal proceedings, University of South Africa, 2015.
[51] See (note 9 above).
[52] *Canadian Union of Public Employees v City of Toronto and Attorney General of Ontario* 2003 SCC 63.

that is inconsistent with international law. I agree with the Supreme Court of Appeals of Canada's position that judges should have a part in limiting the accused's use of delaying strategies in criminal courts.[53]

South Africa has a service charter for victims of crimes, which is vital to South African victims and complaints. The Freedom Charter supported the spirit of the Republic of South Africa Constitution and was introduced with the National Victim Empowerment Programme. They were introduced to protect the rights of victims and complainants. It outlines the responsibilities of different governmental and independent institutions such as the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Department of Health (DH) and the Department of Social Development (DSD), in protecting the rights of victims and complainants. It is done under the United Nations Declaration of Basic Principles of Justice for Victims and Abuse of Power. Some rights under the Charter are set out, such as victims' rights to receive information, victims' rights to be treated with fairness and dignity, victims' right to protection, and the right to restitution. There is no right for victims to get their matter finalised speedily once it is reported as the accused person can only expedite it in terms of section 35 of the Constitution of the Republic of South Africa.[54]

I share the same sentiments with Edward Laws, who asserts that satellite litigations intended to delay and avoid trials can be curbed by having a strong judiciary, more judges, and many law courts, as well as judges that will refuse unnecessary adjournments and court technology that can assist in reducing the number of matters on the court roll. It becomes undesirable to institute satellite litigation to delay and avoid trials if it can be finalised quickly. The problem is that South African courts are congested with criminal matters; if a postponement is granted, the first available court date might be after 12 (twelve) months, which makes it easy for the accused person to delay the matter.[55]

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[53] Section 233 of the Constitution.
[54] Service charter for victims of crime in South Africa, the consolidation of the present legal framework relating to the rights of, and services provided to victims of crime, https://www.justice.gov.za/VC/docs/vc/vc-eng.pdf (accessed on 27 February 2022).
[55] Edward L, addressing case delays caused by multiple adjournments, 14 June 2016, https://assets.publishing.service.gov.uk/media/57a9c983e5274a0f6c000006/HDQ1374.pdf (accessed on 27 January 2022).

I believe that the NPA should utilize the provisions of the Vexatious Proceedings Act[56] to stop Jacob Zuma from constantly instituting legal proceedings to avoid corruption charges and other charges against him. The state should obtain an order directing that before initiating any further legal proceedings to challenge corruption charges, Mr. Zuma must get a court order or written permission from the Deputy Judge President to institute further proceedings.

Jalloh asserts that Africa is doing enough to protect the victims' rights. The introduction of legal instruments, including the Malabo protocol, has played a massive role in promoting the victims' rights. However, Jalloh did not explain how victims should have direct access to follow-up on their matters which are being delayed in courts.[57]

1.11 Theoretical underpinnings

In the ensuing paragraphs, the relevant theories that underpin the research problem will be explored.

1.11.1 Theory of Procedural Justice

This study is informed by the theory of procedural justice. This theory focuses more on how individuals are treated than on the results they experience. It was established on the principle that when people are treated with respect and dignity, they will accept the court's decisions as impartial and fair. People, therefore, require leaders who have honest intentions. People respect the law and follow protocol because it is the right thing to do, not out of fear of punishment or personal risk-benefit calculations, but because procedural fairness promotes value-driven self-regulation.[58]

Procedural justice does not directly predict cooperation and compliance but rather, through citizens' evaluations of the legitimacy of the authorities. When people are treated procedurally justly, they tend to find the authorities morally appropriate and consent to their actions and demands, even when they disagree with them. Legitimacy is a property

[56] See (note 9 above).
[57] Jalloh, C. C. (2022). The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges, Cambridge University Press.
[58] Jackson J, Norms, Normativity, and the Legitimacy of Justice Institutions: International Perspectives, London School of Economics and Political Science Law Department, 2018.

of authorities that makes people more likely to engage in societally desirable outcomes such as legal compliance or cooperation.[59]

1.11.2 Four Pillars Theory of procedural justice

a. Fair process

Underpinning the theory of procedural justice is the need for a fair process. In the eyes of Franck (1990),[60] for the judicial process to be deemed appropriate to the accused and enhance its credibility, it must be seen to be satisfying the determinacy, symbolic validation, coherence, and adherence. These are the critical properties of criminal procedure in criminal law.[61] In short, the concept of determinacy emphasises that the courts demonstrate that the charge is precise and is determined in the context of criminal procedure. This typically asks for clarity on vague issues. It should be provided if interpretation is needed in the accused's interest.[62] Thus, the accused can capitalise on such provisions to delay and evade trial. This relates to the conduct of Mr Zuma when he asked to be furnished with the questions before appearing at the Zondo Commission. He was using such rights because they are provided in the Constitution to ensure a fair process and prevent the accused from being ambushed. This argument further strengthens the doctrine of the presumption of innocence until convicted by a competent court.

Symbolic validation is the ceremony and tradition of using that rule-making body's historical origin or the rule itself to achieve compliance with the law.[63] Thus, South African courts need to be seen as using the same legal doctrine that other courts are using. Deviation from these historic symbolic rituals and traditions will dent their integrity and standing. Finally, coherence is the degree to which the rule is applied consistently.[64] Thus, if others are using the institution of satellite litigation in South Africa, Mr Zuma is also entitled to it as a citizen. The only difference is that some abuse it while others use it for

[59] Same as above.
[60] Thomas M. Franck, The Power of Legitimacy Among Nations (Oxford: OUP, 1990) 52.
[61] Same as above.
[62] Same as above.
[63] Thomas M. Franck, The Power of Legitimacy Among Nations (Oxford: OUP, 1990) 92-94.
[64] Same as above.

the indeterminants. However, determining abuse in instituting satellite litigation for delaying and evading trial is difficult because instituting satellite litigation is provided in the constitution because it is central to giving the accused an opportunity to a fair trial.

b. Transparent in action

The theory of procedural justice emphasises the need for a transparent process. The quality of being transparent and open and accessible is essential for any judicial proceedings, particularly in criminal proceedings. Procedures should be transparent to allow a better understanding of the public and litigants.[65] The constitution, which supports the idea that everyone accused of a crime has a right to protection, lends support to this viewpoint of the law. Because the accused and complainant will provide security when needed, there won't be any conflicts of interest in the proceedings.

c. Provides an opportunity for voice

In the same breath, the theory of procedural justice is anchored on providing the accused an opportunity to be heard fully. It is an essential aspect of natural justice. It allows the parties, especially the accused, to present their case and inculcates confidence in delivering justice. It is cardinal that this right should go unhampered. However, as noted by Lord Widgery CJ: ‘’ Doing what is right may still result in unfairness if it is done in the wrong way ‘’. This is precisely the predicament of the current judiciary in South Africa. By allowing the institution of satellite litigations, some accused members are abusing it to evade justice and delay the trial.

d. Impartiality in decision-making

Appearing before an independent and impartial tribunal is a fundamental human right.[66] There has yet to be an agreement amongst scholars on what constitutes the impartiality of the tribunal. In most instances, impartiality and judicial independence are two intertwined concepts. However, Special Rapporteur Singhvi defines impartiality as not

[65] Selkur, B.R.D. Rules and Challenges for an Efficient and Transparent Criminal Proceeding in Nigeria Vis A Vis Challenges and Prospect sbarr. *KAS African Law Study Library*, 2018,*4*(3), pp.486-497.
[66] Article 14 (1) of the Covenant on Civil and Political Rights.

only a precursor to independence and fairness, and objectivity in judicial proceedings.[67] The South African judiciary endeavours to ensure the impartiality of trials by removing all the absurdities that allow the institution of satellite litigation. Unfortunately, some accused are abusing it to delay or evade trial.

1.12 Limitations of the study

The research was library-based and only relied on extant literature, legislations, case laws, treaties and selected comparative studies of a few jurisdictions.

1.13 Structure and chapters overview

Chapter 1: Introduction

This chapter introduced the background to the problem, research questions, significance of the study, aim and objectives, research methodology, literature review, theoretical underpinnings, limitation of the study and structure of the research.

Chapter 2: Satellite Litigation

This chapter explores the impact of satellite litigation, ways of minimising the abuse of satellite litigation, and the rationale behind it. The chapter further suggests several ways of reducing or eradicating the abuse of satellite litigations. Also, the chapter demonstrates how the proposed solutions are envisaged to protect the justice system's integrity.

Chapter 3: Rights-based Approach to satellite litigation

This chapter examines a right-based approach to the abuse of satellite litigations and its implications for the South African justice system.

Chapter 4: Lessons to be learned by South Africa from other countries in eliminating satellite litigations (USA, Canada, and Italy)

This chapter draws lessons from other jurisdictions for South Africa to learn. Thus, all the good things that the South African judicial system is doing well will be retained, and the loopholes allowing for the abuse of instituting satellite litigation will be closed. This will be more of an incorporation of best practices.

[67] Special Rapporteur L. M. Singhvi, The Administration of Justice, and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc. E/CN.4/Sub.2/1985/18.

Chapter: 5 Conclusions and Recommendations

Finally, this chapter concludes the research and makes some recommendations.

CHAPTER 2: SATELLITE LITIGATION

2.1 Introduction

Some accused persons are using satellite litigations to delay and avoid criminal trials. Many researchers have found that satellite litigations that hinder criminal trials have serious consequences. Using satellite litigation also amounts to the misuse of the court's resources.[68] This chapter examines the rationale behind satellite litigation and the impact of abuse of the right to a fair trial by instituting satellite litigation intended to delay and avoid justice.

2.2 The rationale behind satellite litigations

Not every accused person initiates satellite litigations to delay and avoid trial. A well-known trial which has multiple satellite litigations is the corruption case of the State v former president Jacob Zuma. On the 16th of February 2022, the South African High Court sitting at Pietermaritzburg dismissed Mr Zuma's application for the state prosecutor to be recused from his upcoming corruption trial. Zuma's attorneys attempted to appeal a previous decision that denied his request that the prosecutor be recused from his case. Judge Piet Koen of the Pietermaritzburg High Court rejected the motion after stating that it had little likelihood of success.[69]

Zuma's efforts were intended to delay and avoid the commencement of the corruption case because he was scared that he might be convicted as charged and spend a lengthy period in jail. The court postponed the matter to the 11th of April 2022 for trial to commence. Zuma's corruption charges date back to 2005. Will the former president of South Africa wait for the trial date without instituting more cases to delay the process? The corruption trial might be further delayed, though, if Zuma's attorneys decide to appeal to the Supreme Court of Appeal. Zuma received a 15-month jail sentence in a separate

[68] M Landoni. Justice Delayed, an Overview of the Options to Speed Up Federal Justice, https://jpia.princeton.edu/sites/jpia/files/2007-6.pdf, (accessed on 04 September/2021).
[69] Mogomotsi M, South African court rejects effort to delay corruption trial, 16 February 2022, https://abcnews.go.com/International/wireStory/south-african-court-rejects-effort-delay-corruption-trial-82921506 (accessed on the 16 February 2022).

case for refusing to comply with the Constitutional Court's directive to appear before the state-backed commission looking into claims of corruption during his presidency.[70]

In September 2021, Zuma was granted medical parole and allowed to leave prison due to an undisclosed condition. In December 2022, the Gauteng High Court heard an appeal from Zuma's attorneys against a judgment declaring his parole ineffective and ordering him to return to prison. Later, Judge Elias Matojane permitted an appeal. According to Matojane, the Supreme Court of Appeal in Bloemfontein should take up the issue. He stated that a different court might decide that the former president needs to be treated with "compassion, empathy, and humanness" because of his illness and advanced age.[71]

Mr Zuma tried to delay his proceedings and make an application for the state advocate Billy Downer to be recused, citing that he has no title to prosecute and that he would be biased in the proceedings. The court indicated that there is no evidence proving a lack of independence and impartiality which is very important for such applications. Mr Zuma also wanted the court to rule that evidence of a particular plea should be led *viva voce*.[72] The court ruled that there was no need for oral evidence. [73] In *Thint (Pty) Ltd v National Director of Public Prosecutions and others*[74]*,* Justice Langa indicated that:

> Courts should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation often places prosecutors between a rock and a hard place. On the one hand, they must resist preliminary challenges to their investigations and the institution of proceedings against accused persons; on the other hand, they are engaged to ensure the prompt commencement of trials. Ensuring that the trial court decides the pertinent issues, which

[70] VOA News, Ex-South African President Zuma Sentenced to 15 Months in Jail, 29 June 2021, https://www.voanews.com/a/africa_ex-south-african-president-zuma-sentenced-15-months-jail/6207593.html (accessed on 07 May 2023).

[71] Chabalala J. 'The essence of ubuntu': Judge grants Zuma leave to appeal medical parole ruling, 21 December 2021, https://www.news24.com/news24/southafrica/news/the-essence-of-ubuntu-judge-grants-zuma-leave-to-appeal-medical-parole-ruling-20211221 (accessed on the 16 February 2022).
[72] *S v Moussa* [2021] ZAGPJHC 61.
[73] *S v Zuma and Another* (CCD30/2018) [2021] ZAKZPHC 89.
[74] [2008] ZACC 13, 2009 (1) SA 1 (CC), 2008 (12) BCLR 1197 (CC) para 65.

it is best placed to do, would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however.

2.3 Satellite litigation applications to permanent stay of prosecutions

In the case of *Sanderson v Attorney General*, [75] guidelines were given when a delay may warrant a permanent stay of prosecution. The appellant was a deputy principal of a school who had been accused of sexual offences against students. On the 2nd of December 1994, when he made his first court appearance, the state attempted to have him tried, but the trial was never initiated. Due to the unreasonable delay that violated his constitutional right to a fair trial, the appellant asked the High Court to stay his prosecution permanently, which failed. Mr Sanderson filed an appeal with the Constitutional Court after the application was denied. In the judgement, the Constitutional Court considered rights that needed to be protected and concluded that courts should consider the nature of a matter, the complexity of the case, the prejudice suffered or unlikely to be suffered by the accused person, and the availability of resources from the state to conduct investigations when determining whether a delay was reasonable or not.

By applying these guidelines to the evidence, the Court concluded that Sanderson's lone prejudice was social humiliation. The right in question wasn't violated because the delay hadn't made this social bias significantly worse. As a result, the appeal was turned down. But it's important to keep in mind that society benefits from the criminal justice system, therefore it must put up with the costs it imposes.[76]

Mr. Zuma argued before the High Court in Pietermaritzburg that his application for a permanent stay from prosecution should be granted. He added that the state is the only party to blame for the delay because he and Schabir Shaik should have been prosecuted together in 2003. He added that the NPA was aware of the political motivations behind his lack of charges. He contends that these delays go against the right to fair trial.

The KwaZulu-Natal High Court's full bench, however, rejected the arguments following extensive consideration of the case's history. The former head of prosecution Bulelani

[75] *Sanderson v Attorney General* 1998 (2) SA 38 (CC*).*
[76] Same as above.

Ngcuka chose to charge Shaik rather than Mr Zuma, but nonetheless declared that there was a prima facie case against him. This was Mr Zuma's initial point of contention, which the court first addressed. According to Mr Zuma, prosecution must be pursued after a prima facie case is established. The court, however, noted that Harms DP upheld the validity of the test used by Mr Ngcuka in National Director of Public Prosecutions v. Zuma, which presents a problem with this case.[77]

Former SCA deputy president Louis Harms argued that the presence of prima facie evidence did not guarantee a successful prosecution in 2009 and that each case should be dealt with based on its own merits. Even though two parties are involved in corruption, Harms argued that just because one is guilty does not automatically make the other guilty. The argument that Ngcuka's decision was integral to a grand political scheme was also deemed fundamentally flawed by the KZN court. Mr Ngcuka had defended himself, asserting that the evidence and the court were undisputed.[78]

The complaint that he should have been charged alongside Shaik had been raised before the court by Shaik himself when he appealed to the Constitutional Court. The highest court rejected the argument, saying that while there may be good reasons for joint trials, it did not make a specific trial unfair because other possible perpetrators are not tried. The fact that Mr Zuma was not charged along with Mr Schaik constitutes no prejudice. According to the judgment, the court indicated that the seriousness of the charges Mr Zuma is facing outweighs any bias, which he claims he will suffer if the trial proceeds. Mr Zuma's request for a permanent stay was denied.[79]

Mr Zuma has brought several applications in different courts in different jurisdictions for a permanent stay of prosecution. With his action, it is safe to draw inferences that the reason for bringing such applications is to delay the trial intentionally.

[77] Franny R, High Court rejects Zuma's application for a permanent stay of prosecution, 11 October 2019, https://mg.co.za/article/2019-10-11-high-court-rejects-zumas-application-for-a-permanent-stay-of-prosecution/ (accessed on 20 February 2022).
[78] Same as above.
[79] Same as above.

2.4 The impact of satellite litigations

2.4.1 Loss of Witnesses

The loss of witnesses is one of the significant problems. For instance, the top witness and forensic report author in the Jacob Zuma corruption trial, Johan van der Walt, died. Reports suggest that Van der Walt, the senior managing director of FTI Consulting, died of natural causes in Johannesburg. The exact cause of his death is unknown. He has been described as a '' bloodhound '' auditor. He was a partner and forensic auditor at KPMG before he joined the consulting firm in 2017.[80] Van der Walt testified in the corruption trial of Schabir Shaik and two former senior Samburu Bank officials, Charles Edwards and Gerhardus De Clerck. However, the duo were found not guilty to the ten counts of fraud, theft and contravening the Companies Act, involving R640m. He was listed as the main witness in Zuma's corruption trial in the Pietermaritzburg High Court.[81]

In addition, S 35(3) (I) of the Constitution of the Republic of South Africa, Act 108 of 1996, provides that an accused person has the right to adduce and challenge evidence.[82] A careful reading of section 166(1) of the CPA invests reciprocal rights in both the accused and the prosecution to cross-examine opposing witnesses and to re-examine their witnesses.[83] Similarly, the right to cross-examine a co-accused or witness called on behalf of such co-accused is also extended to both an accused and the prosecution.

No probative value should be attached to evidence where cross-examination of a witness is absent for whatever reason, including illness or death. It is equally fair and equitable that such an approach should apply to prosecution witnesses, defence witnesses, and witnesses called by the court in terms of section 186 of the CPA.[84]

[80] B.L Solomon's, Top witness, and forensic report author in Jacob Zuma corruption trial, dies, Aug 15, 2021, https://www.iol.co.za/news/politics/top-witness-and-forensic-report-author-in-jacob-zuma-corruption-trial-dies-89ef721a-11f9-4131-860c-a63ee6784406, (accessed on the 02 September 2021).
[81] Same as above.
[82] Constitution Act 108 of 1996.
[83] Criminal Procedure Act.
[84] Sec 186 of the Criminal Procedure Act.

The court can reject hearsay evidence even though there is documentary evidence to corroborate such evidence.[85] The court will rely on the Provisions of Section 3 of the General Law Amendment Act to check whether hearsay evidence should be admitted.[86]

He was, therefore, one of a few witnesses on the issues in dispute, but however, one of the most critical witnesses in the trial. In criminal cases, the state must prove its case beyond a reasonable doubt, and the state can only do that by leading evidence of the key witnesses. Now the question will be, if witnesses are dying, how will the state prove its case beyond a reasonable doubt?

The Committee has learned much about the impact of lengthy criminal proceedings on the justice system's efficiency and the people involved. Witnesses who presented the views of victims stressed how stressful delays can be and how these can result in feelings of re-victimization. As they await closure in matters likely to be among the most traumatic experiences of their lives, victims endure further worry and anxiety every time an adjournment is made. Every additional court appearance requires that they prepare to revisit the upsetting events surrounding the crime and to see the accused person in court once again. They may have had to take time off work or travel long distances to get to the courthouse, usually incurring additional personal expenses.

The most significant impact on victims and the integrity of our justice system occurs when a judge orders a stay of proceedings due to a violation of section 11(b) of the Charter. [87]This experience can be particularly devastating for victims. Witnesses may also bear these emotional and financial costs. Through its work in studying various bills in recent years, the Committee has had an opportunity to see the promising emergence of a greater focus on victims' rights in many aspects of the criminal justice system, with the passing of the Canadian Victims Bill of Rights in 2015 which is a particular achievement. The Committee will continue to monitor the implementation of this law and see whether it

[85] *S v Msimango and Anothe*r (187/2005) [2009] ZAGPJHC 34; [2009] 4 All SA 529 (GSJ); 2010 (1) SACR 544 (GSJ) (27 July 2009).
[86] Sec 3 of General Law Amendment Act.
[87] International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI).

achieves the desired transformation in how the justice system responds to the needs of victims.[88]

2.4.2 **Memory Loss by Witnesses**

R v Askov, [89] it was articulated as follows:

> Witnesses are likely to be more reliable in testifying to events which are still fresh in their memories as opposed to events that transpired many years before the trial commences. Witnesses are people; they also sometimes face problems in their working environments; or face family-related problems or work they move from one place to another; they become sick and be unable to testify in a court of law; witnesses also get concerned that their evidence be taken as quickly as possible. Testifying in open court is difficult for witnesses, especially about events many years ago, as its human nature to lose memory. The right to a fair trial and access to courts also protects and covers the rights of witnesses and complainants to finalise their cases within a reasonable time.

Many reported cases are set for trial years later after the occurrence of the event. The problem is that witnesses will likely need to remember the critical evidence or sequence of the event. Sometimes cases are reported in time, but the investigating officers take time to finalise the investigations.

Now the problem lies where the investigations were finalised in time. Still, the accused person uses delaying tactics to avoid trials from commencing knowing that he does not need a valid defence.

It is even more difficult for witnesses to remember in cases where multiple events or charges occurred, unlike the single events of, for instance, an assault case, theft, robbery, or a single count of fraud. Zuma's case had various charges, making it difficult for witnesses to clearly remember all incidents that happened many years before the commencement of the trial. The nature of the event and the period intervals is essential in determining whether the witness will likely forget what happened. The witness' age is necessary because children and older people are likely to forget easily.

2.4.3 **Economic impact**

For economic development, the rule of law is essential. The rule of law fosters development by strengthening the voices of individuals and communities by providing access to justice, ensuring due process, and establishing remedies for violating rights.

[88] Canadian Victims Bill of Rights S.C. 2015, c. 13, s. 2.
[89] *R v Askop* 1991 (49) CRR1, 20.

Livelihoods, shelter, tenure, and contracts provide poor people with the means to defend themselves against violations of their rights. Legal empowerment goes beyond the provision of legal remedies and supports better economic opportunities. Investors prefer to invest where there is a functioning justice system.[90] All human rights, including economic rights, cultural and social rights, and the right to growth and development, must be guaranteed to promote sustainable development under the rule of law.

Courts should guard against unreasonable delay, which leads to violations of the protection of individuals' rights and guarantee fair and credible contract enforcement.[91] There is clear proof of a link between the rule of law and economic development.

Hyun and Kakawin,[92] indicated that:

> There is considerable evidence for the relationship between the rule of law and economic development. But elements of this relationship need to be further researched. For instance, it is still being determined precisely why and how much the rule of law influences economic growth. For example, some countries and sectors have grown because of an industrial policy of favourable treatment for certain companies, while others have benefited from equal treatment under the law. In addition, while liberal understandings of property rights, contract enforcement and so on have tended to be associated with growth, they have significant distributional effects. In some cases, efforts to strengthen the rule of law can be inequitable if they focus on lowering transaction costs for elites rather than facilitating redistributive action or broader access to opportunities.

The constant postponements of corruption cases against the former President of South Africa are negatively affecting the South African economy. Investors are attracted to invest in countries with strong rule of law compliance. Missing government funds plagued Zuma's presidency, and the South African economy was estimated to have lost a trillion ZAR ($60 billion). Zuma is accused of accepting approximately $34,000 (thirty-four thousand) annually from Thales, a French defence firm, to shield them from an investigation into a $2 billion arms deal signed that year. Zuma has continually denied all the allegations of his corruption. He now faces sixteen charges, including racketeering, fraud, corruption, and money laundering. The more his cases are postponed, the more it

[90] Same as above.
[91] Haggard, S. and Tiede, L "The Rule of Law and Economic Growth: Where are We?" (2011), 39 *World Development* 673 for an overview of the literature.
[92] Son H. & Kakawin N, 2008. "Global Estimates of Pro-Poor Growth," World Development, Elsevier, vol. 36(6), pages 1048-1066, June.

affects the economy since investors will be reluctant to invest in the country. Delayed trials can lead to economic impact in diverse ways. Sometimes, the community does not understand the justice process, such as the incident in December 2021 in South Africa when people were chanting and singing that Zuma must be released from custody. Such riots in KwaZulu-Natal and Gauteng provinces caused more than 300 deaths and an estimated $ 1.7 billion property looted and destroyed because of people chanting for Zuma's release.

Many researchers have shown a link between investment, economic growth, and the rule of law or the efficient judiciary. Government institutions such as the SAPS, NPA, and judiciary also play a vital role in the justice system, and they should guard against delayed trials.[93]

There is a need for developing countries to have a working justice system. For example, India is a developing country but has striven to finalise their trial matters within a reasonable time and to have a better justice system. Developing countries need investors to invest in their countries; the question would be, do investors trust the country's justice system? Because the efficacy of the judicial system relates to the country's development, delivering justice more speedily would bolster the country's economic growth by improving the enforceability of contracts.[94]

There is an urgent need for South Africa to invest more efforts to reduce crime in the country, research has shown that crime contributes immensely to discouraging investors, economic development and costs increase. A low crime rate means manageable courts and less unreasonable delays.[95]

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[93] The importance of predictability is stressed in World Bank, World Development Report 1997: The State in a Changing World, New York: Oxford University Press, 1997.
[94] Amrit Amirapu, 22 August 2016, Justice delayed is development denied: The effect of slow courts on economic outcomes in India, https://www.ideasforindia.in/topics/governance/justice-delayed-is-development-denied-the-effect-of-slow-courts-on-economic-outcomes-in-india.html (accessed on 22 February 2022).
[95] International Journal of Economics and Business Administration Volume IX, Issue 2, 2021, pp. 424-438.

2.4.4 The Impact of delayed trials on Victims of Crimes

The delay in obtaining justice for victims has now lasted for years. Some cases have been in court from the year 2010. Victims are waiting far too long in their quest for justice. Delays prevent victims from getting over their trauma, with their lives put on hold. This means some victims will opt out of the criminal justice process altogether, leaving them with no resolution and the public with the risk of a guilty criminal being free to offend again.

Witnesses, victims, and complainants are stressed due to criminal court delays, which makes them feel victimised by the justice system, which is their only hope. Every adjournment means that victims must endure further worry and anxiety as they wait for closure after traumatic experiences. Every additional court appearance requires that they prepare to revisit the upsetting events surrounding the crime and to see the accused person in court once again. They may have had to take time off work or travel long distances to get to the courthouse, usually incurring additional personal expenses. The most significant impact on victims, as well as on the integrity of our justice system, occurs when a judge orders a stay of proceedings; this experience can be particularly devastating because, in most cases, the delays are not done by the complainants but by other organs of the state such as the National Prosecuting Authority.[96]

The constitutional dispensation introduced important protections for accused and awaiting trialists. In civil proceedings, delay is defined as prolonging court proceedings involving private wrongs.[97] Delay in the administration of justice occurs when too much time elapses between the filing of an action and its ultimate decision by the court.[98] In criminal proceedings, delay in the administration of justice is referred to as an antonym to the right to trial within a reasonable time or expeditious justice. Waiting for years to resolve a dispute blurs truth, weakens witness memory and makes presenting evidence difficult.[99] Lengthy delays before trial may cause physical evidence to be lost, tainted, or

[96] Runciman B & Baker G, An Urgent Need to Address Lengthy Court Delays in Canada (2016) 4.
[97] William M, Cain, Delay in the Administration of Justice, 7 Noctre Dame L, Rev.284 (1932).
[98] See note 32 above.
[99] Same as above.

destroyed; moreover, a correlation between time and the accuracy of eyewitness testimony.[100]

The problem of delays in the finalisation of criminal matters is a global challenge, the Covid 19 Pandemic worsened the situation, and that enables the accused person to abuse the right to a fair and speedy trial. These delays hurt victims of crime, and they further endanger their lives as the accused persons, who are supposed to be in jail if convicted, are still out on bail since their matters are still pending. It's a serious concern because some witnesses lose their lives before they testify, weakening their cases.[101]

2.5 Ways of Minimizing the abuse of satellite litigations

2.5.1 Introducing specialised courts to deal with cases suspected to be intentionally delayed

One of the ways to curb the institution of satellite litigations aimed at delaying and avoiding trials is to introduce special courts that deal with cases suspected to be intentionally delayed. The accused persons who intentionally delay the matters have seen a loophole in the South African justice system in that if the case is postponed for any reason, it is likely to be postponed to a date one year later or so because the court's diary will be full. Mostly, the first available court date will be extremely far, which is simple to delay the case for years intentionally.

The president of South Africa should introduce special courts which deal with such cases. In that case, the presiding officers must investigate long overdue cases because of technical or intentional delays. Such cases should be transferred to the special court.

The advantage of such a special court will be that if the accused person intends to request a postponement because of sickness or unavailability of an attorney on the day in question, the matter can be rolled over to the following day or the closest day as the roll will not be congested with cases. It is tough to delay a case in a court which has fewer cases on its roll.

On the 28th of October 2020, the President of South Africa, President Ramaphosa, introduced four new Special Commercial Crimes Courts which were established to deal

[100] Gopaul A, the impact and constitutionality of delayed trials on the rights of a suspect person during criminal proceedings, (2015).
[101] The British Journal of Criminology, Volume 62, Issue 4, July 2022, Pages 1036–1053.

with cases of Covid-19-related corruption. This means that creating more courts that can deal with different issues is possible. [102]

The problem is that Mr Zuma's defence has requested and granted several postponements on various bases, and such postponements have lengthy intervals because the court roll would be full for all nearby dates. They have also brought several interlocutory applications to defer the trial. One may contend that the delay has violated the complainants' right to a fair trial.[103]

In *Sanderson v Attorney-General, Eastern Cape*[104]*,* the Constitutional Court (CC) set out the principles establishing when a delay may warrant a permanent stay of prosecution. But that did not deter Mr Zuma and his legal team from continuing to bring applications for a permanent stay of prosecution. However, he knew that their application was unlikely to be granted. The applications are solely being brought to delay the proceedings.

2.5.2 **Not funding individuals' legal expenses**

One of the reasons for the former president Jacob Zuma to approach different courts to seek an order that he knew would not be granted was because the state was funding his legal expenses. Mr Zuma would not have resorted to the courts so many times to avoid facing criminal charges if he did not have state funding. This is because such a litigious initiative would need many millions. For over a decade, Mr Zuma has used many court applications to avoid corruption, fraud, money laundering and racketeering charges, primarily at state expense. This was made possible by the former president's agreement with the presidency, which allowed him to use state resources to defend himself. If Zuma had lost a case, he would pay back his incurred costs. How much Zuma would have to pay back is not entirely clear.[105]

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[102] Polity, Ramaphosa announces establishment of 4 new courts to deal with Covid-19 corruption, 28TH OCTOBER 2020, https://www.polity.org.za/article/ramaphosa-announces-establishment-of-4-new-courts-to-deal-with-covid-19-corruption-2020-10-28 (accessed on the 05 September 2021).

[103] Justice postponed: what causes unreasonable delays in criminal trials? December 2020, DeRubus.

[104] 1998 (2) SA 38 (CC).

[105] C Mailovich, Jacob Zuma would not have used Stalingrad defence without state funding, EFF tells the court, 06 November 2018, https://www.businesslive.co.za/bd/national/2018-11-06-jacob-zuma-would-not-have-used-stalingrad-defence-without-state-funding-eff-tells-court/(accessed 30 September 2021).

2.5.3 **Time Limits in criminal trials**

Time limits may, in suitable cases, be placed on the start and finalisation of criminal trials. In many jurisdictions, this is the norm. In international criminal law, the nature of the offences can easily result in inordinate delays. Time limits become essential.

Judges should set trial time limits, including the investigation intervals and trial dates. In cases requiring specific reports from experts, such experts should indicate when they will need to compile such reports. Further postponements should be granted in instances where it is justifiable.

Some matters are further delayed even after they have started. Some attorneys or prosecutors will cross-examine a witness for days on irrelevant aspects that they had an opportunity to deal with during admissions and parts which are a common cause or not in dispute.

Presiding officers should guard against attorneys who cross-examine a witness for too long when it's unnecessary, without limiting the right to a fair trial. If that process can be followed, it would assist all courts to have a few matters on the roll and have the highest finalisation rate. Having few cases on the roll would make it difficult for the accused person to have a lengthy postponement intended to delay the trials.

Time restrictions should be imposed only when there are unreasonable delays to guard against interfering with the right to a fair trial. They should be set only on consideration of vital factors, including the complexity of the issues, the burden of proof and the nature of the evidence. Allocations should be founded, always, on reasoned justification. In appropriate cases, it may be beneficial for the presiding officer to receive a summary of the case from the prosecutor, which should include a brief outline of each witness's testimony, the time needed for the evidence in chief and an estimation of the time required to present the entire prosecution case. This requirement could promote the more efficient management of cases and assist the presiding judicial officer decide how trial time should be divided fairly between the parties. This would, by corollary, encourage the prosecution to be better prepared when the trial commences and can help the court's roll planners in drafting the court's schedule. Paradoxically, unscrupulous litigants may abuse time limits and employ excessive objections, unresponsive witnesses, and strategically prolonged

examinations. As before, courts should be alert to parties who abuse legal procedures and take appropriate disciplinary action when needed. Undue constraints on the prosecution can lead to justice miscarriages, while undue delay by the defence erodes justice. Because of these pitfalls, trial time limitations should be considered.[106]

2.5.4 **Judiciary to employ more judges**

Having many judges can encourage practitioners and civil society to believe in courts as their matters will be disposed of expediently; the outcome obtained too late might serve a different purpose. People should not be tempted to trust community justice because of the loopholes in our justice system. The number of cases that go to trial constantly declines in absolute and relative terms. Not only has the latest reform been ineffective in curbing time to disposition, but there still needs to be more to improve upon. Employing more judges assists in reducing the case backlogs, which makes it difficult to delay the finalisation of trials intentionally. Judicial capacity and independence are the fundamental keys to democracy. South Africa needs sufficient judges and presiding officers. Any political motive should not influence the appointment of judges. Employing more judges from practising attorneys, advocates, magistrates, and prosecutors will always boost the public and investors' confidence in the South African justice system. Judges have an increasingly key role in defining the rights of citizens in areas crucial for their well-being, such as health, work, industrial relations, human rights, social security, consumer rights, environmental rights, family relations, and civil rights.

Employing more judges is a practical way to accelerate judicial services, and the judiciary is expected to play its role in protecting and promoting the rights of individuals. In solving the congested court rolls, which lead to violation of the right to a speedy trial, other countries suggested that courts which have three judges or more should consider replacing them with one judge and other judges being given their own courts, which also suggests having more courtrooms and more court officials. There are some cases that one judge can handle without the need for the assistance of fellow judges.[107]

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[106] 2020 De Rubus.

[107] Konstantinos Kalliris & Theodore Alysandratos, 2023. "One judge to rule them all: Single-member courts as an answer to delays in criminal trials," Journal of Empirical Legal Studies, John Wiley & Sons, vol. 20(1), pages 233-268, March.

2.5.5 **Amendment of current legislation**

There is a need to amend current legislation such as the criminal procedure Act 51 of 1977 and the Constitution Act 108 of 1996. Criminal Procedure Act should be amended to the extent that it will guide presiding officers in trial management where there is reasonable evidence that the matter is delayed intentionally. The Constitution must also be amended to discuss the rights of the victims and complainants.

Section 34 of the Republic of South African Constitution,[108] indicates:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Section 35 focuses on the rights of the accused persons, and much has been said and clarified regarding the accused person's rights. Still, nothing is said about the rights of the victims and complainants under section 35 of the Constitution.

2.5.6 **Employing more investigating officers**

South African police services must employ a more efficient and functioning investigating team; for example, Marikana's issues were poorly investigated.[109] The SAPS is South Africa's principal law-enforcement body. Its vision is to create a safe and secure environment for all people in South Africa. The mission of the SAPS is to:

> Prevent and combat crimes that threaten the safety and security of any community, investigate any crimes threatening the safety and security of any community, ensure that offenders are brought to justice and participate in efforts to address the causes of crime.

The Detective Service Programme comprises the Specialised Investigations and Crime Investigations. The purpose of the division is to enable the investigative work of the SAPS, including providing support to investigators in terms of forensic evidence and criminal records. The division investigates, gathers, and analyses evidence to successfully prosecute offenders.

[108] Criminal Procedure Act.
[109] Justice postponed: what causes unreasonable delays in criminal trials? December 2020, DeRubus.

The SAPS should enhance investigative officers' programmes and training for quick investigation finalisation. They should prioritise hiring experts to investigate cases such as corruption; in most cases, investigating officers at SAPS have no tertiary or further qualification; they only have grade 12 as the highest qualification, which is a problem because even the type of statement they reduce in writing lacks quality and can have a lot of grammatical errors. There is a need to employ personnel with relevant qualifications and experience in SAPS's top management positions who have problem-solving abilities to assist the SAPS in achieving its mission and vision while being cost-effective.

2.5.7 **Strict Independence of NPA**

The vision of the NPA is to achieve justice in society so that people can live in freedom and security.[110] The mission of the NPA, guided by the Constitution, is to ensure justice to the victims of crime by prosecuting without fear, favour, or prejudice and working with partners and the public to solve and prevent crimes.[111]

The allegations of corruption against former president Jacob Zuma have made the South African justice system to be seen as less effective. In December 2007, Mr Zuma was charged with fraud, corruption, money laundering and racketeering from multi-billion Rand Arms Procurement contracts in the late 1990s. Just before the general elections of April 2009, the then acting National Director of Public Prosecutions, Mokotedi Mpshe, withdrew the charges against Jacob Zuma. The issue was sent to court, and seven years later, the Full Bench of the Gauteng Division in Pretoria ruled that Mpshe had ignored his oath of office and found the decision to withdraw charges irrational. The NPA should take reasonable steps to comply with its vision and mission. The NPA has legislation that they can rely on to prosecute without fear and favour. They can still use Vexatious Proceedings Act to stop frivolous prosecution.

In President of the Republic of South Africa and Another v Public Protector and Others, [112] the Court reiterated that:

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[110] Adv Mhlanga V & T Kewson, National Conference on Victim's Charter, https://www.justice.gov.za/VC/events/2012natconf/paper_npa.pdf (accessed on 16 February 2022).
[111] Same as above.
[112] *In President of the Republic of South Africa and Another v Public Protector and Others (55578/2019) [2020] ZAGPPHC 9.*

> Under section 32(1)(b) of the National Prosecuting Authority Act, the NPA enjoys prosecutorial independence and no organ of state, including the office of the Public Protector, may improperly interfere with, hinder, or obstruct the NPA in the exercise of its powers, duties, and functions. The Court found that in line with this prosecutorial independence and considering the Public Protector Act and the NPA Act, the Public Protector has no power to direct the NDPP to investigate any criminal offence and how to do this.

In *S v Ndudula,*[113] the Court held that:

> The prosecutor's duty was to seek justice and not to plunder after a conviction blindly and purposelessly at all costs. Prosecutors are expected to safeguard the rights of accused persons and the rights of the complainants, as reasonably possible, and disclose relevant prejudicial and beneficial information under the law and the requirements of a constitutionally fair trial.

The NPA should play its role to ensure the quick finalisation of criminal trials and protect the complainants' rights. The NPA should avoid selective prosecution as it might also contribute to unreasonable delays that might lead to applications for a permanent stay of prosecutions intended to delay and prevent criminal trials. The reference here is made to the well-known case of Schabir Shaik, which dates to 1990. The then National Director of Public Prosecutions, Bulelani Ngcuka, was criticised for selective prosecutions for charging Schabir Shaik without joining former president Mr Zuma as the co-accused or charging him then as it is arguable that both matters were trial-ready.[114]

After assessing the current evidence and charges brought against Mr Zuma, it showed that the state had a prima facie case of corruption against him all along. There was enough evidence to strongly believe that the state could prove their case beyond reasonable doubt.[115] It is contended that Mr Zuma received better treatment due to political reasons.[116]

There was much criticism for Zuma's delayed matter, which negatively impacted the South African justice system and economy.[117] The prosecutions should have enough evidence to prosecute, not to delay the prosecution in the name of further

[113] *S v Ndudula 2019 (1) SACR 609 (ECG).*
[114] *S v Yengeni* 2006 1 SACR 405 (T).
[115] *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA).
[116] Same as above.
[117] Sections 179(2) and (4) Constitution.

investigations",[118] though the NPA should avoid laying frivolous charges. The NPA should never forget that whether a whether the court will convict or not lies solely on the presiding officer. Considering the Shaik judgment, the NPA was expected to prosecute Mr Zuma when prosecuting Mr Schaik.[119]

The National Prosecuting Authority plays a crucial role in preparing and conducting criminal prosecutions. It is expected to always abide by its Act and the constitution, and all prosecutors are expected to work without fear or favour and prejudice and without being politically influenced. In *Democratic Alliance v President of the RSA*[120], the court ruled that:

> Regarding the conspectus of the evidence before us, we find that Mr Mpshe found himself under pressure, and he decided to discontinue the prosecution of Mr Zuma and consequently made an irrational decision. Considering the situation in which he found himself, Mr Mpshe ignored the importance of the oath of office, which demanded that he act independently and without fear or favour. Thus, the allegations against Mr McCarthy did not taint the envisaged prosecution against Mr Zuma. Mr Zuma should face the charges as outlined in the indictment.

2.5.8 **The use of The Vexatious Proceedings Act 3 of 1956**

This Act was introduced to protects rights of individuals against frivolous proceedings. Anyone who proves that a respondent has repeatedly initiated legal proceedings without appropriate grounds can benefit from the Act. The Act also ensures that frivolous lawsuits are not placed on the court roll, protecting parties against unnecessary legal costs, and avoiding wasting the state's resources. The respondent will no longer be allowed to initiate legal proceedings without the court's permission. The court may grant permission to a legal action if it is legitimate and has presumptive justifications.

In *Christensen NO v Richter,*[121] the first respondent was considered a vexatious litigant using section 2(1)(b) of the Act.[122] The estate was the target of several applications filed

[118] *NDPP v Zuma* (SCA) paras 27, 43
[119] Same as above.
[120] [2018] ZAGPPHC 836; [2019].
[121] *Christensen NO v Richter* 2017 JDR 1637 (GP).
[122] Vexatious Proceeding Act.

by the first respondent. The court held the following when deciding whether to declare the first respondent to be a vexatious litigant:

> The first respondent is a vexatious litigant. He should therefore be prevented from instituting any further legal proceedings against the estate and or its executors. I am satisfied under the circumstances that the applicants have made out a case for a final interdict. They have established a clear right for the granting of a final interdict. The applications launched by the first respondent need to be more specific and substantiated, and the balance of convenience favours the granting of the final interdict. The first respondent cannot continue to litigate as relentlessly as he does, disregarding court orders. This must stop. I am inclined to accept that the applicants have no alternative remedy to stop him from continuing his actions.

The court considered the constitutionality of Section 2 (1)(b) of the Act in *Beach and Others v Ernst and Young and Others*,[123] and the court stated that:

> *The provision does limit a person's right of access to the court. However, such limitation is reasonable and justifiable. While the right of access to court is essential, other equally crucial purposes justify the limitation created by the Act. These purposes include the effective functioning of the courts, the administration of justice, and the interests of innocent parties subjected to vexatious litigation. Such purposes are served by ensuring that the courts are neither swamped by matters without merit nor abused to victimise other members of society.*

The right to access court is indeed protected in Section 34 of the Republic of South Africa Constitution. It is also not in dispute that the said right could be limited in terms of Section 36 of the Constitution.[124] Courts should always observe public interest against vexatious litigants who institute legal proceedings without a reasonable basis but legal abuse processes or the right to access courts. The courts should also impose excessive costs against vexatious litigants to discourage them from abusing the legal procedure.[125]

Mr Zuma, has instituted satellite litigations on several occasions intended to delay and prevent justice to prevail, for instance, the discovery of transcripts of the conversation recorded in the spy tapes in *DA v Acting NDP.*[126]

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[123] *Beach and Others v Ernst and Young and Others*1999 (2) SA 116 (CC).
[124] Sec 34 of the Republic of South Africa Constitution.
[125] Maloka T.C, Biowatch shield, costs liability for abuse of process and crossfire litigation ,2020, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S168258532020000100013&lng=en&nrm=iso(accessed on 01 March 2022).
[126] *DA v Acting NDPP* 2016 (2) SACR 1 (GP).

The unending litigation is intended to delay and prevent justice from prevailing. In *Moyo v Minister of Justice & Constitutional Development*, Wallis JA indicated that sometimes attorneys are part of satellite litigation institutions and intend to deal with today's criminal trials.[127] The courts should strongly discourage the abuse of the right to access courts by instituting frivolous proceedings to delay and prevent justice from prevailing. The former president of South Africa, Mr Zuma, initiated several applications in courts, but most of his applications were unsuccessful. However, that did not deter him from creating further applications because he intended not to seek redress or justice, but to delay court proceedings.

2.5.9 **Court hours adherence**

Courts in South Africa should have a set of practice directives regarding administration and procedure. These directives should be equally applicable and binding on all courts in South Africa. The court should commence at 9:00 am and run strictly until 4:00 pm, and police dockets must reach the prosecutor the day before the matter is heard for the state Prosecutor to make an informed and objective decision. This will prevent prosecutors from quickly scanning a police docket in the morning and proceeding without adequate information, leading to further delays and an infringement on the right to a fair and speedy trial.

2.5.10 **Capacitating laboratories**

There is a considerable need to maximise the capacity of our laboratories in South Africa, and it is well known that South Africa is facing a severe DNA backlog which in 2022 exceeded 210,000 cases. It still needs to be clarified when the results will be released in all outstanding cases. The court is withdrawing cases because of the outstanding DNA results, which lead to an application for a permanent stay of prosecutions. Some accused persons then get an opportunity to abuse their right to a fair trial by starting satellite litigations and endless appeals to avoid justice. This is a threat to the whole country as dangerous criminals are being removed from lawful custody due to justice system's

[127] *Moyo v Minister of Justice & Constitutional Development*, [2018] ZASCA.

loopholes, and that violates the rights of the complainants who need justice being served. Unfortunately, some complainants lose their lives before hearing their matters in court.[128]

2.6 Conclusions

This chapter discussed the impact of satellite litigations, the rationale behind satellite litigations and how to curb satellite litigations that are intended to delay and avoid the commencement of trials. It also referred to a well-known trial with multiple satellite ligations, the corruption case against the former South African President, Mr Jacob Zuma. The trials were delayed by instituting different satellite litigations and appealing the outcomes, to an extent where the state lost some key witnesses. Some witnesses are also likely to lose their memory.

Role players such as the NPA, SAPS and the judiciary should play their roles in curbing the institution of satellite litigations aimed at delaying criminal trials. This chapter also demonstrated how important the rule of law is to the development of the economy. The rule of law promotes development by guaranteeing due process, establishing remedies for rights violations, and strengthening the voices of individuals and communities. It is recommended that trials commence and finalise within reasonable time for witnesses to remember the events.[129]

justice that is unduly delayed is not meaningful to the victims and complainants. Court managers and the judiciary should facilitate the employment of more presiding officers and create more courts to finalise criminal trials quickly. This chapter has shown that satellite litigations negatively affect the rights of victims and complainants and negatively impact our economy.

[128] Van Der Linde DC “Once, Twice, Three Times Delayed: Considering a Permanent Stay of Prosecution in Rodrigues v The National Director of Public Prosecutions" PER / PELJ 2022(25) – DOI.
[129] D John, The effects of delay on long-term memory for witnessed events, January 2007, https://www.researchgate.net/publication/232481010_The_effects_of_delay_on_long-term_memory_for_witnessed_events (accessed on the 04/ September/2021).

CHAPTER 3: RIGHTS-BASED APPROACH TO SATELLITE LITIGATION

3.1 Introduction

This chapter deals with the right based approach to satellite litigations focusing on South African and international laws and its implications on the justice system in South Africa. Court's resources are wasted due to the abuse of the right to fair trial. The most well-known example of satellite litigation is by former president Jacob Zuma,[130] deploying every possible legal device to prevent his prosecution arising from alleged corruption in the arms deal from proceeding. In every single court case, time is a crucial component of fairness. Delaying court proceedings results in exploiting the right to a fair trial. Justice systems should not have loopholes that benefit certain groups of people while other groups are being disadvantaged.

3.2 Section 34 of the Republic of South Africa Constitution

Everyone is guaranteed the right of access to the courts in terms of Section 34,[131] which states that:

> everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The rule of law expresses a fundamental value by guaranteeing everyone the right to seek the assistance of a court and ensuring that disputes are resolved in an orderly and fair manner by courts.[132] This section when read together with its subsequent section, gives more details on the rights of accused persons, unfortunately, nothing specific is said on the rights on the victims. The NPA and courts must use their wisdom to get interpretations that will completely favour the rights of the victims. To check if this right can be limited, we consider the provisions of section 36 of the constitution.

3.3 Vexatious Proceedings Act 3 of 1956

Many accused persons institute satellite litigations to prevent criminal trials from proceeding. Victims are protected in terms of this Act, Section 2(1)(b) which states that:

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[130] Bhengu C (note 12 above).
[131] Constitution (Sec 34).
[132] Same as above.

> Complainants are to approach National Prosecuting Authority or any other relevant institutions to apply Section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 as amended by Act 3 of 1995 if they believe that their matters are being intentionally delayed by way of instituting satellite litigations aimed at delaying and avoiding their trials which is their constitutional right.

This is because in *Brinish and Another v Ernst & Young and Others,*[133] the constitutional court ruled that section 2(1)(b) was constitutional. Complaints and victims still enjoy the protection under Vexatious Act, the question would be: Are courts doing enough to protect the rights of the complainants?

In re Anastasiadis,[134] The court determined that South African courts lack the inherent authority to impose a general restriction to stop frivolous litigations. Our common law gives the courts powers and competence to halt vexatious and frivolous litigation that abuses its processes after looking at the evidence submitted by both parties in its totality. The aggrieved parties or complainants must apply for the application of Vexatious Act in courts as high courts enjoy the inherent power to strike out vexatious claims.

3.4 Complainants and Victim's Right to a speedy trial

Many jurisdictions have a provision in their legislation that outlines the rights of the victims of crime, including the right to a speedy trial. With these rights enshrined, victims are given protection and the courage to follow up on the progress of their matter for swift finalisation. In terms of 18 U.S. Code § 3771, Crime Victims' Rights, Sections (a) (7), victims have the right to a speedy trial of their cases. In practice, and often in law, the right to a speedy trial limits the duration of the trial and guards against unreasonable delays. Courts should always consider the potential prejudice to the victims.[135]

Well-functioning courts give positive hope to victims. Furthermore, a lengthy trial process can also be financially burdensome for victims as they may need to take time off work or pay for legal representation. In other countries like Ethiopia, which are pursuing finalising their matters as swiftly as possible, the presiding officers avoid multiple adjournments and request for satellite litigations by simply ruling against it if there are no strong persuasive

[133] *1999 (2) SA 116 (CC).*
[134] In re Anastasiadis 1955 (2) SA 220 (W).
[135] 18 U.S. Code § 3771 - Crime victims' rights, Sections (a)(7).

reasons. The judicial reform has set targets and time frames that should be monitored to protect the rights of victims and complainants. Furthermore, In Ethiopia, the performance of judges is rated based on the number of finalised cases; judges who grant unreasonable postponements are rated low. These force judges to limit unnecessary postponements and grant applications intended to delay the process. [136]

3.5 Section 342A of the CPA

Section 342A of the CPA was introduced to curb unreasonable delay in criminal court proceedings.[137] The South African cabinet directed the Departments of Justice, Crime Prevention, and Security to conduct and review the criminal justice system in 2003 to identify challenges and obstacles within the system and reform and make changes to improve efficiency and effectiveness.[138] This section was introduced after the reform commission's investigation into the delays in finalising criminal cases. The motivation was based on the causes of delays in criminal case disposition. This section was introduced to get trial proceedings finalised speedily.

This section empowers courts to identify and solve the problems of unreasonable delays, but few prosecutors and presiding officers use this power effectively. Trial court presiding officers must apply the procedural rules justly, fairly, and firmly, and appellate courts must encourage this fair and firm practice. Judges and magistrates can accomplish a lot by effectively managing trials and parties. The public must trust the criminal justice system to act quickly to fulfil its educational and conflict resolution function, that is the message that must be instilled in all those who serve the organisation. Justice delayed is justice denied from every angle.[139]

3.6 Refusal of further postponements in terms of S342 A

The court's refusal of postponements is another statutory remedy for preventing further court delays. Section 342A (3)(a), states that:

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[136] Edward L, addressing case delays caused by multiple adjournments, 14 June 2016, https://assets.publishing.service.gov.uk/media/57a9c983e5274a0f6c000006/HDQ1374.pdf (accessed 16 January 2022).
[137] Criminal Procedure Act 51 of 1977.
[138] Same as above.
[139] S342 (A) (3) (f) of Act 51 of 1977.

> if the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any orders it deems appropriate to eliminate the delay or prevent further delay or prejudice, including an order refusing further postponements of proceedings.

The court can apply Section 342A (3)(a) and rule that no further postponement under this provision will be granted. It is refusing to postpone the proceedings any further because actual prejudice is now being caused to the accused and the proceedings are being delayed in an unreasonable manner. This decision may be made if the court determines that the state had sufficient time to prepare its case and that further postponements would be unjustified. In such cases, the court may proceed with the trial or make a ruling based on the evidence presented thus far. Section 342A applies first to the remedy of refusing postponement.

In the case of *Madiba v Director Public Prosecution,*[140] the case was appealed, and the court had to assess whether the court *aquo* should have consented to offer the solution of rejecting a further postponement or striking the case off the roll.[141]

The constitutional amendments introduced essential protection of suspects and accused's rights. Appellate courts need to consider providing stronger support to the lower court's presiding officers who refuse postponements they believe to be illegal or intended to thwart the prosecution. Policies to keep an eye on court rolls are to be observed, enforcing this strategy strongly will help reduce excessive court delays.

When defending a client, trial lawyers can obtain advance fee coverage. In appropriate cases, presiding officers should require private-practice lawyers to proceed with a trial, even if unpaid. It is even unethical for an attorney to tell the court that he has been instructed fully to proceed with the trial, but in the middle of the case, he raises the issue of lack of financial instructions.[142]

Courts should refuse all unreasonable postponements requested by the state, the same thing should happen to an accused person who constantly postpones his case for further evidence to delay the finalisation of the matter. The court should order that his case be

[140] *Madiba v Director Public Prosecution [2016] ZANCHC 30.*
[141] Same as above.
[142] 2020 de rubus.

closed and the court to give an outcome based on the submitted evidence.[143] For the court to order the party to close its case, it must be satisfied that the postponements will not prejudice the other party.[144]

Presiding officers should assist by making it difficult for accused persons who intend to abuse their right to a fair trial. Satellite litigations are mainly done by wealthy accused persons because it is very costly to institute several litigations in high courts. The problem is when the state or taxpayers' money must pay the said legal fees. In the Zuma case, the attorney for former President Jacob Zuma was no longer financially briefed, so he had to terminate the counsel's brief due to Mr Zuma's uncertainty and lack of funds.

In the case of *Wild and Another v Hoffer No and others,*[145] the court concluded that the accused themselves were partly responsible for the three-year delay between arrest and trial. The request for a permanent stay was denied.[146]

Judges must additionally expedite trials to ensure intentional delays do not further victimise the crime victim during an already challenging process. A typical approach in some jurisdictions is for the state prosecutor to call witnesses to court and release them without attending to them. They are not called inside the courtroom to listen to the proceedings when they are in court. Sometimes the prosecutor also applies to excuse them because the accused intends to plead guilty; they should be allowed to listen to that guilty plea and benefit from the subsequent proceedings such as mitigating and aggravating stages. The defendants, on the other hand, can sit in the courtroom and get support from their family members on trial, whereas the victims are left out. Judges have the authority to sentence offenders for the crimes they have been found guilty of. Judges may be required to include information about the victim's impact. Complainants should be part of the trial even if their evidence is unnecessary. Mere attendance is justice to them.[147]

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[143] Ngalo L, Z, the right to a fair trial: an analysis of s342(A) of the Criminal Procedure Act and permanent stay of prosecution, University of KwaZulu Natal, (2017).
[144] See note 44 above.
[145] *Wild and Another v Hoffer No and others* 1998 (3) SA 695 (CC).
[146] Act 51 of 1977.
[147] A handbook on justice for victims, (1999)69.

3.7 Striking the matter off the court roll in terms of Section 342A of CPA, 51 of 1977

The court can remove the matter from the roll if it believes the state is delaying it. The state has the right to request for further postponements to get other evidence, such as DNA results. Unfortunately, South African laboratories have much work pending. As a result, they release the results extremely late. However, before striking the matter off the roll, the court is bound to look at the community's interest, the seriousness of the charge, and the accused's right to a speedy trial. The remedy of temporarily removing the matter for further investigations harms the victims less. It becomes problematic if the accused gets a permanent order to stay the matter. These provisions apply to the accused persons who have never pleaded to the charges.[148]

In S v Ndibe,[149] The case dealt with a review matter; the accused was arrested in 2000 after being found in possession of drugs. The accused's legal representative objected to further postponement after several postponements because the docket was not brought before the court on several occasions. As a result, the court refused postponement and removed the matter of the roll because the entire delay was caused solely by the state and not by the accused.[150]

In *S v Joseph,*[151] the court removed the matter from the roll after the matter was postponed on several occasions for the accused to be admitted to the psychiatric hospital as referred to in sections 77 and 79 of the CPA. The accused was not accepted due to the unavailability of a bed or resources. The court sent the matter to high court for review. The high court ruled that the matter was struck off the roll prematurely because the prosecution did not directly cause the delay.[152] The court determined that because the accused was joined with the other five defendants, there would be some delays. The court

[148] Criminal Procedure Act 51 of 1977.
[149] Same as above.
[150] *S v Ndibe* (2012) ZAWCHC 245.
[151] *S v Joseph* 2007 (1) SACR 496 (W*).*
[152] In *Zanner v Director of Public Prosecutions*, Johannesburg 2006 (2) SACR 45 (SCA).

decided that no further postponement would be denied because the state was not to be blamed for the delay.[153]

3.8 The African Charter on Human and Peoples' Rights

South Africa acceded to the African Charter on the 9th of July 1996. The Parliament of South Africa agreed to adherence to the Charter. This declaration expresses its position that state parties should consult on a variety of issues.[154] Section 231(4) of the Constitution provides that:

> any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that Parliament has approved is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

While national legislation has not incorporated the Charter into South African law, Section 233 states that a court must favour reasonable and consistent interpretations of the law over interpretations that are not. South Africa has enacted many legislations to be used aligned with the charter.[155] Article 7 (1) (d) of the African Charter on Human and Peoples Rights indicate that "every individual has the right to be tried by an impartial court or tribunal within a reasonable time".

3.9 The United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power

South Africa should also benefit from OHCHR which protects the victims' rights. It indicates that victims should be treated respectfully and, where possible, the state should provide redress. Some offences need urgent redress; victims can only get the redress if the matter is finalised; section 300 of the CPA compensates the victims that suffered loss or damage. It becomes practically impossible to utilise this section if the matter is still pending. South African courts can use international law principles or rules to combat the

[153] Same as above.
[154] African Charter on Human and Peoples' Rights, https://www.justice.gov.za/policy/african%20charter/africancharter.htm#:~:text=South%20Africa%20acceded%20to%20the,be%20accompanied%20by%20a%20declaration, (accessed on the 20 February 2022).
[155] sec 231 (4) of the constitution.

threat of satellite litigations and protect the rights of victims. Courts should guard against applications that are brought to delay matters intentionally. Therefore, South Africa is highly expected to strive against protection of victims' rights.[156]

3.10 International Covenant on Civil and Political Rights (ICCPR)

Article 14 (3) (c) of the International Covenant on Civil and Political Rights provides for the "right to be tried without undue delay".[157] This section is very helpful to victims of crimes, even though it has specifically push swift finalisation of accused's trials, other stake holders such as SAPS, NPA and judiciary would be expected to play their roles in quick finalisations. Finalisation which is intended to protect the rights of the accused person also benefits the victims of crimes to have a fair closure on their cases.

3.11 The Right to a fair hearing

There is an obligation on judiciary to be independent and impartial, as well as respect for expeditious proceedings.[158] When proceedings take an unreasonable amount of time to complete, the parties' right to a fair hearing is violated. In *Munoz Hermona v Peru,*[159] the United Nations Human Rights Committee held that:

> the concept of fair hearing necessarily entails that justice be rendered without undue delay and that the inability of the state party to explain the delay constituted an aggravation of the violation of the principle of fair hearing.

3.12 Conclusion

From the above discussion, it is now apparent that satellite litigations are instituted to delay and avoid criminal trials to proceed to court to get justice. Still, when court proceedings are delayed, it brings frustration. South African courts should implement the legislations mentioned above to avoid unreasonable postponements, delay of proceedings and delaying public interest in getting justice. The South African justice system has laws in place to curb unjustified delays.

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[156] A handbook on justice for victims, United Nations Office for drug control and crime prevention; United Nations, 1999.
[157] ICCPR art 14(3)(c).
[158] No. 203/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 200 (1988).
[159] Same as above.

CHAPTER 4: LESSONS TO BE LEARNED BY SOUTH AFRICA FROM OTHER COUNTRIES IN A BID TO ELIMINATE SATELLITE LITIGATIONS (USA, CANADA, AND ITALY)

4.1 Introduction

This chapter seeks to draw lessons for South Africa to learn from the USA, Italy, and Canada regarding how to curb satellite litigation intended to delay and avoid criminal court trials and prevent abuse of the right of access to courts. Many vexatious litigants abuse the right of access to court by instituting vexatious proceedings and satellite litigations that lack basis only to delay and avoid trials. Section 39(1) (b) of the Constitution of the Republic of South Africa states that "when interpreting the bill of rights, a court, tribunal, or forum must consider international law." Therefore, it becomes vital for South Africa to learn from developed countries how they have eradicated intentional court delaying tactics. Italy and Canada use an adversarial legal system like South Africa. In contrast, the USA uses an inquisitorial legal system. However, there is a lot that South Africa can learn from the USA, Italy, and Canada, as they are developed countries with successful justice systems.

4.2 The legal position in the USA

4.2.1 The Speedy Trial ACT 18 U.S.C. §§ 3161-74

The USA introduced the Speedy Trial Act of 1974 and further amendments on the 2nd of August 1979.[160] The right to a speedy trial was introduced to protect the rights of the accused and victims of crime.[161] The Act provides time frames that should be followed from the beginning to the finalisation of the trial to avoid intentional delays that might

[160] The United States of, Department of Justice, https://www.justice.gov/archives/jm/criminal-resource-manual-628-speedy-trial-act-1974#:~:text=Title%20I%20of%20the%20Speedy,%C2%A7%C2%A7%203161%2D3174. (Accessed on 06 March 2022).

[161] Eliot T. Revisiting the right to a speedy trial: reconciling the sixth amendment with the speedy TRIAL ACT, file:///C:/Users/Ndivhudzannyi.Masind/Downloads/7727-revisiting-the-right-to-a-speedy-trial-reconciling-the-sixth-amendment-with-the-speedy-trial-act.pdf (accessed on 01 March 2022).

violate the rights of access to justice and a speedy trial.[162] Exceptions about allocated time limits are introduced to eradicate criminal trial delays.[163]

According to the Act, information or indictments must be filed within 30 days of the arrest date or the date the summons was served. Trial must typically begin within 70 days of the filing of charges or, if later, the defendant's appearance before a judicial officer in the relevant court. When the 70-day limit established by Section 3161 expires, the trial judge may dismiss the case with prejudice based on statutory factors.[164] When the matter is struck off the roll, the number of days will still apply when the issue is reinstated in the registration. Vermont, Arizona, Tennessee, and Utah have already implemented constitutional amendments in the general interest of all victims and complainants of criminal trials to access speedy trials. Arizona has a victims' bill of rights to protect victims' rights and promote the right to a speedy trial.

The legislature expresses its legislative intent and the purpose of the bill of rights for crime victims clearly and unequivocally. Because the right to a speedy trial is included in this section of the Arizona Constitution, the legislature expressly states that it intends to ensure that this right aids in the healing of victims and that state employees are responsible for enforcing this right.[165]

4.2.2 Enforcement of Victims' Rights to a speedy trial

The attorney general or public prosecutors lawfully represent victims and complainants of criminal offences, as victims' rights are outlined in the victims' charter.[166] This gives enough weapons to oppose the constant postponement of cases brought by the accused persons to delay and avoid trials. When an accused starts a satellite litigation, the state will fight such postponements by referring to the victims' rights to a speedy trial.

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[162] Greg O, Speedy Justice, and Timeless Delays: The Validity of Open-Ended "Ends-of-Justice" Continuances Under the Speedy Trial Act, https://chicagounbound.uchicago.edu/cgi//viewcontent.cgi?//article=5641&context=uclrev(accessed on 01 March 2022).
[163] The Speedy Trial Act of 1974 as Amended.18 U.S.C. § 3161(c)(1).
[164] 18 U. S.C. § 3162 (a) (2).
[165] 18 U. S. Code § 3771, Crime victims' rights.
[166] Same as above.

4.2.3 Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process

Courts have the power to sanction an attorney or any legal representative who intentionally causes court delays by abusing the judicial process. In the United States, defendants who prolong the pre-trial phase through their actions may lose their right to a speedy trial. Lawyers contribute to the overcrowding of the courts by abusing the judicial process in various ways, including failing to show up for trials on time, responding to depositions or interrogatories, making frivolous objections at trial, and bringing in meritless actions. Some attorneys are cautious about the delay because they know the reputations that follow when the court rules against them for delaying a trial. They must write reasons to the lawyers' regulatory bodies stating why they should not be struck off the roll for such misconduct. Section 1927 of Title 28 of the United States Code; Rule 37 of the Federal Rules of Civil Procedure; and the inherent power of courts to enact rules governing the conduct of attorneys are all examples of such rules. Finally, two non-judicial sanctions are discussed briefly: disciplinary proceedings and private party actions.[167]

Punishing an attorney for intentionally delaying or obstructing the judicial process has long been regarded as a power inherent in all courts, necessary to maintain order and ensure that justice is administered fairly. *In Ex parte Robinson,*[168] *86 U.S. (19 Wall.) 505, 510 (1873)*, the Court stated:

> The power to punish for contempt is inherent in all courts; its existence is essential to preserving order in judicial proceedings, the enforcement of the court's judgments, charges, and writs, and, consequently, the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they possessed this power. For a history of the development of the contempt power, see Comment.

Though attorneys are aware of the sanctions and the reputation thereof, they still seem adept in using delay tactics in courts; however, courts have set some requirements to be met before finding an attorney guilty of intentionally delaying criminal matters. In *Sykes v the United States*,[169] the attorney failed to appear on the trial date because he said he

[167] Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3916&context=uclrev (accessed on 01 March 2022).
[168] *In Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).
[169] 564 U.S. 1 (2011).

misunderstood the trial date. The failure to appear was deemed negligent by the trial court, and he was fined for contempt. The court of appeals, however, overturned the contempt conviction, stating that an essential element of intention had not been established.[170]

4.2.4 Rule 37 of Federal Rules of Civil Procedure 1927

This rule is pivotal to curbing attorneys who assist clients to intentionally delay trials. This rule states:

> that the court can order attorneys who fail to participate in good faith in the discovery process to pay the expenses, including attorney's fees, incurred by other parties because of that failure.

This section was introduced for quick finalisation of matters in court after it was discovered that some attorneys assist clients in delaying and avoiding their cases. Before, no sanctions would be taken against the attorney or the legal representative. Now, with the inception of rule 37, any legal representative who stops to act in good faith during discovery should face the law. This section promotes speedy trials. Courts should always guard against unreasonable delays and frivolous litigations.[171]

4.2.5 Section 391.7 of Code of Civil Procedure

In protecting victim rights, courts should always utilise Section 391.7 indicates that:

> (a) In addition to any other relief provided in this title, the court may, on its motion or the motion of any party, enter a prefilling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. A vexatious litigant's disobedience of the order may be punished as a contempt of court. (b) The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the defendants' benefit as provided in Section 391.3. (c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefilling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing.

Presiding officers are empowered to grant an order to prevent Vexatious litigants from initiating further frivolous litigation. The court can grant that order *mero mutu.*

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[170] Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3916&context=uclrev (accessed on 01 March 2022).

[171] Rule 37 of Federal Rules of Civil Procedure 1927.

4.2.6 Prevention of vexatious litigation

Courts have introduced different ways to curb vexatious litigation, which is litigation that abuses the court's resources, right to access courts, judicial process, and tempts the other party's rights.[172] The court can declare a person a vexatious litigant after the person has brought several frivolous applications. Other countries have enlisted vexatious litigants who must get the prior approval of the judge to institute further proceedings.[173]

California passed the first vexatious litigant law in the United States in 1963. Several states, including Florida, Hawaii, Ohio, and Texas, passed legislation in 2007 to curb abuse of the right of access to the courts and ensure that courts operate efficiently without being slowed down by frivolous cases.[174]

In Chaffers' case, Wright J. expressed that:

> The test to be applied is an objective one made clear by Ormerod L.J. in the Court of Appeal decision in In Re Vernazza. In rejecting counsel's submission that the test was subjective, which had to be decided by considering whether the person instituting the proceedings acted maliciously or otherwise in good faith, his Lordship further indicated that it is not the right way to look at the matter. The words of the section are 'without any reasonable ground instituted vexatious legal proceedings. But, in the court's opinion, the proceedings are vexatious, and there is no good ground for bringing them, then they are within the category at which this section aims.[175]

4.2.7 The Use of Technology in USA Courts

It is proven in many jurisdictions that courtroom technology makes an efficient justice system. The use of technology has sped up trials by up to fifty percent; it is further believed that most technologies are user-friendly. However, some people are still struggling to adjust to the digital courts' operations; witnesses are called to testify via conferencing software, which is also a solution during this COVID-19 pandemic. The use

[172] Vexatious litigation,2 March 2022, https://en.wikipedia.org/wiki/Vexatious_litigation#cite_note-alv-2 (accessed on 05 March 2022).
[173] Alvin Stauber, "Litigious Paranoia: Confronting and Controlling Abusive Litigation in The United States, The United Kingdom", International Review of Business Research Papers, Vol.5 No. 1 January 2009, pp.11- 27.
[174] Rosalind D & George W (2015). The High Court, the Constitution and Australian Politics. Cambridge University Press. p. 133.
[175] Smith S, vexatious litigants, and their judicial control - the Victorian experience, http://classic.austlii.edu.au/au/journals/MonashULawRw/1989/4.pdf (accessed on 01 March 2022).

of court technology also makes it easier to access information and keeps the documents safe, as some documents are filed electronically.[176]

Many countries use video conferencing technology to postpone trials and hear bail applications. In legal proceedings, evidence can be managed and presented with the aid of computerised litigation support systems. The technology used throughout the trial process must remain under the court's authority.[177]

It becomes challenging to delay court proceedings where the roll is correctly managed because even if you can request a postponement, the court will provide a very close date. Even if the attorney can institute satellite litigations, the matter might be finalised quickly. Still, in South Africa, it is simple to use delaying tactics in criminal courts because the trial roll is congested with trials.

4.3 The legal position in Canada

4.3.1 The use of the Supreme Court Act, S.Y.2013, c.15 to reduce satellite litigation, and frivolous and vexatious proceedings in Canada

The Supreme Court Act, S.Y. 2013, c. 15, provides in s. 7. (1) that:

> '' If on the application or its own motion, the Court is satisfied that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may, after giving notice to the Attorney General of Yukon and giving the person the opportunity to be heard, order that except by leave of the Court (a) the person must not institute a proceeding on behalf of themselves or another person; or (b) a proceeding previously instituted by the person must not be continued.''

In *Fuhgeh v. Stewart*,[178] the court discouraged the abuse of the right to access courts by vexatious litigants who institute baseless litigations. The court further emphasised that it does not limit any person's right to exhaust all available remedies or approach all appeals

[176] Brooks L, 3 ways courtroom technology can impact court cases, 27 March 2019, https://www.toomuchatstake.com/3-ways-courtroom-technology-can-impact-court-cases/ (accessed on 01 March 2022).
[177] Anne Wallace, Technology, and the Judiciary: The Use of Technology in the Criminal Trial Process, Technology, and the Judiciary: The Use of Technology in the Criminal Trial Process (Accessed on 01 March 2022).
[178] *Fuhgeh v. Stewart*, 2021 ONSC 3053 (CanLII).

courts. Still, the court will always be cautious about such litigations if the person will still lose the case at the end of the day.

In the appeal case of *Currie v Halton Regional Police Services Board,*[179] the appeal judge indicated that it could not be said that a person should be declared a vexatious litigant after bringing the matter to court many times. Each case must be assessed based on its own merits. It is difficult to quickly declare a vexatious litigant because that person has the right to institute satellite litigations and can appeal until they exhaust available remedies. In South Africa, the perfect example is the case of the former president of South Africa, Mr. Jacob Zuma, who has brought countless applications, satellite litigations and appeals to which most of them were unsuccessful. One can argue that the intention was to delay and avoid a trial. The question will be why the NPA did not apply to the court to have him declared a vexatious litigant. Though the Vexatious Act cannot fully solve the problem of intentional delay tactics in courts, it still gives a right to the vexatious litigant to get permission to institute further proceedings. Approaching the court to obtain such consent will also be time-consuming because such an application can be made while another primary matter is pending the finalisation of such a case.

In Foy v. Foy[180], Howland, C.J.O. said:

> Under the Vexatious Proceedings Act, R.S.O. 1970, c. 481, the word "vexatious" has not been clearly defined. Under the Act, the legal proceedings must be vexatious and must also have been instituted without reasonable ground. In many of the reported decisions, the legal proceedings have been considered vexatious because they were initiated without a rational basis. As a result, the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is bringing one or more actions to determine an issue that a Court of competent jurisdiction has already decided.

It is disturbing that many litigants bring proceedings without the prospect of success. It is an expensive litigation in which the other party will be forced to pay for attorneys. [181]

[179] *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815.
[180] *Foy v. Foy* (No. 2) (1979), 1979 CanLII 1631 (ON CA), 26 O.R. (2d) 220 at 226.
[181] https://www.fieldlaw.com/News-Views-Events/192402/Halting-Vexatious-Litigants-in-Their-Tracks?#utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed 01 March 2022).

4.3.2 Appointment of enough judges

The Canadian government decided to employ more judges in criminal courts to reduce the number of old cases and the number of cases on the roll. Hiring more judges is a permanent solution that guarantees the criminal justice system is responsive, faster, and fair.[182]

More than 475 judges for the Supreme Court have been appointed since November 2015. These outstanding jurists are exemplary of everything that makes Canada so strong. Moreover, half of the judges are women, and the appointments represent the growing numbers of visible minorities, indigenous peoples, and people who self-identify as disabled. Canada has proven that appointing many judges can assist in managing the court roll and having fewer delayed matters.

4.3.3 Judicial independence

The Canadian Constitution states that the judiciary is independent of the executive and legislature, allowing judges to make decisions free of bias and based solely on facts and the law. Every Canadian has the right to a fair trial and judgment by judges who are not biased. The law in Canada has constitutional provisions that guarantee the right to an independent and impartial court.[183]

4.3.4 Amending current legislations

To enhance equal access to justice and prompt decisions in criminal court trials, the Canadian government has amended the Criminal Code, the Youth Criminal Justice Act (S.C. 2002, c.1), and other Acts. It is done in response to the Jordan decision from the Supreme Court of Canada in 2016, which introduced acute deadlines for finalising criminal cases and stated that if they are not fulfilled, the proceedings must be stopped. The Canadian government argues that the ongoing revision of the law and the development of new tools for crime control are major reasons for the country's dropping crime rate. The rights of complainants and victims may be violated, which could have a

[182] CBC News, Attorney General to hire more judges, lawyers to shorten trial wait times, 01 December 2016, https://www.cbc.ca/news/canada/ottawa/ontario-justice-hires-trial-lengths-1.3876204 (accessed on the 03 November 2021).
[183] Canadian government, the judiciary, 01 September 2021, https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html(accessed on 17 February 2022).

detrimental effect on them. People can undermine court due to excessive delays.[184]The amendments are intended to have a justice system which is accessible, and practical, while protecting public safety. They also aim to address the overrepresentation of indigenous peoples and vulnerable populations, who are more likely to be denied bail or have their bail conditions tightened if released.[185]

4.3.5 Case and Case Flow Management by the Judiciary

The period of finalisation of criminal trials differs across the world because chief judges and trial judges have different methods for managing cases and case flow. Case management is used to control individual criminal processes, whereas case flow management controls how criminal cases are handled. Judges must make sure that they successfully manage courtroom operations through case management to guarantee that the issues before them are quickly resolved. Some witnesses said that chief judges might receive little to no management training, despite the former Justice Rolland's assertion that such training is occasionally accessible.[186]

Judges are the managers of their courtrooms, and they are expected to apply and interpret the law, [187] for judges to deliver swift finalisation they should also be given enough court's resources. Judges should consider the rules and elements that determine deadlines and time restrictions for preliminary motions, as well as steps that responsible attorneys should take to assist the court in promoting fair and effective criminal trials. The Committee accentuates how crucial it is to give judges sufficient case management training. The administration of judicial cases and case flow across Canada should be evaluated in the future to see if it has improved.

Judges are urged to push for a shift in the culture of the criminal justice system. The statute gives them more powerful tools to manage the cases they have before them,

[184] Canada Government, Reducing Delays and Modernizing the Criminal Justice System, 7 July 2021, https://www.justice.gc.ca/eng/cj-jp/redu/index.html (accessed on the 17 February 2022).
[185] Same as above.
[186]OTTAWA, state of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, April 13, 2016, https://sencanada.ca/en/Content/Sen/committee/421/lcjc/06ev-52482-e (accessed on 10 January 2021).
[187] Justice Law Canada, https://laws-lois.justice.gc.ca/eng/acts/C-46/index.html (accessed on 11 January 2021).

strengthening their case management abilities to support them in this role. Judges in charge of case management have also been granted additional control over the admissibility of evidence and the site of the trial. It is a method intended to hasten the resolution of a criminal case.[188] South African courts also use case flow management to control and reduce the number of cases on the docket; they have introduced court-annexed mediations, and the high court encourages all matters to be sent to mediation first in accordance with Rule 41A.[189]

4.3.6 Provide adequate Legal Aid

Accused persons are encouraged to apply for legal aid assistance for all offences if they qualify. Judges have realised that trials proceeding with an unrepresented accused person take time to complete as the accused person will not understand some criminal trial steps such as admissions and confessions. Access to justice is aided by legal aid services for those who are poor and unable to afford a lawyer on their own. The federal government subsidises legal aid services in the provinces and territories.[190]

4.3.7 Canada Conducting Inquiries to eradicate court delays

In Canada, they use preliminary investigations to evaluate if there is sufficient evidence to bring the accused to trial. They are used by both the Crown and the accused to test the case's evidence, among other things. The method is applied differently in different provinces, and some claim that its purpose has been greatly diminished by the Crown's requirement to give the accused all relevant evidence relating to their allegations. A preliminary investigation can only be ordered for an adult suspected of a felony punishable by 14 years or more in prison under the new law. The preliminary inquiry judge may also restrict the matters to be investigated and the witnesses to be heard. These measures will reduce the number of preliminary investigations while ensuring that those charged with the most serious crimes have access to them. This can save court time and

[188] Same as above.
[189] Rule 41A.
[190] Canada, Department of Justice, https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/p1.html (accessed on the 11 November 2021).

reduce stress for some witnesses and victims, such as sexual assault survivors, who would otherwise have to testify twice - once at the preliminary inquiry and again at trial. The Senate of Canada authorized the Standing Senate Committee on Legal and Constitutional Affairs (the Committee) on January 28, 2016, to investigate delays in Canada's criminal justice system and the roles of the federal government and Parliament in addressing such delays. [191]

4.3.8 The use of technology during the Covid 19 pandemic

The Canadian government introduced new legislation to improve the operation of the criminal justice system in response to the delays caused by the COVID-19 pandemic. The government is also committed to increasing the use of technology in all Canadian courts to keep Canadians safe and improve the criminal justice system's efficiency, accessibility, and effectiveness. The pandemic has generated and exacerbated problems and constraints in the criminal justice system. To address these difficulties, Canada's criminal courts have been transforming and modernizing its courts, however, training, and further resources should still be provided.[192]

These new amendments intend to make justice accessible to everyone, including people who are staying in rural areas. All courts in rural areas are given preference for the installation of the technology.[193] The proposed changes aim to broaden systems that allow accused persons to attend most criminal hearings remotely through video conference or audio conference, with consent, at the discretion of the court, and with other relevant precautions. The suggested revisions would make distant appearances available in appropriate circumstances, thereby limiting the spread of COVID-19. These changes are intended to eradicate delays in court and protect the rights of the accused as well as victims of crimes.[194]

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[191] Same as above.
[192] Government of Canada, Government of Canada introduces legislation to improve the operation of the criminal justice system and address the impacts of the COVID-19 pandemic, 8 February 2022, https://www.canada.ca/en/department-justice/news/2022/02/government-of-canada-introduces-legislation-to-improve-the-operation-of-the-criminal-justice-system-and-address-the-impacts-of-thecovid-19pandemic.html (accessed on the 17 February 2022).
[193] Same as above.
[194] Same as above.

4.3.9 Enough resources

Resources are the justice system's most essential and efficient tools; a court with limited resources will likely need more time to finalise the matters. All courts should have enough staff and resources. Each court should have interpreters for all relevant and local languages; stenographers should receive proper training on recording and handling court books and court diaries; court orderlies should be trained to take orders in court and holding cells; and all role players should be encouraged to excel in their duties. All courtroom equipment should be constantly serviced.

Some courts postpone matters because of a lack of a courtroom available to be utilised, the availability of a presiding officer, the availability of the prosecutor, the availability of the clerk to record the proceedings, and the lack of power or electricity in courts of law. Court managers should ensure that there is backup power in court in case there is a power failure or load shedding.[195] There are compelling reasons to act immediately.[196] The Judges Act specifies the number of judges to be appointed by the federal government to provincial superior courts.[197] Many witnesses told the Committee that legal aid money should be raised across the country and that there is a need to boost the legal aid budget.[198] Legal aid should be supported in order to prevent accused people from representing themselves in court.

4.4 The legal position in Italy

4.4.1 Preliminary examination

The Italian legal system is accusatorial. It therefore creates a barrier between the investigatory and trial stages; at the end of the trial, the information gathered during the

[195] The Court of Queen's Bench of Alberta, a proposal for an increase to the judicial complement of the Court of Queen's bench of Alberta, January 2016, https://s3.documentcloud.org/documents/2838613/Judicial-Complement-Submission-January-2016.pdf (accessed on 21 October 2021).
[196] Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, 13 April 2016, https://sencanada.ca/en/Content/Sen/committee/421/lcjc/06ev-52482-e (accessed on 15 October 2021).
[197] Judges Act, R.S.C. 1985, c. J-1.
[198] Same as above.

preliminary stage is not used to make a decision.[199] To emphasize the neutrality of the judge, the Italians placed investigating responsibilities in the hands of the public prosecutor rather than the judge or the police.[200] The police must notify the public prosecutor within 48 hours of a crime being reported, and the prosecutor has six months to finish an investigation and gather evidence.[201] Prosecutors can request an incident report for witnesses or evidence that may not be available at trial, allowing for the hearing of testimony from a witness and preserving a witness's testimony for future trial proceedings.[202] The evidence is then entered into a trial record.[203] Because mandatory prosecution is required in Italy, a prosecutor must openly request dismissal from a judge if they believe the case is weak.[204] During the investigation, prosecutors collect incriminating and exculpatory material for presentation at a preliminary hearing, which determines whether the accused will go to trial or not. Following the prosecutor's investigation and before the preliminary hearing, the defendant is advised of the outstanding charges against him, has the opportunity to present further evidence to the prosecution, and has the option to request that the prosecutor continue the investigation for another thirty days. Even after the improvements, judges are still participating in the preliminary investigation from a distance. Each probe is assigned a preliminary investigation judge. A fresh preliminary hearing judge analyses all the evidence gathered by the prosecution during the preliminary hearing and decides whether to go to trial, drop the charges, or archive the case.[205] In comparison to Italy's previous inquisitorial system, this judicial oversight severely limits the prosecutor's authority.

All criminal proceedings begin with preliminary inquiries. During the trial, the court evaluates the evidence and determines whether the defendant is guilty. The court proceedings terminate when the defendant is sentenced or acquitted, with the option of

[199] Giulio I, The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988), 4 WASH. U. GLOBAL STUD. L. REV. 567, 569-70 (2005).
[200] William T. Pizzi & Luca Marafioti, The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, 17 YALE J. INT'L L. 1, 3 (1992).
[201] Elisabetta Grande, Italian Criminal Justice: Borrowing and Resistance, 48 AM. J. COMP. L. 227, 228 (2000).
[202] Same as above.
[203] Same as above.
[204] Jeffrey S. Lena & Ugo M, introduction to Italian law, 2002.
[205] Elisabetta G, Italian Criminal Justice: Borrowing and Resistance, 48 AM. J. COMP. L. 227, 228 (2000)

appealing to a higher court. Complainants and victims of crime may have an important role to play in criminal procedures.[206]

Preliminary inquiries were introduced to prevent the court roll from becoming congested with cases with no merit. These cases have the highest discharge possibilities because there is no prima facie case. It is a good way of promoting quick finalisation of criminal matters, as criminal court rolls are not congested.

South Africa has introduced judicial case management to ensure quick finalisation of criminal trials.[207] Through judicial case management, a pre-trial hearing is conducted to check if the matter is trial-ready or not, if the state is ready to proceed or not, whether the accused has a lawyer or not, whether there are other means to dispose of the matter or not, obtaining the facts in dispute and the facts that are disputed, whether there is a conflict of interest or not, whether the parties have exchanged the necessary documents for trial or not, and also how the state intends to adduce evidence. This will also assist the court in having a proper court plan after assessing how long the trial might take and what time should be allocated to the specific trial.

4.4.2 Amendments to Current Legislation

Italy has improved access to justice for all people who want to use courts and administrative adjudicatory tribunals to settle issues.[208] Italy has time frames for crime investigations and the running of trials, but further amendments are to be introduced for specific crimes to have periods.

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[206] Italy, Victims' rights by country, 13 October 2020, https://ejustice.europa.eu/171/EN/victims__rights__by_country?ITALY&member=1&cookies=disabled (accessed on 17 February 2022).

[207] South African Government, https://www.gov.za/about-government/judicial-system (accessed on 21 February 2022).

[208] Nathy R MA & Rouas V, directorate-general for internal policies policy department c: citizens' rights and constitutional affairs, adequate access to justice, November 2017, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf (accessed on 15 February 2022).

4.4.3 Enough resources

Italy has been ensuring the improvement of physical infrastructures such as the courtrooms and court equipment and employing enough court officials to ensure that justice is rendered in better conditions for citizens and legal professionals.[209]

4.4.4 The Use of Technology in Courts for speedy trials

The development of electronic justice systems facilitates the handling of cases and communication between lawyers and courts.[210] The use of technology in Italian courtrooms is a solution to avoid intentional delays in criminal courts of law. The use of information technology has increased the number of finalized pre-trial conferences, which is a response to the need to reduce the number of cases on the court's docket. Since its inception, the use of technology has been a cornerstone of justice, from the investigation of the matter to the conclusion of the case.[211]

Many attorneys and court officials are used to the introduced technology. These introduced technologies do not change the original manner of conducting trials in terms of the Italian Code of Criminal Procedure.

The technology is created to assist witnesses not in court to be cross-examined through visual tools. Expert witnesses and accused persons can also testify visually and get their evidence tested through cross-examination. [212]

Most governments permit certain types of evidence presentation, but they rarely officially control it. Even for these reasons, they remain only symbolic and are not admissible as proof, although worries are being expressed that the use of complex computer-generated visualisation technology in court may affect perceptions, memories, attitudes, and decision-making. Using software that identifies voice and automatically types and

[209] Nathy R MA & Rouas V, directorate-general for internal policies policy department c: citizens' rights and constitutional affairs, effective access to justice, November 2017, https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf (accessed on 15 February 2022).
[210] Same as above.
[211] Michele S, Defence rights and the use of information technology in criminal procedure, Dans Revue internationale de droit pénal 2014/1-2 (Vol. 85), pages 261 - 310.
[212] Same as above.

captures evidence has also aided in the expediting of trial matters. These strategies are commonly employed by both the prosecution and defence counsels. However, each party is free to verify the information given by a computer before the other side submits such evidence.[213]

The use of technology aids in case management systems by allowing litigants to electronically submit and upload pleadings and other documents, as well as present their cases and arguments during court sessions. The system's installation aided during the Covid19 pandemic when personal contact had to be minimized. However, though the system is helping, some attorneys and court officials complain that they need to be used to the system and therefore need workshops and training.

Furthermore, it improves the rights of both complainants and accused persons by increasing access to the file. Accessing electronically stored information is the only concrete option to locate exculpatory evidence in some difficult instances when material is exceedingly voluminous. The benefit of adopting an online filing system is that documents are always safe because they cannot be lost or stolen; this may eventually contribute to the effectiveness of the right to be tried within a reasonable time. Among courtroom technology, the new methods of cross-examining witnesses deserve special attention since they address what is widely regarded as the decisive point in the struggle between prosecution and defence. Introducing the possibility to cross-examine witnesses at a distance via videoconferences in other countries such as Australia, Canada, the US, Germany, Belgium, and Sweden is a success story in Italy.[214]

4.5 Conclusion

After a comprehensive comparative analysis, this study has concluded that there are more similarities than differences in the cited countries regarding the solution to curb satellite litigation. However, there are various aspects to be learned from each jurisdiction. In that regard, the next chapter makes recommendations from lessons learned based on other jurisdictions for South Africa to improve its justice system.

[213] Same as above.
[214] Same as above.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 OVERALL CONCLUSIONS

South Africa has enough legislation to prevent the accused from delaying and avoiding trials using satellite litigation tactics. There is, therefore, a need to boost the justice system by adding more resources for the legal system to work efficiently. South Africa has been a constitutional democracy since 1994 and has a well-functioning judicial system. South Africa is a country with strong and healthy international ties. It is a signatory to several international treaties and covenants that protect human rights. As a result, it must abide by international rules governing the speedy finalisation of trials. It should feel compelled and duty-bound to keep its word and adhere to international norms and standards. If this is done, South Africa will put itself on an equal footing with other nations and rank among the best at advancing its constitutional provisions and just judicial system. It has been established that unreasonable delays have a negative effect on both the economy and fundamental rights. I conclude that the recommendations below can improve the South African justice system and protect the rights of victims and complainants to finalise their matters without delay.

5.2 Recommendations

5.2.1 Building more specialised courts

The study recommends the introduction of special courts that deal with cases suspected of being intentionally delayed. These special courts will prevent accused persons from intentionally delaying matters by requesting postponement, knowing that the court is likely to postpone the case to a date one year later because the court's diary is already full in that year. The special court will have an open diary, as it won't have many matters on the roll. Matters will be rolled over to the following day or postponed to an earlier date. If no cases are on the roll, the special courts will assist other courts in reducing the backlog of cases.

5.2.2 Appointment of more judges

South Africa should employ more judges. By having many judges, practitioners and civil society will have more faith in the courts, knowing their matters will be dealt with expeditiously. Justice obtained too late might not serve its purpose. Adding judges could help reduce the backlog of cases, making it difficult to delay a trial's conclusion deliberately. Democracy depends on the judiciary's competency and independence.

5.2.3 Amendment of current legislation

It is necessary to amend current legislation, such as the Criminal Procedure Act 51 of 1977 and the Constitution Act 108 of 1996. The Criminal Procedure Act should be amended to allow presiding officers guidance in trial management where there is reasonable evidence that the matter is being deliberately delayed. Furthermore, the constitution should be amended to enhance the protection of the rights of victims and complainants.

5.2.4 Employing more investigating officers

The South African police should employ a more efficient and effective investigation team. Specialised investigators dealing with crimes such as corruption should be used to expedite investigations. SAPS investigators should be guided and assisted by the experts. Management positions should be occupied by skilled personnel who have relevant professional knowledge rather than by political appointments.

5.2.5 Strict Independence of NPA

The NPA should always act independently and guard against political interference and influence. The NPA is expected to be independent and work without fear or favour.

5.2.6 Courts' resources

Courts should have a set of practice directives and provisions for the court's resources to be made available promptly. The directive should also specify that police dockets must be delivered to the prosecutor the day before the case is heard, allowing the prosecutor

to go through the docket and decide how to proceed with the case. Presiding officers should always guard against court employees who tend to delay proceedings.

5.2.7 The use of Vexatious Act

The NPA should prioritise seeking relief in the Vexatious Proceedings Act to stop accused persons who constantly institute legal proceedings to avoid and delay trials.

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