

SOUTH AFRICA / JUDGMENT

Bennets and Others v National Director of Public Prosecutions and Others (25814/15) [2017] ZAGPPHC 464 (6 June 2017)

[2017] ZAGPPHC 464**COURT**

North Gauteng High Court, Pretoria

BEFORE

Tlhapi VV

CASE / FILE NUMBER

25814/15

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****CASE-NUMBER:** 25814/15**DATE:** 6 JUNE 2017
In**the matter between:** PINKY
ELIZABETH
BENNETS
1st APPLICANT
GODFREY
MONYAI
2nd
APPLICANT
SABATA
NORMAN
BULE
3rd APPLICANT
MEDUPE
ADAM
TLOU
4th APPLICANT
LESIBA
SAMULE
MOKAUTU
5th APPLICANT
ABRAM
MALEKA 6th

APPLICANT
HENRIK
KHATUTU MASHISHI
7th
APPLICANT
MOYAHABO
FRANS
PHEEDI
8th APPLICANT
WEYE
ARTHUR NQOKO
9th
APPLICANT
And
NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
1st RESPONDENT
DIRECTOR OF PUBLIC
PROSECUTIONS; PRETORIA
2nd RESPONDENT
ADVOCATE
CASPER KRUGER
3rd
RESPONDENT
RUSSIA
MOGALE 4th
RESPONDENT
MANDLA
ABSALOM
MABUZA 5th
RESPONDENT

JUDGMENT

TLHAPI J

- [1] This application was set down by the first, second and third respondents for hearing on the opposed motion roll on the 15 May 2017. For convenience, the first, second and third respondents will be referred to as "the respondents". The fourth and fifth respondents are co accused with the applicants in a criminal case which is the subject of this application. They did not oppose the application.
- [2] The notice of set down was served on the attorneys for the applicants, HJ Greenwald Attorneys Inc. on 25 January 2017 and the

Heads of Argument on 1 December 2016. No heads of argument were filed on behalf of the applicants. At the hearing I was informed that after the practice note was served on the applicants a notice of withdrawal of the application dated 10 May 2017 was served on the respondents and a tender for wasted costs was made. The said notice was handed in from the bar as no such notice was filed with the Court and there was no appearance by the applicants or on their behalf at the hearing.

[3] Mr Arendse appearing for the respondents submitted that the applicants had failed to comply with Rule 41 of the Rules of Court.

The matter had already been set down for hearing and that there was no consent to such withdrawal. He informed the court that his

instructions were to proceed with the matter and that a date had been secured for the criminal trial. Mr Kruger who is the prosecutor in the criminal matter was present.

[4] Rule 41(1) (a) provides:

"a person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or

leave of the court withdraw such proceedings..."

It was therefore not competent for parties who had launched the application to withdraw without complying with the above Rule, such

withdrawal is deemed to be invalid, *Protea Assurance CO. Ltd v Gamlase and Others* 1971(1) SA 460 (E) at 465G. Furthermore the applicants had not approached the Court for leave and since there was no appearance for the applicants, no case was presented for leave to withdraw, the matter had to proceed in the absence of the applicants and as requested on behalf of the respondents.

Having heard Mr Arendse and as articulated in his Heads of Argument, the application was dismissed with costs which included costs of two counsel. My reasons for dismissing the application follow.

[5] This application was launched in terms of Rule 53 of the Rules of Court and the following orders were sought:

1. A declaration of invalidity of a decision taken by the first respondent's

predecessor in office, namely Advocate Menzi Simelane in terms of Section 2(4) read with section 1 and 2 of the Prevention of Organized Crime, Act 121 of 1998 (as amended) on 22 of November 2011 to authorise the prosecution of first applicant on a charge of contravening Section 2(1) (f) of POCA (racketeering). A copy of the written decision of the first respondent is annexed hereto, marked "A"

2. A declaration of invalidity of a decision taken by the first respondent's predecessor in office, Advocate Menzi Simelane, in terms of the provisions of Section 2(4), read with section 1 and 2 of POCA on 22 of November 2011 to authorise applicants prosecution on charges of contravention of section (2) (1) (e) of POCA (racketeering}. A copy of the written decision of the first respondent is annexed hereto, marked annexure "A2"
3. An order reviewing and setting aside the aforesaid decisions, taken by the first respondent on 22 November 2011;
4. A declaration of invalidity of the decision or decisions of the first and/or second and/or third respondents to prosecute applicants on charges contained in counts 1 and 2 of the charge sheet in Pretoria;

[6] The applicants and the fourth and fifth respondents were members of the South African Police Service and were stationed at the Vehicle Investigation Section, Pretoria West, Pretoria. They were charged with several criminal offences allegedly committed during the period May 2008 to February 2011 and they appeared in the Regional Court, Pretoria under case 14/ 2395/11. The arrests occurred after the South African Police Service through its Project Clamp, launched an investigation which focused on police officials who were stationed at the Vehicle Identification and Safeguarding Section, situated in Pretoria West.

[7] According to the applicants the decision of the first respondent was irrational. They could not establish what information was placed before the first respondent for consideration before the authorisations were issued. It was averred that no 'reasonable

decision maker' could have issued the said authorisations from information contained in the dockets justifying a charge of racketeering. They gave options as stated in paragraph 47 of the founding affidavit from which they speculated as situations that could have prevailed and which could have resulted in the unlawful and invalid authorisations. They averred that the prosecutions under section 2 (1) of POCA were an abuse and that the first respondent failed to consider the evidence carefully, before issuing the authorisations. In paragraph 54 thereof the applicants dispute that a charge of racketeering in respect of the 6th applicant was justified. In as far as reliance on the evidence of the agent employed as a trap was going to be utilized, such evidence was 'sufficient for the

prosecution of a charge in terms of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004.

[8] The answering affidavit was deposed to by Mr Shaun Abrams who occupies the position of the first respondent. He averred that he acquainted himself with the same information presented to his predecessor including the prosecution memorandum. He averred that the issue of the authorisations complied with the requirements of the law and and the Constitution and that he aligned himself with the decision of his predecessor. Mr Abrams further relied on the decision of *S v Chao* 2009 (2) 595 (CPD) which drew a distinction between the authorisations and the decision to prosecute and his agrees with the decision

taken by the third respondent to prosecute.

[9] The said authorisations in terms of section 2 (4) of POCA were obtained on 22 November 2011 for the applicants and the fifth

respondent to be charged with contravention of section 2(1)(f) and section 2 (1) (e) of POCA as amended. A charge sheet and memorandum

which formed part of the Rule 53 record was served on the applicants. The respondents aver that by the 19 January 2012 all the accused persons and their legal representatives were in possession of the contents of the case dockets and had knowledge of the authorisations issued by the first respondent.

[10] The appearances in the criminal court from 19 January 2012 to 30 June 2014 entailed requests for further particulars, objections to certain charges, and quashing of about 15 counts. Finally on 1 September 2014 dates were available to commence the trial from 14 April 2015 for three days. It was only on 8 April 2015 when the respondents announced that they were challenging by way of a review application, the legality behind the authorisations of 22 November 2011. This was despite the fact that they came to the knowledge of such authorisations during 2012. This application was served on 15 April 2015 and this resulted in the trial not proceeding.

[11] The respondent averred that this constituted an abuse of the court process and was intended to frustrate the criminal proceedings.

Furthermore, that the applicants failed to disclose that they were dismissed during 2012 at disciplinary hearings on the same evidence

as shall be presented in the criminal trial. They contended that although a different standard of proof is required, there was prima facie evidence justifying the authorisations issued in terms of POCA. It was contended further that from the information detailed in the prosecution memorandum the charge of racketeering was justified.

[12] Mr Arendse argued that there had been unreasonable delay of three years to institute the review proceedings and that the applicants

were dilatory in their finalisation of this application. They were served with the Rule 53 record on 19 June 2015 and that to date they have failed to indicate whether they intended to amend or augment their founding papers and the criminal trial has been 'postponed

several times pending these proceedings. He contended that their conduct constituted an abuse of the court process and submitted that it was meant to delay or frustrate the criminal trial and that the application on this ground alone should be dismissed. In dealing with what should be considered by the court in exercising its discretion, where there had been unreasonable delay causing prejudice to the other party, the head note in *Wolgroeiërs Afslaaers (Edms Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)* stated the following:

"Prejudice to opposite party does not have to be proved before application can be dismissed on the ground of unreasonable delay. - Such prejudice nevertheless a relevant factor - Application for review dismissed on the ground of unreasonable delay despite the fact that it would have succeeded on the merits"

[13] In his heads of argument Mr Arendse addresses the rationality and legality of the decisions by the first respondent to issue the section 2(4) authorisations and I do not deem it necessary to deal fully with these aspects save to state that I am in agreement with his submissions for the following reasons:

- (a) The attack on the rationality of the decisions was based on speculation as appears from paragraphs 54 - 57. Subsequent to the launching of the application the Rule 53 record, the prosecution memorandum, charge sheets, and further particulars, were available to the applicants to enable them to further supplement or amend their founding papers in as far as it related to the views expressed and the attack on the charges as formulated. The applicants averred in paragraph 65 of the founding papers and relying on Chao supra, that what they conceived to have been a violation of their constitutional rights could only be addressed in review proceedings. Their failure to ensure that their application is heard and finalized, leads me to the conclusion that there was no merit in the

application. For the above reasons the application was dismissed as indicated above.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 15 MAY 2017

REASONS

RESERVED ON

: 15 MAY 2017

ATTORNEYS FOR THE APPLICANT : HJ GROENEWALD ATT

ATTORNEYS FOR THE RESPONDENT : THE STATE ATTORNEY

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Prepared on 11 October 2026 · Esheria