

SOUTH AFRICA / JUDGMENT

**Minister of Police and Another v Sosibo
NO and Others (AR276/10) [2010]
ZAKZPHC 102 (14 December 2010)
[2010] ZAKZPHC 102**

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn, Nkosi

CASE / FILE NUMBER

AR276/10

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG REPUBLIC OF SOUTH AFRICA

Case No: AR276/10

In the matter between

The Minister of PoliceFirst Applicant

The National Commissioner,

South African Police ServicesSecond Applicant

and

NP Sosibo N.OFirst Respondent

Thiresh MaharajSecond Respondent

Muzi Anthony ThembuThird Respondent

The Director of Public Prosecutions (KZN)Fourth Respondent

JUDGMENT

Delivered on: 14 December 2010

STEYN J

- [1] This is a review, lodged on behalf of the first and second applicant to set aside the decision of the first respondent, a Magistrate at the Durban Magistrates' Court.

- [2] The background facts are as follows: The second Respondent was charged with one count of contravening section 154(1)(a) of the Liquor Act, 27 of 1989, in that on or about 13 February 2010 and at Howell Road, Sydenham, in the district of Durban he unlawfully sold 2 bottles (750ml) of Carling Black Label beer.
- [3] In pursuance of the illegal transaction the members employed by the South African Police Services, seized a large quantity of alcohol. The second respondent then brought an application in terms of s 31(1)(a) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as 'the Act') for the alcohol not required as exhibits at the trial to be released. The first respondent pursuant to the application then ordered that the items that were seized by the first applicant's members be released. The state prosecutor never opposed the application before the court a quo. In these proceeding the Director of Public Prosecutions of KwaZulu-Natal filed a note that they will abide by the decision of this court. The applicants, had brought an application before the Durban High Court, for an order to stay the first respondent's order, pending the outcome of this review.
- [4] Mr Kuboni, acting on behalf of the first and second applicant, submitted that the applicants, have the necessary locus standi to lodge the review application on the basis that the magistrate committed an irregularity by ordering the release of the seized items referred to in the SAP13. Mr Bahadur, acting on behalf of the second respondent strongly opposed the application on the grounds that the applicants failed to establish that they have a direct and substantial interest to review the decision of the first respondent or that they have locus standi, since the right to prosecute vests in the fourth respondent. In his view, only the fourth respondent has the necessary locus standi to have launched the present application.
- [5] In my view, the right to institute criminal proceedings is pivotal to the decision of locus standi. In addition, given the facts at hand, it is necessary to consider the rationale behind seizing section 20 articles and the disposal of such articles in term of s 31 of the Act.

Prosecuting authority

- [6] Section 179 of the Constitution of the Republic of South Africa, 1996 reads as follows:

"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –

- (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
- (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

National legislation must ensure that the Directors of Public Prosecutions –

- (a) are appropriately qualified; and

- (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- (5) The National Director of Public Prosecutions –
 - (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
 - (b) must issue policy directives which must be observed in the prosecution process;
 - (c) may intervene in the prosecution process when policy directives are not complied with; and
 - (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.

The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

All other matters concerning the prosecuting authority must be determined by national legislation.”

[7] Section 179 was challenged in the early days of our newly found constitutional democracy. The Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*[1996] ZACC 26; , 1996 1996

- (4) SA 744 (CC) rejected the objection. Hereafter a new prosecutorial scheme has been proposed and adopted by the enactment of the National

Prosecuting Authority Act.1 Important to the decision in this case is s 22(1) of the National Prosecuting Authority Act, which provides that:

“The National Director, as head of the prosecuting authority, shall have authority over the exercising of all powers, and the performance of all duties and functions conferred and imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law.”

In my view the relevant powers related to this case are:

to institute and conduct criminal proceedings on behalf of the State;

To carry out any necessary functions incidental to such criminal proceedings; and

To discontinue proceedings.

- [8] The second respondent was never charged with any other offence than the one and only count of selling two bottles of Carling Black Label beer. The prosecutor elected to charge the second respondent with only one count. The prosecution correctly exercised a choice not to oppose the application before the Magistrate's court in the light of the charge it preferred against the second respondent.
- [9] I agree with Mr Bahadur that the applicants misdirected themselves on the facts, when they submitted to us that the second respondent was also charged with three more counts. The first respondent correctly applied the law and was not misdirected on either the law or the facts when the court ordered that the alcohol seized be released. The submissions that were made on behalf of the applicants, namely, that the first respondent committed a gross irregularity is without substance. Such a contention is also not in accordance with the law.
- [10] Accordingly the application is dismissed with costs.

Steyn, J

Nkosi, AJ: I agree.

Date of Hearing: 19 October 2010

Date of Judgment: 14 December 2010

Counsel for the applicants: Mr Bahadur

Instructed by: The State Attorney (KwaZulu-Natal)

Counsel for the 2nd & 3rd respondents: Adv Kuboni

Instructed by: Sunil Panday & Associates

1Act 32 of 1998.

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