

SOUTH AFRICA / JUDGMENT

Mkhize v Director of Public Prosecutions KwaZulu-Natal (CCD38/2023) [2024] ZAKZDHC 89; 2025 (1) SACR 392 (KZD) (9 December 2024) [2024] ZAKZDHC 89

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Olsen

CASE / FILE NUMBER

CCD38/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

REPORTABLE

Case

No: CCD38/2023

DR.

NONHLANHLA OMIC MKHIZE

APPLICANT

and

DIRECTOR

OF PUBLIC PROSECUTIONS

KWAZULU-NATAL

RESPONDENT

In

re:

THE

STATE

vs

SIBONGILE

DUDUZILE CHILIZA AND 15 OTHERS

THE ACCUSED

JUDGMENT

OLSEN J

- [1] On or shortly after 29 June 2023 the Director of Public Prosecutions, KwaZulu-Natal, served an indictment on 16 accused persons. One of them, accused no. 15, is the applicant in these interlocutory criminal proceedings. The indictment reflected some 280 counts of corruption, fraud, theft, forgery, money laundering, defeating or obstructing the course of justice, contraventions of the Public Finance Management Act, and intimidation. None of the counts is raised against all of the accused. Almost all of them arise from or are connected to a series of payments made by the uMhlatuze Water Board (the “Board”) to a firm of attorneys between about August 2019 and July 2021. The sum of the payments is approximately R37 million.
- [2] In terms of that indictment, (it has subsequently been amended, a subject to which I will return later), the applicant was charged on counts 278 to 280 with intimidation, defeating or obstructing the course of justice and fraud. She was charged on those counts together with accused 8, 12 and 16.
- [3] The present application was launched by the applicant in April 2024. The sole respondent is the Director of Public Prosecutions, KwaZulu-Natal. (The other accused have indicated during the course of case management that they have no interest in these proceedings and abide the decision of the court.) Four orders are sought by the applicant. The first is a declaration that the joinder of what is called the “applicant’s criminal matter” with those of the other accused is a misjoinder in terms of section 156 of the Criminal Procedure Act (the “CPA”). The second and third

orders

are in effect a single order for a separation of the trial of the applicant from the trial of all the other accused persons named

in the indictment. The fourth order is one directing the respondent to determine within 10 days whether the applicant’s trial will be heard in the regional court or this court. For the purposes of this judgment I will ignore the fact that nothing said in the founding affidavit, and no provision of the CPA, supports a conclusion that the applicant is entitled to be tried alone, as

opposed to together with at least the other accused (8, 12 and 16) with whom she is alleged to have colluded in perpetrating the crimes on which she has been indicted. In view of the conclusions I have reached, that detail, important as it ordinarily would be, can be ignored.

The State Case in the Criminal Proceedings

- [4] Piecing things together from the at times somewhat cryptic summary of substantial facts which accompanied the original indictment, it appears that concerns were raised by the auditor general concerning the affairs of the Board, which resulted in a forensic investigation of its affairs being undertaken by an independent party at the instance of the members of the Board. The papers before me do not disclose the contents of that forensic report. It may be assumed that the facts or alleged facts which gave rise to the charges against the main body of accused were set out in that forensic report, together

with, presumably, the identification of the documents and witnesses which and who speak to those facts. (I refer to a “main body of accused persons” with the intention to distinguish the position of accused 15 and 16, who, according to the original indictment, were only charged on counts 278, 279 and 280.) The report was presented to the board members in February 2022.

- [5] Following that presentation only the chairperson of the Board was permitted to keep a copy of the report. It was to be treated as confidential, presumably to maintain the integrity of the evidence which was believed to support the conclusions reached in the report.
- [6] It is alleged that the applicant acted in combination with accused 16, their common purpose being to extract the forensic report, or a copy of it, from the chairperson of the Board so that it could be provided to and for the benefit of at least the principal accused who might use it to their advantage. The applicant is a prominent official in the provincial government of this province. The State alleges that on 11 February 2022, she telephoned the chairperson of the Board to request her to please meet accused 16 at her home, as accused 16 was an intelligence officer who was investigating wrongdoing in public entities generally. The statement was false. The chairperson acceded to the request. When accused 16 arrived, he was allowed into her house. There he threatened and intimidated her and contrived through such action to leave her house with the report, or a copy of it. The extent of its subsequent distribution is not disclosed on the papers before me. Given that accused 8 (the erstwhile chief executive of the Board) and accused 12 (the attorneys) are charged together with the applicant and accused 16, one assumes that it is the State case that at least they received a copy of the forensic report which had been extracted from the chairperson of the Board.

The Applicant's Case in this Application

- [7] In summary, the case the applicant seeks to make is as follows.
- (a) In terms of section 156 of the CPA, any number of persons charged with separate offences committed at the same place and time or at about the same time, can be tried together if the prosecutor informs the court that the evidence admissible at the trial will, in the prosecutor's opinion, also be admissible in the trial of any one or more of the others.
- (b) The applicant points to the fact that certainly as to time, the offences allegedly committed by her are alleged to have been committed later than those which gave rise to the other charges set out in the indictment. (She also protests that the prosecution has not informed the court as required by section 156 of the CPA, a point which has no merit. The CPA lays down no

formal procedure for conveying that information to the court. There can be no complaint as long as it is done before the charges are put to the accused at the time when they are asked to plead.)

- (c) Giving examples of other cases, the applicant asserts that cases involving allegations of money laundering, fraud, corruption and theft take a long time to be finalised, her estimate of the duration of the present case being 2 years at least. She asserts that less than one percent of the documentary evidence provided by the prosecution relates to her and the allegations against her. She asserts that only one or perhaps two witnesses will testify against her and that her case, if dealt with alone, would take perhaps only 2 days. She says that she is unable to retain lawyers to represent her throughout a lengthy trial taken up with the other counts, and that, given her employment situation, she would not qualify for legal aid.
 - (d) It is accordingly argued on her behalf that the prejudice she would suffer by participating in the full trial far outweighs any prejudice to the State, and that she is accordingly entitled to an order that she be tried separately.
- [8] It is undeniable that there is merit in the applicant's assessment of her predicament. However, that does not mean that she is entitled to the relief she seeks in these proceedings.
- [9] In making her case for a separation of trials the applicant relies on section 157 (2) of the CPA. It reads as follows.

"Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any such accused."

Is this Application Premature?

- [10] Section 20 of the National Prosecuting Authority Act, 32 of 1998 provides, in conformity with section 179 of the Constitution, that the power 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."

Private prosecutions aside, the power to decide who should be charged and with what offence lies exclusively in the hands of the prosecuting authority until and unless, in conformity with the CPA, any order of court might determine otherwise. The decision as to whether more than one accused should be tried together on any charge is that of the prosecuting authority in the first instance. The same goes for the content of the indictment. In my view, it is fair to say that until accused persons have pleaded, the indictment is the prosecution's.

- [11] Accordingly, by way of example, the prosecution may, as has been done in this case, amend the indictment without the leave of the court at any time prior to it becoming fixed by the delivery of the accused's plea to it. Charges may be added or removed and accused persons may be joined or excused.
- [12] Sections 85 and 87 of the CPA stand out as examples of the court's power to intervene before trial in the prosecution's control of the indictment. Under s 85 the court may intervene when an accused objects to the charge before pleading, and the grounds upon which objections may be made are set out in the section. (In terms of ss 85 (2) (b) of the CPA such proceedings may result in the quashing of the charge.) Section 87 empowers the court to order the delivery of particulars by the prosecution, and provides that, when particulars are delivered, the trial proceeds "as if the charge had been amended in conformity with such particulars".
- [13] It is with that background in mind that one must consider the provisions of s157 (2) of the CPA. It provides a remedy for misjoinder of accused persons. The remedy is a separation of trials, and it may be granted by the court "during the trial". In my view the words 'during the trial' must be read in conformity with s105 of the CPA. In its essential part s105 reads as follows.

"The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, ..., be required by the court forthwith to plead thereto in accordance with section 106."

(My underlining)

- [14] On my analysis the position is as follows.
- a) The charges set out in the indictment, in the form it takes at the time the trial is to begin, are put to the accused.
 - b) The accused are then required to plead to the charges.
 - c) The trial then commences, the issues between the State and the accused having been fixed by the accused's plea.
 - d) With the issues thus crystalised, the State and the accused then have a right to apply for a separation of trials, if that is considered appropriate.
- [15] I am in respectful agreement with the statement of the law in this regard made in *S v Ramgobin and Others* 1986 (1) SA 68 (N) at 73.

“Furthermore, section 157 (2) seems to envisage a situation where the trial has commenced; at least to the extent that the accused have pleaded. Not only does the section referred to any stage “during the trial” (not to any stage during the proceedings) but it enacts that the court may abstain from giving judgment in respect of any of the accused: the duty which it has only after the accused has pleaded”.

[16] The issue as to which court may entertain an application for a separation of trials in terms of s 157(2) of the CPA, and when it might be done, was considered at length in *Williams & Others v Director of Public Prosecutions: Western Cape* [2022] 1 All SA 269 (WCC) at paragraphs 44 to 58. The conclusion was that such an application can only be entertained by the trial court. I am in respectful agreement with that conclusion. It is consistent with the fact that the CPA deals quite precisely with the times at or

occasions upon which the court may intervene in the exercise of prosecutorial discretion. These are examples.

- (a) In terms of section 81 (2)(a) the court may in the interests of justice direct that an accused be charged separately in respect of any charge joined with any other charge. Subsection (2)(b) provides that such an order may be made “before or during a trial”.
- (b) Objections to a charge in terms of s 85 of the CPA may be made “before pleading to the charge”.
- (c) The court’s power to order that a charge be amended in terms of s 86(1) of the CPA may be exercised “at any time before judgment”.
- (d) The court’s power under s 87(1) of the CPA to order the delivery of any particulars by the prosecution may be exercised “at any time before any evidence in respect of that charge has been led”.
- (e) In terms of s 157(1) an accused may be joined with any other in the same proceedings “at any time before any evidence has been led in respect of the charge in question”.

[17] In my view, disregarding such provisions of the CPA as to when things may be done is not consistent with the desired outcome of the efficient and just disposal of criminal proceedings. The remedy of a separation of trials can only be considered by the trial court “during the trial”. I conclude that the application before me is premature, and for that reason alone it cannot be granted.

The Amended Indictment

[18] As it turns out this case provides an example of what can go wrong if premature applications for separation of trials are permitted. I mentioned earlier that an amended indictment had been served upon the accused by the prosecution. As I understood the answer of counsel for the applicant when I enquired as to when the amended indictment was presented, it was served upon the applicant more or less at the time when the present application was launched, or when it was about to be launched. For some reason it was not dealt with in the founding papers. The amended indictment included a new count against the applicant and

accused 16, who are now accused as accessories after the fact to fraud and theft, in that during February 2022 the two accused unlawfully and intentionally “acting in furtherance of a common purpose directly/indirectly engaged in conduct intended to

enable the perpetrators or accomplices in the crime of fraud/theft to evade liability for their crime in that accused assisted accused 1, 6, 8, 11 or 12 ...”. The facts relied upon are the same ones which supported the other charges (which the State has not abandoned), and which had been set out in the original indictment.

[19] As pointed out in Hiemstra’s commentary on section 257 of the CPA, the definition of an accessory after the fact furnished by Snyman, *Strafreg* 3 ed was endorsed in *S v Morgan* 1993

(2) SACR 134 (A) at 174. In the 7th (English) edition it reads as follows.

“A person is an accessory after the fact to the commission of a crime if, after the completion of the crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such a person's evasion of liability”.

[20] The formulation of the new charge in the amended indictment is poor. The prosecution must either correct that unilaterally or be confronted with an objection in due course by the applicant and accused 16. But the essence of the charge, and its object, are clear enough. The State intends to prove that the intention of the applicant and accused 16 in securing a copy of the forensic report, was to enable or assist the principal accused to evade liability for their crimes. If they (the principal accused) are innocent of the crimes, especially of fraud or theft, on which they are charged, the applicant and accused 16 cannot possibly be successfully prosecuted as accessories after the fact. For that reason the case against the principal accused must be proved not only as against them, but also as against the applicant and accused 16. As a result of the amendment of the indictment s 155(1) of the CPA applies. It reads as follows.

“Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.”

[21] In the circumstances, separating the trial of the applicant from that of the principal accused will place upon the State a duty of leading all of the evidence on the principal charges twice over, and upon the public purse the burden of financing that enterprise twice over. It is for good reason a matter of legal policy that a course which involves more than one court of first instance hearing and deciding the same issue should be avoided if at all possible. For these reasons, if I am wrong in holding that the application cannot be considered now, I would have dismissed the application for separation of trials.

The Order

- [22] Counsel for the applicant has argued that if I should decide, as I have, that the present application is premature, I should adjourn the application to be dealt with by the trial judge in due course. Counsel for the prosecution has argued that the proper order is the dismissal of this application, given that the refusal of the current application will have no detrimental effect on the right of the applicant to present an application for separation of trials before the trial judge at the appropriate time if the applicant is advised that such an application would or might be viable in the circumstances which prevail at that time.
- [23] The present application was launched to be dealt with as an independent interlocutory proceeding beyond the control of the trial judge who is yet to be allocated the trial. An order granting or refusing an application for separation of trials is the product of the exercise of judicial discretion. The exercise of that discretion is the prerogative of the trial judge. The present application was brought with a view to engage the discretion of a judge who is not the trial judge. In reality, the only distinction to be drawn between these proceedings and the civil motion proceedings with which the judge in Williams was confronted, lies in the fact that in this case the papers bear the case number of the affected criminal proceedings. That does not lend these proceedings any more legitimacy than would have been the case if civil motion proceedings had been employed as they were in Williams. I do not think that allowing such an application to survive sends the correct message. The state has been put to unnecessary expense, and judicial resources have been expended unnecessarily. The papers in this application would in any event not be fit for purpose by the time the trial judge might be asked to consider a separation of trials.
- [24] I accordingly make the following order.

The application is dismissed.

APPEARANCES

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Prepared on 12 October 2026 · Esheria