

SOUTH AFRICA / JUDGMENT

Mokoena v Magistrate Nekosie and Others

(A05/2020) [2024] ZAFSHC 253 (6 May 2024)

[2024] ZAFSHC 253

COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue, TL Manye

CASE / FILE NUMBER

A05/2020

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Review case no: A05/2020

In the matter between: TLADI JACOB MOKOENA Applicant and MAGISTRATE NEKOSIE 1st Respondent REGIONAL COURT PRESIDENT, MS Z MBALO 2nd Respondent THE MAGISTRATES' COMMISSION 3rd Respondent THE PUBLIC PROTECTOR 4th Respondent DPP: FREE STATE DIVISION, BLOEMFONTEIN 5th Respondent

CORAM:

JP DAFFUE J et TL MANYE AJ

HEARD ON: 06 MAY 2024

ORDER GRANTED ON: 06 MAY 2024 (reasons to follow)

REASONS

Introduction

[1] The applicant, Adv Tladi Jacob Mokoena (Adv Mokoena), an admitted advocate of the High Court of South Africa as well as a qualified chartered accountant, brought a review application under review case number A5/2020 which application was issued out of this court on 13 January 2020. On 6 May 2024, four years after the application was issued, this matter was heard by myself and Manye AJ.

[2] Adv Mokoena did not attend the hearing and did not instruct anybody to appear on his behalf. Adv RJ Nkhahle of the local Society of Advocates appeared on behalf of the Director of Public Prosecutions, Free State Division, Bloemfontein (the DPP), cited as the fifth respondent in the application. He submitted that the matter should be finalised without a further postponement being granted and that Adv Mokoena's review application be dismissed with costs. The following order was made:

- '1. The application for postponement is dismissed with costs.
 2. No order is made in respect of the National Director of Public Prosecutions' application filed under the above review application number A05/2020.
 3. All applications filed by the applicant under review application number A05/2020 are dismissed with costs.
 4. Reasons shall be provided in due course.
 5. This order shall forthwith be sent by the registrar to the applicant to his email address, to wit tl[...].@gmail.com.'
- [3] In paragraph four of the above order we stipulated that the reasons would follow in due course. These are the reasons. Unlike the approach by Adv Mokoena throughout the course of events from 2014 onwards, I shall deal with this matter as unemotionally as possible.
- [4] In November 2011 the acting municipal manager of Ngwathe Municipality lay criminal charges against Adv Mokoena which led to his prosecution in the Regional Court, Kroonstad under case number SH 99/2014. Having been confronted with criminal prosecution, Adv Mokoena caused his first review application to be issued out of the High Court. Several further applications followed as I shall set out when I summarise the relevant background facts.

The parties hereto and the relief sought

[5] Adv Mokoena sought the following relief which I quote verbatim:

'1. Reviewing and setting aside the decision by the First Respondent's decision to adjudicate this matter in the Criminal Court when the Criminal Court has NO JURISDICTION IN MATTERS CONCERNING AN EMPLOYMENT CONTRACT: SECTION 77(1), SECTION 77(3) AND SECTION

77(5) OF THE BASIC CONDITONS OF EMPLOYMENT ACT 75 OF 1997 CONFERS EXCLUSIVE JURISDICTION TO THE LABOUR COURT AND CIVIL COURTS ON MATTERS CONCERNING AN EMPLOYMENT CONTRACT. THE HONOURABLE COURT SHOULD REMOVE THE MATTER FROM THE CRIMINAL COURT AND TRANSFER THE MATTER TO THE LABOUR COURT AS SECTION 77(5) IS MANDATORY

2. Reviewing and setting aside the decision by the First Respondent's granting a warrant of arrest on 21 November 2019 at 09h30.
3. Reviewing and setting aside the decision by the First Respondent's granting a Contempt of Court Order against the Applicant on 22 November 2019.
4. Reviewing and setting aside the decision by the Frist Respondent's granting the re – opening of the case under case number: SH231/11/2019 with CAS No: 34/11/2011, when the old case under case number: SH 99/2014 and CAS No: 34/11/2011 was closed by the First Respondent before 21 November 2019.
5. Ordering the Respondents or those of the Respondents that have opposed the relief sought herein, to pay costs of this application on Bonis De Propriis, jointly and severally, the one paying, the other to be absolved.' (my underlining - the bold and/or capital letters are that of Adv Mokoena)

It is this review application which eventually served before me and Manye AJ which we dismissed on 6 May 2024. The reasons for dismissal will be dealt with hereunder. It is emphasised that the essence of the relief sought by Adv Mokoena and the golden thread running through his attacks on various respondents in different applications over the years is the Regional Court's alleged lack of jurisdiction. More about this later herein.

- [6] In this review application Adv Mokoena cited the presiding Regional Magistrate Nekosie as the first respondent, the Regional Court President, Ms Z Mbalo as the second respondent, the Magistrates'

Commission as the third respondent, the Public Protector as the fourth respondent and the DPP as the fifth respondent. Only the DPP opposed the application.

- [7] During the entire period since his first appearance in the Regional Court till the hearing of this application on 6 May 2024, Adv Mokoena caused the delay of the criminal prosecution due to several applications in the civil courts. Adv Mokoena's submission that the Regional Court does not have jurisdiction to adjudicate the criminal case has already been determined. It is really a case of res iudicata. On 28 October 2016 in case number 1670/2016 Mhlambi AJ dismissed his review application. The learned judge also dismissed an application for leave to appeal. Thereupon Adv Mokoena sought leave to appeal from the Supreme Court of Appeal who dismissed his application on 3 July 2017 under case number 347/2017.

The events immediately before and on 6 May 2024

- [8] I shall turn to the relevant background facts of this case under the next heading. Before then, and in order to put the reader in the picture, I shall deal with what has happened immediately before and during the hearing of the application on 6 May 2024.
- [9] On 4 March 2024 Loubser J and I were to adjudicate Adv Mokoena's review application. The events of that day will be described more fully hereunder, but it is apposite to quote our order at this stage, bearing in mind Adv Mokoena's email addressed to the State Attorney which I quote in paragraph 11 hereunder. The order of 4 March 2024, which was sent to Adv Mokoena's email address, reads as follows:

- '1. The matter is postponed to 6 May 2024 at 09h30.
2. This is a final postponement.
3. The applicant, ie Mr Tladi Jacob Mokoena, is ordered to pay the wasted costs occasioned by the postponement.
4. This order shall be served on the applicant at the email address provided by him, to with T[...]@gmail.com.'

- [10] It should be mentioned that Adv Mokoena did not employ the services of an attorney during most of the time and consequently, he communicated directly per email with the State Attorney as well as personnel of the High Court. They used the same method of communication. Sunday evening, 5 May 2024 at 22h11, my secretary received an email from Adv Mokoena which was also carbon-copied to inter alia the Judge President's secretary, the State Attorney, as well as Adv Nkhahle who has been instructed to appear on behalf the DPP. The email is quoted verbatim:

'Dear All

I am currently suffering from PILES AND CANNOT SIT FOR A LONG TIME.

ON WEDNESDAY 08 MAY 2024 I MIGHT HAVE TO GO FOR OPERATION.

As such I am unable to attend Court and my Doctor has booked me off until 08 May 2024.

Please receive a copy of the medical certificate

and the matter to be postponed to 2025 March so that i can deal with my health.

Kind regards

Adv Mokoena'

- [11] On Monday 6 May 2024 Adv Nkhahle appeared for the DPP as was the case during the previous appearances. He vehemently opposed any possible postponement of the application on instructions of the Office of the

State Attorney and submitted that Adv Mokoena's review application should be dismissed with costs. He referred the court to an email from Adv Mokoena to Ms Bester of the Office of the State Attorney, dated 4 March 2024, being the same day that he received the email with court order. Ms Bester immediately responded by email and pointed out that the postponement was final. Both emails were handed up from the bar. I quote Adv Mokoena's email verbatim:

'Dear Bester

This court Order is unconstitutional.

I believe that only God can say that the matter is postponed for the last time. the judges cannot make such finding. it shows that they have an interest in the matter. I have to say that i had asked for them to be recused as they were not objective

but we will see what would happen

[12] Adv Mokoena failed to file a formal application for postponement and nobody was instructed to appear on his behalf on Monday, 6 May 2024. The irony of his email is inescapable. He sought a postponement to

March 2025, but this is in conflict with the medical certificate relied upon. In terms thereof he was only booked off on the Saturday,

two days before the hearing, until Wednesday, two days after the hearing, to wit 8 May 2024. Furthermore, in his email he referred to a possible operation on 8 May 2024, an aspect not even mentioned in the doctor's certificate.

Material factual background

[13] The State Attorney indexed, paginated and bound the relevant documents, consisting of 561 pages, in three separate bundles. These did not include the belated application of Adv Mokoena filed on 13 March 2013, as well as the answering and replying affidavits thereto. However, the paginated bundles made my task to summarise the events in a chronological order easier.

[14] Adv Mokoena is not only an admitted advocate, but also a chartered accountant. To the best of my knowledge and bearing in mind the documentation presented to the court, he has never made use of the services of either an attorney, or advocate to draft his affidavits and heads of argument. One notice of motion was drafted by counsel as

will be shown later herein. Adv Mokoena personally appeared before Mhlambi AJ ex facie the transcript of the proceedings in 2016, as well as before Loubser J and I on 13 March 2023.

[15] It is now opposite to deal with the history of the litigation which will be done in chronological order from the onset to 6 May 2024. Adv Mokoena initially faced three counts, to wit two fraud counts, the

second with an alternative charge of theft and a third count relating to transgression of the Municipal Finance Management Act 56 of 2003 in respect of fruitless and wasteful expenditure. Apparently, the second count of fraud with its alternative of theft is the only remaining count as the other two counts have been withdrawn. According to the second count, Adv Mokoena is guilty of the crime of fraud in that between 18 August 2011 and 31 August 2011 he unlawfully, falsely and with the intent to defraud, pretended to Ngwathe Municipality that his salary was R 950 000, retrospectively from 1 November 2010. Therefore, the municipality owed him a nett salary amounting to R 146 221.13 as back-pay. He, by means of a misrepresentation induced the municipality to their loss and prejudice that it owed him that amount in back-pay, whilst knowing that his salary was not R 950 000 per annum, but R 750 000 per annum. The alternative count of theft is on the basis that Adv Mokoena unlawfully and intentionally stole R 90 673.83 during the same period, the property of, or in the lawful possession of Ngwathe Municipality. These offences were allegedly committed 13 years ago.

[16] Adv Mokoena was charged in the Regional Court, Kroonstad under case number SH 99/2014. He never pleaded, but eventually brought his first review application to this court under case number 1670/2016.[1] He sought the following order:

- ‘1. That the criminal court does not have jurisdiction to adjudicate on Labour Court matters;
2. That the legislation takes precedence over common law principles, the Municipal Finance Management Act (“MFMA”) is applicable to matters relating to MFMA, HR Policies and contract of employment and common law principles of fraud or theft are not applicable;
3. Costs of this Application if opposed.’

[17] The application was set down for hearing on 27 October 2016. Mhlambi AJ presided over the matter. Adv Mokoena represented himself during oral argument. The learned judge held, quoting him verbatim, ‘(i)t is evident that the thrust of this application are the criminal charges that the applicant is facing and stands arraigned in the regional court at Kroonstad and his wish to have these matters transformed into labour disputes to be heard by the Labour Courts.’

The learned judge agreed with the counsel for the DPP and stated ‘that the applicant’s contention that he was contractually entitled to a certain amount of salary and that it therefore constitute a dispute with regard to salary increases triable in the Labour Court should not be confused with the question whether the applicant was entitled to unilaterally without the necessary authority to do so and without exhausting legal processes cause payments to be made to him. This is the crux of the alleged case against the applicant and wherein the misrepresentation lies that caused the alleged loss, the principles of fraud and theft are therefore applicable I agree, consequently this application is dismissed with costs.’[2]

- [18] On 28 October 2016 Mhlambi AJ dismissed Adv Mokoena's application for leave to appeal with costs whereupon he filed an application for leave to appeal to the Supreme Court of Appeal. This application was dismissed by two judges of that court on 3 July 2017 as mentioned above.
- [19] After the dismissal of Adv Mokoena's application for appeal the prosecuting authority decided to charge him again. Obviously, a new J15 had to be prepared and a new case number allocated, to wit SH 231/11/2019. I noted that Adv Mokoena made serious submissions about the new case number and the manner in which this was obtained. It is unnecessary to deal with these issues as it should be common cause that the prosecution had to obtain a new case number. It is apparent from the records that the docket, to wit CAS 34/11/2011 remained the same. This was acknowledged by Adv Mokoena in paragraph 4 of his

notice of motion in the present review application quoted above.

- [20] On 10 November 2019 Adv Mokoena caused another application to be issued out of the High Court under case number 5337/2019. In this instance the National Prosecuting Authority (NPA) was cited as the only respondent. In terms thereof he intended to seek the following orders on 6 February 2020 which I quote verbatim:

- '1. That an order for a Permanent Stay of Prosecution for the case involving the Applicant (CAS NO: 34/11/2011, Case NO: SH 99/2014, Kroonstad Regional Court) on the ground that only the Labour Court or the Civil Court have exclusive jurisdiction to adjudicate matters concerning Employment Contracts: term of employment contract relating to increase of Salary.
2. That continued prosecution by the Respondent in the Criminal Court of the matter meant for the Labour Court amount to Malicious prosecution by the National Prosecution Authority.
3. That registration of a Fraud case by the South African Police Service ("SAPS") when the matter was meant for the Labour Court amounted to defamation of character of the Applicant [Adv Mokoena].
4. Costs of the Application if opposed.' (my underlining)

This application was set down for hearing on 6 February 2020. It served before Musi JP who removed it from the roll, Adv Mokoena to pay the costs. Adv Mokoena never prosecuted this application any further. The matter is therefore not finalised and still pending.[3]

- [21] Also, in November 2019, Adv Mokoena caused an application to be issued in the Regional Court, Kroonstad under case number 231/11/2019 (it being the criminal case number). As is the case in the aforesaid High Court application referred to in the previous paragraph issued in the same month, he cited the NPA as the only respondent. Adv Mokoena sought an order that Regional Magistrate Nekosie (cited as the first respondent in the present application), Senior Prosecutor, Adv Swanepoel, Senior Prosecutor Victor J De Bruyn, Captain Goosen,

and Warrant Officer Mofokeng, be removed from the case with immediate effect and that internal disciplinary proceedings as well as criminal charges be instituted against these persons as well as a female Warrant Officer Eloff. Furthermore, he sought an order that the 'illegal and unlawful warrant of arrest and conviction on contempt of court' be reversed and set aside. Finally, he insisted that the current case with case numbers SH 99/2014 and SH 231/2019 with CAS number: 34/11/2011 be transferred to the labour court in terms of ss 77(1), 77(3) and 77(5) of the Basic Conditions of Employment Act 75 of 1997 and that costs be ordered against anybody opposing the application. This application was opposed by the NPA and answering affidavits were filed. In this case Adv Mokoena removed the application from the roll and did not prosecute this any further.[4]

[22] In order to show why he did not attend the court proceedings in the Regional Court in November 2019, he attached a medical certificate of Dr IW Alinnor, the same person who now, nearly five years later, presented Adv Mokoena with two further medical certificates in March 2024 and May 2024 respectively. In terms of this certificate, the doctor alleged that Adv Mokoena was suffering from a 'medical condition', that he was informed that Adv Mokoena took ill on

19 November 2019, that he was first seen by him on 19 November 2019 and that he was unfit for duty from 19 November 2019 to 23 November 2019.

[23] On 12 February 2020 Adv Mokoena filed a notice of removal from the roll[5] in the Regional Court, Kroonstad, stating the following reasons:

- '1. There is a pending review application in terms of Rule 53 of the Uniform Rules of Court, with case number A5/2020. This review application has the effect of finalising the matter and this application might not be necessary. A copy of the notice of motion for the review application is attached hereto as Annexure "A".
2. When the review application is granted and this application is adjudicated might lead to controversial decisions by the same Court.
3. The notice of removal is therefore by agreement between parties and costs reserved.'

[24] A further notice of motion dated 12 June 2021 without a case number was found in the court file. There is no proof that it has been issued out of this court. This document was drafted by Adv AM Motake on instructions of Melato Attorneys. The affidavit of Adv Mokoena referred to herein is not in the file. This notice of motion is dated eighteen months after issuing of the present review application. Furthermore, several further parties have been cited, to wit the Department of Justice, the Judicial Service Commission, the Minister of Police, the Minister of Justice and Correctional Services and the National Prosecuting Authority. It provides for certain prayers in Part A, dealing again with the exclusive jurisdiction of the Labour Court to the exclusion of the Regional Court, and Part B, inter alia pertaining to the issuing of an alleged unlawful warrant of arrest by the Regional Court. We were not called upon to decide this application which was not properly before us, but merely attached to the NDPP's

affidavit in support of the application to declare Adv Mokoena a vexatious litigant.

[25] During September 2022 the NDPP decided to apply for an order declaring Adv Mokoena a vexatious litigant. The State Attorney probably believed that it could merely serve and file this application with all its attachments without issuing a new application and obtaining a new case number. As mentioned herein, the documents attached to the deponent's founding affidavit were properly indexed, paginated and bound in three separate bundles which provide for easy reading. But, the NDPP's 'application' could never be adjudicated as it did not comply with any procedural

requirements contained in the Uniform Rules of Court. More about this later herein.

Notwithstanding the procedural irregularities, Adv Mokoena filed an answering affidavit to which the NDPP responded in a replying affidavit. Adv Mokoena raised several points in limine. Those in respect of procedural irregularities are valid. He also reiterated his stance about the exclusive jurisdiction of the Labour Court. This 'application' was set down for hearing on 13 March 2023.

[26] The review application under case number A5/2020 (the present application before this court) was initially set down for hearing on Monday 31 October 2022. Adv Mokoena objected to the compilation of the bench and specifically the presence of one of its members. It is not necessary to delve into the issue, save for stating that the matter did not proceed, but was postponed to Monday, 13 March 2023.

[27] On Friday, 10 March 2023, and under the same case number, Adv Mokoena drafted a notice of motion. This new application was only issued on Monday morning, 13 March 2023. It was served on the State Attorney and filed with the court just before the hearing was to start. Adv Mokoena's supporting founding affidavit consisted of 43 pages to which he attached a voluminous set of documents. He sought the following orders:

- '1. That the review application on the issue of lack of jurisdiction of the Magistrate Court to be adjudicated by the Judge President of the Free State High Court.
2. That the review application on the issue of lack of jurisdiction of the Magistrate Court to be adjudicated as UNOPPOSED REVIEW APPLICATION AS A RESULT OF THE FIRST, SECOND AND FIFTH RESPONDENTS FAILING TO SERVE AND FILE THE ANSWERING AFFIDAVITS.
3. That the review application on the issue of lack of jurisdiction of the Magistrate Court to be adjudicated as UNOPPOSED REVIEW APPLICATION AS A RESULT OF THE FIRST RESPONDENT BEING BOUND BY SECTION 110(2) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 – WHICH IS PEREMPTORY THAT IF A MAGISTRATE COURT DOES NOT HAVE JURISDICTION AND THE ACCUSED HAS NOT PLEADED, THEN THE MAGISTRATE MUST REMOVE THE MATTER TO A COURT WHICH HAS JURISDICTION:
4. That the review application on the issue of lack of jurisdiction of the Magistrate Court to be adjudicated as UNOPPOSED REVIEW APPLICATION AS A RESULT OF THE FIRST RESPONDENT BEING BOUND BY SECTION 77(1), SECTION 77(3) AND SECTION 77(5) OF THE BASIC CONDITIONS OF THE EMPLOYMENT ACT 75 OF 1997 – WHICH IS

PEREMPTORY THAT IF THERE IS A DISPUTE THAT EMANATE FROM THE EMPLOYMENT CONTRACT, ONLY THE LABOUR COURT HAS ABSOLUTE JURISDICTION TO ADJUDICATE THE MATTER.

5. That the review application on the issue of lack of jurisdiction of the Magistrate Court to be adjudicated as UNOPPOSED REVIEW APPLICATION AS A RESULT OF THE FIRST RESPONDENT BEING BOUND BY THE TWO CASES THAT CONFIRMS THAT ONLY THE LABOUR COURT HAS ABSOLUTE JURISDICTION TO ADJUDICATE THE MATTER WHERE IS A DISPUTE THAT EMANATE FROM THE EMPLOYMENT CONTRACT: A CONSTITUTIONAL CASE WITH CASE NUMBER 20/18 – SOUTH AFRICA (PTY) LTD AND THE SUPREME COURT OF APPEAL CASE WITH CASE NUMBER 1073/2019 – CHERYLL LEWARNE V FOICHEM INTERNATIONAL (PTY) LTD.
 6. That the Applicant lodged a complaint with the Judicial Review Council against the abuse of power and the court processes by the legal representatives from the State Attorney, the prosecutors which is tolerated and condone by the Judge President of the Free State High Court which he was presiding in this matter in one of the sitting and he is aware of the transgressions of the law by the prosecutor in the High Court.
 7. That the Applicant lodged a complaint with the Judicial Review Council against the abuse of power and the court processes by the legal representatives from the State Attorney, the prosecutors – the Complaint is more on the unethical conduct of these legal representatives and the condonation of these unethical conduct by the Judge President.
 8. The State Attorney to pay the costs of the review application on the scale of an attorney and own client scale.
 9. Granting the Applicant with further and/or alternative relief this Honourable Court may deem fit and/or just.’ (my underlining in respect of paragraphs 1, 3, 6 and 7 - the other underlining and bold and/or capital letters are that of Adv Mokoena)
- [28] It is reiterated that Adv Mokoena stated in paragraph 3 of the notice of motion filed on 13 March 2023 that he had not yet pleaded in the Regional Court, but that the Regional Magistrate should have removed the matter from the roll due to lack of jurisdiction. On that day Adv Mokoena appeared in court in person. That was his last appearance in this court in respect of the present litigation. He submitted that on 31 October 2022 the presiding judges recused themselves and therefore, they could not validly postpone the application to 13 March 2023. He also insisted that the NDPP was represented unlawfully as she was not before the court. After considering all the submissions by the parties, Loubser J and I granted the following

order by agreement in an endeavour to obtain finality regarding the litigation between the various parties:

‘Having considered the documents filed of record and having heard Mr TJ Mokoena in person and the legal practitioner for the National Director of Public Prosecutions,

IT IS ORDERED BY AGREEMENT THAT:

1. The matters are postponed to 14 August 2023.
2. The application for review under case number A05/2020 together with the application filed this morning by Mr Mokoena under the same case number as well as the vexatious proceedings application by the National Director of Public Prosecutions shall all be heard on the same day, to wit 14 August 2023.
3. The answering affidavit of the National Director of Public Prosecutions in respect of the new application filed under A05/2020 today, and if so advised in respect of the initial review application, shall be filed on/or before 13 April 2023.
4. Mr Mokoena, the applicant in the review application and the further application filed this morning, shall file his replying affidavit on/or before 2 May 2023.
5. Heads of argument by Mr Mokoena shall be filed on/or before 10 June 2023 and the National Director of Public Prosecutions’ heads of argument shall be filed on/or before 27 June 2023.
6. Costs shall stand over for later adjudication.’

[29] On 14 August 2023 Adv Mokoena did not appear. A few minutes before the hearing was supposed to start at 09h30, my secretary was presented with an email obtained from the secretary of the Judge President, Ms Mostert. It was received that morning at 09h12, ie 18 minutes before the start of proceedings. It reads as follows:

‘Dear Judge President

I really sick and cannot attend Court Today. I have a short breath, my voice is gone. My whole body is in pain. i will go to the Doctor.

I will submit the medical certificate some time during the day.

Can you please postpone the matter to March 2024.

The costs for today i will pay.

Kind Regards

The promised medical sick note never arrived to the best of my knowledge.

[30] As the National Director of Public Prosecutions was not a party to the original review application and its application for vexatious proceedings was filed under the same case no, ie 5/2020, she was ordered by myself and Loubser J to issue a separate application if it so wished in accordance with the Vexatious Proceedings Act before 28 August 2023. For convenience of the reader, I quote the order granted by myself and Loubser J:

- '1. The review application is postponed to Monday, 4 March 2024 due to the illness of Mr Mokoena, the applicant, and at his request.
2. The National Director of Public Prosecutions shall, if they so wish, issue its application in terms of the Vexatious Proceedings Act in accordance with the Uniform Rules of Court before 28 August 2023 and proceed to finalisation thereof before the date of hearing in paragraph 1 above.
3. Costs shall stand over for later adjudication.'

We postponed the application as requested by Adv Mokoena and notwithstanding his offer to pay the wasted costs, we decided that costs should stand over for later adjudication.

[31] The National Prosecuting Authority did not launch separate proceedings in terms of the Vexatious Proceedings Act and on 4 March 2024 Loubser and I, to whom the review application was again allocated, were supposed to hear the review application. Again, a few minutes before the hearing was supposed to start, my secretary received an email from Adv Mokoena to which he attached a medical certificate from the same doctor, Dr IW Alinnor. I quote the email:

Please receive the medical certificate.

For the past week my health has been bad, my eyes have been red i consulted Sandton Hospital last week and not better.

Please postpone the matter to FOURTH QUARTER.

The certificate stated as follows:

'Name: Tladi Jacob Mokoena

was examined by me and that: he

1. Is suffering from: Medical Condition
2. I was informed by the patient that he/she took ill on: 2/3/2024
3. He/she was first seen by me on: 2/3/2024
4. He/she is unfit for duty from: 2/3/2024
5. He/she may resume work normal/light duty on: 5/3/2024
6. The fact that he/she will be absent for more than a week is due to: return for review on 4/3/2024'

[32] Adv Mokoena did not attend the proceedings as was the case on 14 August 2023 and also failed to appoint an attorney or counsel to appear on his behalf. In a final attempt to accommodate him, we postponed the matter to 6 May 2024. The order is quoted above.

The Stalingrad defence

[33] The material facts show that the litigation ensued by Adv Mokoena against the DPP and other respondents has a ‘long and troubled history’ spanning over a period of 10 years. I quote the dictum by Harms JA in *National Director of Public Prosecutions v Zuma*[6]:

[2] The litigation between the NDPP and Mr Zuma has a long and troubled history and the law reports are replete with judgments dealing with the matter. It is accordingly unnecessary to say much by way of introduction and a brief summary will suffice.’

[34] Navsa ADP commented as follows with reference to TS Eliot’s ‘recurrent end of the unending’ in *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another*[7] and concluded:

‘This abbreviated history illustrates that on any reckoning, the scale of litigation, which is likely unprecedented in the South African courts, justifiably attracts the epithet ‘Stalingrad’.

[35] Wallis JA also referred to the Stalingrad defence in *Moyo v Minister of Justice and Constitutional Development and Others (Moyo)*[8] and I quote:

‘The term ‘Stalingrad defence’ has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.’

[36] Ponnan JA, writing for a unanimous bench of the Supreme Court of Appeal, dealt with the Stalingrad defence recently in *Jacob Gedleyihlekisa Zuma v William John Downer and Another*[9] and eventually found that Mr Zuma’s approach to the civil litigation was an abuse of process.[10]

[37] Having considered the material facts set out herein and the authorities quoted above, I am satisfied that Adv Mokoena’s approach over the years can be characterised as a Stalingrad defence. It is immediately accepted that Adv Mokoena’s litigation has not received the same attention from our courts and

the media as was the case in respect of the litigation by and/or against Mr Zuma. Fact of the matter is that his matters have been

dragging on in our courts over a period of ten years. It may also be pointed out that he even filed an application for leave to appeal this court’s order of 6 May 2024 whilst these reasons were still outstanding. This is indicative of his intention to avoid his criminal prosecution in the Regional Court.

Legal principles applicable to applications for postponement

[38] An application for postponement is not there for the taking. The usual requirements applicable to postponements are trite. The following is a summary of the authorities and the principles referred to in Erasmus[11]:

- a. the court has a discretion to grant or refuse postponement which discretion must be exercised in a judicial manner;
- b. the applicant for a postponement seeks an indulgence and he or she must show good and strong reasons;
- c. the applicant must furnish a full and satisfactory explanation of the circumstances giving rise to the application;
- d. the application must be made timeously, i.e. as soon as the circumstances justifying that became known to the applicant;
- e. the application must always be bona fide and not used simply as a tactical manoeuvre to gain an advantage;
- f. prejudice shall be considered, especially whether any prejudice caused by the postponement can be fairly compensated by an appropriate order of costs;
- g. the balance of convenience or inconvenience to both parties should be considered.

[39] In *Lekolwane v Minister of Justice and Constitutional Development (Lekolwane)*[12] the Constitutional Court restated the law pertaining to applications for postponement in the following words:

‘The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.’

The Constitutional Court added that the broader public interest and the prospects of success on the merits are also factors to be considered in granting a postponement.

[40] In *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for General Equality as amici curiae)*[13] the Constitutional Court quoted *Lekolwana* with approval and added the following further factors:

[11] ... The following factors could non-exhaustively be added to the above: the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided. In balancing these factors it is of vital importance to keep in mind that –

'(w)hat is in the interests of justice will . . . be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.'

[41] The reader is reminded that Adv Mokoena submitted in his email of 4 March 2024 to the State Attorney that our order of even date, granting a final postponement, was unconstitutional. He is wrong. The Chief Justice of the Apex court of this country granted a final postponement in Lekolwane whereupon the Constitutional Court, our Apex court, concluded as follows:[14]

'In light of the above, there does not appear to be any good cause shown for the application for condonation and postponement by the applicants. On the contrary, the applicants had foregone opportunities to have the matter fully ventilated and had been warned

that the previous postponement granted was a final one. To grant yet another postponement would have constituted a gross abuse of the processes of this Court. As such, it could not be considered in the interests of justice to grant the application. Therefore the Court did not grant the request for condonation and postponement.'

[42] We were satisfied that Adv Mokoena's request for a postponement – not even to mention the request till March 2025 – was made mala fide and clearly a tactical manoeuvre to ensure that he never has to face criminal prosecution. His action was calculated: he was not prepared to adhere to the order of 4 March 2024 which he regarded as unconstitutional. As advocate he knew what he had to do. He failed to prepare a proper application for postponement and to furnish a satisfactory explanation why he could not arrange for his

case to be argued on his behalf, alternatively for such person to seek a postponement on proper grounds. On the information before us, we were satisfied that the broader public interest demanded that no further postponement be granted. Finally, the prospects of success on the merits weighed heavily against Adv Mokoena.

Evaluation of the grounds of review

[43] Before the review application is considered, it is necessary to record the following. The NDPP instructed the State Attorney to approach the court to declare Adv Mokoena a vexatious litigant in terms of s 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 as indicated above. An improper process was adopted. The NDPP is cited as applicant and Adv Mokoena as respondent in the notice of motion. There is no reference to any of the other parties. No case number has been allocated to this application. The NDPP could and should have

applied for leave to join the proceedings as a respondent and thereafter file a counter-application to seek the relief that it intended to seek, alternatively a separate application should have been issued and leave sought that the two applications be heard together. For these reasons, Loubser J and I directed the NDPP on 14 August 2023, if it so wish, to issue its application in terms of the Vexatious Proceedings Act before 24 August 2023 in order to get finality before 4 March 2024, the date to which the review application was postponed. She failed to do so. When this matter was heard on 6 May 2024, Adv Nkhahle informed us that the NDPP's application had not been instituted yet. Therefore, we made no order in that regard.

[44] Adv Mokoena embarked upon a forum shopping process. He continued to submit that the dispute is a labour dispute to be adjudicated exclusively by the Labour Court and that the dispute has nothing to do with criminality which should be adjudicated by the Regional Court. This aspect has been settled earlier by Mhlambi AJ and the Supreme Court of Appeal who refused to grant Adv Mokoena leave to appeal. However, I shall briefly deal with the relevant principles hereunder.

[45] Last year Adv Mokoena decided that the Judge President of this division was the only judge that could hear and decide his review application. This is not his prerogative, but also a strange request, bearing in mind his allegations pertaining to the Judge President in paragraphs 6 and 7 of the notice of motion that he filed on 13 March

2023. It is not necessary to deal with the serious allegations contained in his founding affidavit in support of this application.

Fact of the matter is that Adv Mokoena never applied for the recusal of Loubser J, myself or Manye AJ. The application has been allocated to us and there is no reason why we should not have heard and adjudicated it.

[46] Notwithstanding the dismissal of Adv Mokoena's first review application by Mhlambi AJ and his unsuccessful application for leave to appeal to the Supreme Court of Appeal, he continued to submit that the Regional Court did not have jurisdiction as he had not committed criminal offences. According to him, the dispute was a mere labour dispute. He has over the years quoted the same two cases, to wit the Supreme Court of Appeal case in *Lewarne v Fochem International Pty Ltd (Lewarne)*[15] and the Constitutional Court case in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another (Amalungelo)*. [16] Consequently, and based on these authorities, Adv Mokoena has always maintained that he was entitled to a referral of the matter to the Labour Court.

[47] For the sake of completeness, the two judgments relied upon by Adv Mokoena should be put in perspective. Neither of these cases support Adv Mokoena's view point. They did not deal with alleged criminal offences such as fraud and theft. In *Lewarne* the appellant, an employee, launched an application in the High Court claiming payment from her employer in respect of a portion of her thirteenth cheque as well as her salary. The High Court dismissed the application on the basis that the Labour Court had exclusive jurisdiction to

adjudicate the claim in terms of s 77(1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). On appeal, the Supreme Court of Appeal held that s 77(3) of the BCEA conferred concurrent jurisdiction on the civil and the Labour Courts. Consequently, the employee's claim succeeded.

[48] In *Amalungelo* the union and several of its members claimed that the employers incorrectly deducted tax from their salaries in respect of company cars. Eventually, the Constitutional Court had to decide whether the Labour Court had jurisdiction to adjudicate the claim. The court held that the Labour Court enjoyed exclusive jurisdiction over all disputes and claims arising from the provisions of the BCEA, subject to a few specified exceptions. Consequently, it held that the Labour Court erred in concluding that it did not have

jurisdiction in respect of one of the claims brought to it and therefore the matter was remitted to that court.

[49] Adv Mokoena's submission that the Labour Court has exclusive jurisdiction in *casu* is totally wrong. That court has no jurisdiction to adjudicate alleged criminal offences. His reliance on s 110(2) of the Criminal Procedure Act 51 of 1977 (the CPA) is misplaced and wrong. That section reads as follows:

'(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.'

The wording of the section is clear. He should have pleaded lack of jurisdiction and that court should have upheld his plea. This did not happen. There is no evidence that he ever pleaded in the Regional Court to the effect it did not have jurisdiction and that such plea was indeed upheld as provided for in s 110(2) of the CPA. In fact, it is his case, relying on s 110(2), that he has not pleaded yet, but that the Regional Magistrate should have removed the case from the roll due to lack of jurisdiction. This is the relief that he sought in paragraph 3 of his latest application issued on 13 March 2023 which I quoted above. Consequently, the Regional Court is entitled to hear the case. Adv Mokoena should, when the charges are put to him, plead thereto in order for the criminal prosecution to proceed. The section relied upon by him is of no assistance. It is in principle intended to provide for the scenario where the crime has allegedly been committed outside the court's jurisdiction. It should be emphasised that

the Regional Court has jurisdiction over all offences, excluding treason.[17]

[50] Adv Mokoena's was convicted in the Regional Court for contempt of court for failing to appear in that court, but not sentenced yet. There is ample authority that review or appeal courts should not interfere mid-stream with proceedings in a lower court. This court should not come to his assistance at this stage of that proceedings.

[51] For these reasons we granted the order contained in paragraph 2 above.

JP DAFFUE J

I concur

TL MANYE AJ

On behalf of the Applicant: No Appearance On behalf of the 5th Respondent: Adv RJ Nkhahle

Instructed by: Office of the State Attorney BLOEMFONTEIN

[1] Record at 27-28.

[2] Record at 110 -111.

[3] Record at 17 paras 20-23 of the founding affidavit of Ms N Gcingca.

[4] Record at 14-16 paras 12-19 of the founding affidavit of Ms N Gcingca.

[5] Record at 215-217.

[6]

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 2.

[7] (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017) para 8.

[8] Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others (387/2017; 386/2017) [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA);

[2018] 3 All SA 342 (SCA); 2018 (2) SACR 313 (SCA) (20 June 2018)

para 169.

[9] (case no 788/2023) [2023] ZASCA 132 (13 October 2023).

[10] Ibid para 32.

[11] Van Loggerenberg: Erasmus, Superior Court Practice Vol 2 at D1-553 to D1-555.

[12]

[2006] ZACC 19; 2007 (3) BCLR 280 (CC) at para 17.

[13]

[2007] ZACC 14; 2007 (5) SA 620 (CC) para 11.

[14] Lekolwane loc cit para 20.

[15] (1073/18) [2019] ZASCA 114.

[16] (CCT20/18) [2019] ZACC 45.

[17] Section 89 (2) of the Magistrates' Courts Act 32 of 1944.

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