

SOUTH AFRICA / JUDGMENT

Maremba and Others v National Director of Public Prosecutions and Others (2031/2023)

[2024] ZALMPTHC 15 (8 February 2024)

[2024] ZALMPTHC 15**COURT**

Limpopo High Court, Thohoyandou

BEFORE

BF Gededger

CASE / FILE NUMBER

2031/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****LOCAL****DIVISION,****THOHOYANDOU)****CASE****NUMBER: 2031/2023****REPORTABLE:**

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

08/02/2024

BF

GEDEDGER AJ

In

the matter

between:	MAREMBA
	EMMANUEL
	REMBULUWANI
Applicant	NETSHITANANI
	FARANANI
	Second
Applicant	RAVULUVULU
	TSHILISANANI
	Third
Applicant	RAVELE
	CALVIN TSHIFHIWA
	Fourth
Applicant	MUKHITHI
	OFHANI
	Fifth
Applicant	MADZHIE
	EMMANUEL
	Sixth
Applicant	SIEMA
	LIVHUWANI
	Seventh
Applicant	and
	NATIONAL
	DIRECTOR
OF	PUBLIC
	PROSECUTION
	First
Respondent	DEPUTY
	DIRECTOR OF PUBLIC
	Second
Respondent	
PROSECUTION:	THOHOYANDOU
	DIRECTOR
	OF PUBLIC
PROSECUTION:	LIMPOPO
	DIVISION,
	POLOKWANE
Third	
Respondent	

JUDGMENT

GEDEDGER AJ:

- [1] In this application the First - Seventh Applicants (hereinafter referred to as "the Applicants") seeks an order reviewing and correcting or setting aside the decision of the Director of Public Prosecutions: Limpopo Province (hereinafter referred to as "the DPP") (Third Respondent) to charge them with 1 x count of murder in terms of section 51(1) of the Criminal Law Amendment Act[1], 1 x count of assault with intent to cause grievous bodily harm and defeating or obstructing the end of justice.
- [2] It is common cause that the Deputy Director of Public Prosecutions: Thohoyandou (hereinafter referred to as "the DDPP") (second Respondent) had initially referred the criminal matter to an inquest hearing at the Thohoyandou Magistrates' Court.
- [3] Subsequent to the aforesaid decision by the DPP reviewed the decision of the DDPP to refer the matter to an inquest hearing, thus taking a decision to prosecute the Applicants.
- [4] It is the case of the Applicants that the decision of the DDPP cannot simply be overturned by the DPP without consulting or involving the accused (the Applicants herein). This proposition is based on the principle that any prosecution authority ought to be free from control, so it was argued.
- [5] In support of the aforesaid principle counsel for the Applicants referred the court to the provisions of section 32(1)(b) of the National Prosecuting Authority Act (hereinafter referred to as "the NPA Act")[2] which provides that:

"Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of staff} nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."

- [6] It was further argued that the Third Respondent was wrong in reviewing the decision of the Second Respondent unilaterally without having regard to Section 179(5)(d) of the Constitution of the Republic of South Africa (hereinafter referred to as "the Constitution") which provides that:

"The National Director of Public Prosecutions -

- (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
- (i) The accused person.
- (ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant."

[7] It was argued on behalf of the Respondents that the DPP as the head of the Limpopo Office of the National Prosecuting Authority (hereinafter referred to as "the NPA") was lawfully empowered to can review and set aside the decision of the DDPP as she did.

[8] It was argued further that subject to the control and directions of the National Director, the Third Respondent is empowered to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting and conducting such criminal proceedings, and discontinue criminal proceedings in respect of the area of jurisdiction for which he or she has been appointed, as contemplated in section 20(1) of the NPA Act and Section 179(2) of the Constitution.[3]

[9] Of relevance, counsel for the Respondents referred the court to the provisions of section 24(9)(b) of the NPA Act which provides that:

' power, duty or function which is exercised, carried out or performed by a Deputy Director is construed, for the purposes of this Act, to have been exercised, carried out or performed by the Director concerned."

[10] In support of such proposition counsel for the Respondents referred the court to section 6(3) of the National Prosecuting Authority Act (hereinafter referred to as "the NPA Act")[4] which provides that:

"(3) If a Deputy Director is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a Director designated in writing by the National Director."

[11] In light of the above, so it was submitted on behalf of the Respondents, the authority to review a decision of the Third Respondent lies with the National Director (First Respondent) who has the powers to review and set aside the decision of the DPP (Third Respondent).[5] It was further submitted that the Applicants ought to have made representations to the NDPP before approaching the Court, to have the Third Respondent's decision.

APPLICATION OF THE LAW TO THE FACTS

[12] The relief sought by the Applicants to review and set aside the Third Respondent's decision or to correct such decision, is premised on three grounds, namely that:

[12.1] the decision to arraign was taken by the Third Respondent without consulting the Applicants as the accused;

[12.2] there are two conflicting decisions from the prosecution (1) inquest hearing and (2) indictment of the Applicants;

[12.3] the decision of the Third Respondent to review the decision of the Second Respondent amounts to self-review and is accordingly unlawful.

[13] At the onset a question arises as to whether the DPP is vested with the powers to review a decision taken by the DDPP?

[14] Section 179(2) of the Constitution is the empowering provision in this regard. It empowers the NPA to institute criminal proceedings, and to carry out 'any necessary functions incidental to instituting criminal proceedings'. The power to make prosecutorial decisions and to review them flows from this.

[15] In the case of *National Director of Public Prosecutions v Zuma*[6] the Supreme Court of Appeal (SCA) held that:

"[35] The court below began its discussion of the legal issues implying in general terms that a decision to prosecute is an administrative action to which the audi principle (with its offspring the doctrine of legitimate expectation) applies (para 47-53). This has never been the law and, as the Constitutional Court held, it is not the law under the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Such a decision is not susceptible to review"

[16] From the preceding paragraph it is clear that the review of prosecutorial decisions by prosecutors and DPPs is not subject to any consultation or representation requirement. Support for this is found in paragraph

[64] in the case of *National Director of Public Prosecutions v Zuma*, in which the SCA in footnote 59 thereof remarked as follows:

"Footnote 59 It will be recalled that prosecutorial decisions and their internal reconsideration were, except in the limited sense set out earlier, not subject to procedural limitations or judicial overview. Mr Kemp accepts that the review of prosecutorial decisions by prosecutors and DPPs is not subject to any consultation or representation requirement."

[17] The above principle was followed in the case of *National Director of Public Prosecutions v Zuma*, in which the SCA in paragraph [70] remarked as follows:

"I thereof conclude that s 179(5)(d) does not apply to a reconsideration by the NDPP of his own earlier decisions but is limited to a review of a decision made by a DPP or some other prosecutor for whom a DPP is responsible."

[18] The above being the case, I find that the Third Respondent (DPP) had the powers to review the decision of the Second Respondent (DDPP) as empowered by Section 179(2) of the Constitution which empowers the NPA to institute criminal proceedings, and to carry out 'any necessary functions incidental to instituting criminal proceedings'.

[19] The power to make prosecutorial decisions and to review such decisions flow from the provisions of Section 179(2) of the Constitution, and considering that the Constitution is the supreme law of the Republic of South Africa, then the obligations imposed by it must be fulfilled by members of the NPA.[7]

[20] It is not in dispute that the Second Respondent was the DDPP at the Thohoyandou office of the National Prosecuting Authority (in accordance with section 15(1) of the NPA Act) at the time of the decision that referred the matter for a formal inquest at the Thohoyandou Magistrates' Court, working under the control and directions of the DPP.

[21] Accordingly, I find that the DPP in casu was required to carry out 'any necessary functions incidental to instituting criminal proceedings', which included reviewing of the decision of the Second Respondent (DDPP) falling under her control and directions as provided for in section 6(3) of the NPA Act, which provides that:

"If a Deputy Director is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a Director designated in writing by the National

Director."

[22] In support of the above, section 20 of the NPA Act provides further that:

"(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to - (a) institute and conduct criminal proceedings on behalf of the State; (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic

(2) Any Deputy National Director shall exercise the powers referred to in subsection (1) subject to the control and directions of the National Director.

(3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of.- (a) the area of jurisdiction for which he or she has been appointed; and (b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.

(4) Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of.- (a) the area of jurisdiction for which he or she has been appointed; and (b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director."

[23] The question that now remains is whether the decision of the Third Respondent (DPP) to review the decision of the Second Respondent (DDPP) amounts to self-review?

[24] The answer is negative as per paragraph [70] of the SCA judgment in the National Director of Public Prosecutions v Zuma referred to in paragraph [17] herein above.

[25] In the absent of dishonesty or ma/a tides or an exceptional circumstance, the decision of the DPP to prosecute the Applicants is not amenable to judicial review.

- [26] The SCA in paragraph [37] of the case of *National Director of Public Prosecutions v Zuma* found that a prosecution is not wrongful merely because it is brought for an improper purpose and further that it will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.[8] I need to point out that the Applicants do not allege absence of reasonable and probable grounds for prosecuting in their Founding Affidavit.
- [27] This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality, which may be subjected to a challenge in terms of PAJA or legality review.
- [28] Presenting before me is a review application aimed at challenging the decision of the DPP to prosecute which the Applicants argue that it is wrongful and subject to a review. It was however contended for the Respondents that the Applicants ought to have first exhausted internal remedies requiring representation to the NDPP for the decision of the DPP to be reviewed.
- [29] In the matter of *Kaunda v President of the RSA*[9] the Constitutional Court held that in terms of the Promotion of Administrative Justice Act[10] (PAJA) a decision to institute a prosecution is not subject to review[11].
- [30] If consideration is being had of the preceding paragraph, then I agree with the contention made for the Respondents in this regard and accordingly I conclude that any challenge to the decision of the DPP ought to have been submitted to the NDPP who has the powers to review in terms of Section 179(5)(d). However, the Applicants failed to do so.
- [31] This understanding should be able to extinguish the Applicant's case in this application.
- [32] I turn now to deal with the question of an appropriate cost order to be made.
- [33] Costs, it is trite, are within the discretion of the court. In exercising that discretion a court takes into account the circumstances of the matter, the issues adjudicated and the results of such adjudication, the conduct of the parties and what would be fair and just between the parties.
- .
- [34] In these circumstances, I consider that it would be appropriate for each party to bear its own costs.
- [35] In the result I make the following orders:
- [34.1] The application is dismissed;
- [34.2] No order as to costs

BF GEDEDGER

Acting Judge of the High Court of South Africa,

Limpopo Local Division, Thohoyandou

APPEARANCES: For the Applicant: Adv AG Mphanama SC Instructed by: State Attorney:
Thohoyandou For the Respondent: Adv WKK Mphahlele Instructed by: Director of Public
Prosecutions: Polokwane

- [1] Act 105 of 1997
- [2] Act 32 of 1998
- [3] Section 20(3) of the NPA Act
- [4] Act 32 of 1998
- [5] Section 179(5)(d) of the Constitution of the Republic of South Africa
- [6] (573/08)
- [2009] ZASCA 1 at para 35[2009] ZASCA 1; ; 2009
- (2) SA 277 (SCA); 2009
- (1) SACR 361 (SCA) ; 2009
- (4) BCLR 393 (SCA) ; (2009] 2 All SA 243 (SCA) at para 35
- [7] Section 2 of the Constitution
- [8] Beckenstrater v Rottcher & Theunissen 1955
- (1) SA 129 (A); Relyant Trading (Pty) Ltd v Shongwe [2007] 1 All SA 375 (SCA)
- [9] 2005 (4) SA 235 (CC) para 84
- [10] Act 3 of 2000
- [11] Section 1(b)(ff) of PAJA

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