

SOUTH AFRICA / JUDGMENT

Nzuza and Others v National Director of Public Prosecutions and Others (Leave to Appeal) (70192/17) [2024] ZAGPPHC 1360 (27 December 2024) [2024] ZAGPPHC 1360

COURT

North Gauteng High Court, Pretoria

BEFORE

Mlambo

CASE / FILE NUMBER

70192/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO:

70192/17

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

27 December 2024

SIGNATURE

In

the matter between:

XOLANI
NZUZA
First Applicant
ANELE
ZONKE
Second Applicant
SIMPHIWE
BOOI
Third Applicant
KHANYILE
KAHYISE
Fourth Applicant
MZOXOLO
MAGIDIWANA
Fifth Applicant
THOLAKELE
DLUNGA
Sixth Applicant
SAMKELO
MKHIZE
Seventh Applicant
AMANDA
NOGWAZA
Eighth Applicant
THOBILE
TYOBENI
Ninth Applicant
MAJEKE
NONKONYANA
Tenth Applicant
MZUKISI
SOYINI
Eleventh Applicant
BONGILE
MPOTYE
Twelfth Applicant
ZAMIKAYA
NDUDE
Thirteenth Applicant
STHEMBILE
SOHADI
Fourteenth Applicant
LOYISO
MTSHEKETHSE
Fifteenth Applicant
ZOLILE
HONXO
Sixteenth Applicant
ZWELITSHA
MTSHENA
Seventeenth Applicant

MZIWANELE
MXINWA
Eighteenth Applicant
MZOKOLO
ZUKULU
Nineteenth Applicant
ASSOCIATION
OF MINEWORKERS AND
CONSTRUCTION
UNION
Twentieth Applicant
and
THE
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent
THE
NATIONAL PROSECUTING AUTHORITY
Second Respondent
MINISTER
OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
Third Respondent
MINISTER
OF POLICE
Fourth Respondent
PRESIDENT
OF THE REPUBLIC OF SOUTH AFRICA
Fifth Respondent

Heard: 11 October 2024

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 27 December 2024.

ORDER

1.
Condonation for the late filing of the application for leave to appeal is granted.
2.
The application for leave to appeal is refused.
3.
Each party is to pay their own costs.

JUDGMENT

(LEAVE TO APPEAL)

MLAMBO, JP

Introduction

[1] This is an application for leave to appeal against the judgment and order I handed down on 15 April 2024.[1] The applicants also seek condonation having only launched this application on 16 July 2024, which is more than 2 months after the 15 days provided for in this Court's rules.[2] Applications for leave to appeal are regulated by section 17 of the Superior Courts Act.[3] In terms of this section, an applicant must show that another court would reach a different conclusion or that there is a compelling reason for leave to be granted.[4] I first consider whether a case has been made out for condonation.

Condonation

- [2] The main reason provided by the applicants is that when the attorneys received the main judgment, the individual applicants, who are migrant workers, had either relocated (domestically and outside the Republic) or returned to their respective rural homes. The result was that communicating the outcome of the application and co-ordinating a unified response equally representing their best interests became unexpectedly lengthy. A further difficulty under these circumstances was that there were no financial instructions given to the attorneys to prosecute the application for leave to appeal. Considering that the history of this matter, has spanned some 12 years, they submit that a two month delay is not inordinate nor does it cause incurable prejudice to the respondents.
- [3] They therefore submit that this explanation covers the entire duration of the two months delay, and that in the circumstances, their representatives took all reasonable measures within their power to locate the applicants, a process that unfortunately ended up taking two months. They further submit that there is no prejudice on the respondents, while refusing condonation would cause them great prejudice. This as their section 34 rights of access to courts, which includes appeals, would be denied. Lastly on the prejudice aspect, they submit that they enjoy excellent prospects of success on appeal.
- [4] The respondents[5] submit that the explanation provided by the applicants for condonation is insufficient and unreasonable. First that it is not true that some of the applicants are from outside the Republic as the docket records them being from the Eastern Cape and KwaZulu-Natal. Second that the explanation lacks important information such as the dates on which the attorneys tried to contact the applicants and how and why they failed to get a hold of them. They do however concede that granting condonation would be in the public interest because it would allow this matter to be finalised if a decision is granted on the merits.

- [5] I am of the view that while the applicants' attorneys do not include all the detail they could reasonably have provided, the crux of the explanation is reasonable and it covers the entire period of the delay. While a two month delay is not as benign as the applicants make it out to be, in light of their explanation, it is not so unreasonable so as to justify the refusal of condonation, especially because the respondents have hardly made out a case of how it was or would be prejudiced. I therefore grant condonation.

Grounds for leave to appeal

- [6] The grounds for leave to appeal are based on this Court's invocation of section 173 of the Constitution, its assessment of the abuse of court, application of *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*
- [6] in assessing undue delay and its treatment of the NDPP's reasons which they argue were in the first place no reasons at all, but if accepted as reasons, as irrational.

Abuse of court

- [7] On abuse of court the applicants first issue is that this Court's finding was reached *mero motu* as it was not raised by the respondents. They take issue with the fact that a drastic remedy was used to dismiss their application in circumstances where it was not pleaded. As a result, such a finding would be a development in the law which on its own would be sufficient for an appeal court to consider. Regarding section 173, they place reliance on the Constitutional Court's decision in *Molaudzi v S* [7] and that of the Supreme Court of Appeal in *Knoop and Another v NNO v Gupta (Tayob Intervening)*[8] that section 173 can only be invoked in relation to procedural and not substantive rights. The effect of these decisions, they say, is that section 173 "does not apply to substantive rights but rather to adjectival or procedural rights"[9] in that "[a] court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario" (applicants emphasis).[10]
- [8] Rule 53 read with Rule 6 of this Court's rules deals with review applications. In terms of these rules time periods are included only for the initiation of the application until the point of prosecution. In my view, this creates a lacuna for the situation in the current matter where the application is timeously initiated but not prosecuted. The circumstances of the

delay as set out in the main judgment therefore fall squarely within procedural matters (i.e. failure to timeously prosecuting a review having initiated it) and therefore section 173 was correctly invoked. I am inclined to agree with the respondents that the Supreme Court of Appeal's decision in *Cassimjee v Minister of Finance*,[11] found that section 173 can appropriately be invoked to limit the right of access to court as "[t]he same considerations [relating to vexatious litigation] ... apply to an abuse of court procedures". As I found the delay an abuse of court

procedures, it was within my discretion to use section 173 in the manner that I did. The respondents correctly submitted that having

exercised a discretion, an appeal court could only interfere if such discretion was not exercised judiciously.[12] Having followed binding Supreme Court of Appeal precedent,[13] this is not such a case.

[9] With that said, a fault line with this ground and all others discussed in relation to this point is that this Court did not merely dismiss the application on the technical point of delay. The main judgment dealt with the merits, and in my view, this renders the issue of section 173 moot.

Correct test for undue delay

[10] The applicants argue that in following Khumalo, this Court erred as that decision was superseded in State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited[14] and Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited, [15] which developed the correct test to apply in determining the effect of undue delay. In Gijima, the Constitutional Court emphasised that undue delay in initiating review proceedings can prejudice the respondent, hinder the court's assessment, and undermine the public interest in certainty and finality. Citing Khumalo, it also acknowledged that courts have a discretion to overlook delays, stressing that such discretion should not be exercised

lightly and must be grounded in relevant facts or objective factors. In Buffalo City, the Constitutional Court applied the two-step approach from Khumalo which asks whether the delay was unreasonable and even if found to be unreasonable, whether the interests of justice require that the delay be condoned nonetheless. Contrary to submissions made on behalf of the applicants, both Gijima and Buffalo City approve of Khumalo, it is not an “outdated” test. Furthermore, neither Gijima nor Buffalo City decided that merely because there is conduct that is constitutionally invalid, delay does not matter, the decision to condone the delay remains within the court’s discretion.

[11] What Gijima and Buffalo City make clear is that a pre-requisite of the test is first finding conduct, in this instance, a decision by the NDPP, that is constitutionally invalid, despite a delay in bringing the application. Once that threshold has been met, a court “may nevertheless be constitutionally compelled to declare the state’s conduct unlawful ... because section 172(1)(a) of the Constitution enjoins a court to declare invalid ... conduct that it finds to be inconsistent with the Constitution”. [16] In the main judgment, I found the NDPP’s decision to pass constitutional muster and consequently, the applicants argument must be rejected as the test can be taken no further. In any event, as stated above, this Court went beyond merely dismissing the review application solely on the delay ground, it also considered the merits of the review.

Attribution of fault for the delay

[12] This Court found that as dominus litis, the applicants had the duty to move the matter along, and it is not disputed that they failed to do so. Even after intervention by the Deputy Judge President, it was the respondents who filed their heads first. The main judgment makes it

clear that what was in issue was whether the applicants took any steps after launching their review, to move the matter along. The conclusion, which remains correct, was that after launching the review in October of 2017, no further engagement with the matter was forthcoming from the applicants. Again, as dominus litis, this failure is solely attributable to them. I find no reason why another court would reach a different conclusion.

- [13] The attribution of ulterior motives was not reached lightly. It was the only reasonable inference left for this Court to make on the evidence before it. The applicants are the accused in a criminal trial, where amongst others, they are charged with murder. If convicted, they could be sentenced to direct imprisonment. The record placed before me and this very review are evidence of the fact that they wanted to stop their prosecutions.[17] They first approached the NDPP and when that failed, they approached this Court. In the main application, there was no explanation given for the delay in the prosecution of the matter, even during oral argument, the focus was on the proceedings being instituted in time and little was advanced on what happened subsequent to the launching of the application. In these circumstances and where no explanation has been proffered for why the review was not timeously prosecuted, I can find no reason why another court would reach a different conclusion on this aspect.

The NDPP's reasons

- [14] The main judgment comprehensively dealt with the reasons why it was not appropriate in this case to review the decision not to prosecute. The legal principles are clear that this is not a power courts will easily exercise.[18] The applicants exercised their rights by presenting evidence before the NDPP on why their prosecutions should not proceed. This included their view on the evidence of Mr X, which they said was the only evidence the state had against them. The NDPP disagreed, and on the information placed before me contained in the record, it cannot be disputed that the NPA has other evidence. While the applicant takes the view that Mr X's evidence which is "at the heart of the NPA's case"[19] was discredited, these are motion proceedings and on application of the Plascon-Evans rule, the respondents' version that Mr X is one of many witnesses must prevail. This Court could not be asked to provide a view on the strength of the State's case because that is the role of the criminal trial Judge. Any pronouncement from this Court on this issue would, in the circumstances be an encroachment of the judicial independence doctrine.
- [15] On the adequacy of the reasons, this Court's conclusion was that although terse, the NDPP did provide reasons. Further to this, the record showed the evidence provided to the NDPP included the docket, video footage, reasons for his opinion and a copy of an extract from the Farlam Commission containing its findings regarding Mr X's evidence. There was no basis proffered suggesting that the NDPP did not apply his mind to it and there is no law requiring him to state individual reasons based on each instance of the evidence provided before him. I agree with the respondents that there

was nothing new between the first and second requests. While the applicants argue that the meeting of 12 September 2017 was an

intervening factor, it does not change that no new information was presented to the NDPP and that a holistic reason was that the NDPP remained unconvinced in their case. It is important to note that the NDPP too is restrained from overstepping his authority, and I agree that the grounds raised by the applicants will more appropriately be dealt with by the trial judge.

[16] There was a further submission that this Court erred in the main judgment when it found that the NDPP had fully substantiated his reasons for refusing to stop the prosecution in the answering affidavit.[20] Reliance is placed on the Supreme Court of Appeal's decision in *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another*, [21] where it was held that reasons given at the time of the request are the only reasons a Court should consider and not those proffered in an answering affidavit. The respondents are correct that the Supreme Court of Appeal's decision was in relation to giving different reasons in an answering affidavit. This was not the case in this matter as the answering affidavit merely substantiated the reasons already known to the applicants. Furthermore, the applicants were aware of this substantiation yet they elected not to file a replying affidavit. However, even if the import of the decision in *Zuma* also covers substantiated and not merely different reasons, this difference had no effect on the main judgment's outcome. This is because the conclusion reached in what is stated preceding the words "[i]n any event" in paragraph 59 of the main judgment, does not consider the reasons given in the answering affidavit.

[17] I now turn to the submission that this Court ought properly to have found irrationality on the part of the NDPP in that, inter alia, they failed to take into account relevant considerations and/or took into account irrelevant ones. When the NDPP received the

representations from the applicants, witness statements, photographs, the docket, video footage, reasons for the DPP's opinion and a copy of an extract from the Farlam Commission containing its findings regarding the evidence of Mr X and why the DPP did not agree that it was discredited, were considered. The information sent to the NDPP therefore met the low hurdle required for his decision to be rationally connected to the reasons for continuing the prosecution. It was on this basis that the NDPP agreed that there was a prima facie case against the applicants. The NDPP was not called upon to determine with certainty that there would be a successful prosecution, merely that if the State's case as alleged was true, whether the applicants would be convicted. There was further no information placed before this Court stating why any of the information placed before the NDPP was irrelevant. In the circumstances, the decision reached was itself rational while being rationally connected to the information before the NDPP. Therefore, another Court would not reach a different conclusion on the merits relating to the review of the NDPP's decision.

Compelling reasons why leave to appeal should be granted

[18] The argument here is that the historical importance of this matter and its concomitant socio-economic and political context the events occurred in, coupled with the now 12 year delay, make a prosecution to be against the public interest. This ground is unsustainable. The public importance of this matter equally applies to anyone who allegedly committed crimes, especially serious crimes, being

prosecuted and convicted if found guilty. The number of years which have passed cannot on their own be a ground for granting leave to appeal, despite submissions from the applicants that the North West High Court placed blame for the delay on both the applicants and the State when it struck the trial from the roll.[22] In my view, this does not change the significance of the fact that the applicants are dominus litis. They instituted this review application which played a major part in those delays, and with this Court having pronounced itself on it, there is no longer an impediment to the trial proceeding. In the circumstances, the application for leave to appeal must be refused.

Costs

[19] The applicants submitted that the Biowatch principle applies and I find no reason why it would not, despite the respondents seeking costs.

Order

D MLAMBO

JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT

Appearances

For the Applicants: D Mpofu SC; T Seboko and M Qofa Lebakeng instructed by Nkome Inc
For the Respondents: Z Matebese SC and V Mashele instructed by State Attorney, Pretoria
Date of hearing: 11 October 2024 Date of judgment: 27 December 2024

[1] Nzuza and Others v National Director of Public Prosecutions and Others

[2024] ZAGPPHC 335; 2024 (2) SACR 251 (GP) (“main judgment”).

[2] Rule 49(1)(b) of the Uniform Rules.

[3] 10 of 2013.

[4] Id section 17(1)(a).

[5] The first and second respondents.

[6]

[2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014

(5) SA 579 (CC) (“Khumalo”).

- [7] [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (“Molaudzi”).
- [8] [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) (“Knoop”).
- [9] Molaudzi above n 6 at para 33; Knoop id at para 32.
- [10] Molaudzi id.
- [11] [2012] ZASCA 101; 2014 (3) SA 198 (SCA).
- [12] [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); 2007 (1) SACR 408 (CC) at paras 38-9.
- [13] Cassimjee above n 11 where it was found that failure to prosecute an appeal can constitute an abuse of court which can be regulated in terms of section 173 of the Constitution.
- [14] [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (“Gijima”).
- [15] [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (“Buffalo City”).
- [16] Id at para 63.
- [17] I note this as a neutral fact.
- [18] Panday v National Director of Public Prosecutions
- [2020] ZAKZPHC 52; [2020] 4 All SA 544 (KZP); 2021 (1) SACR 18 (KZP) at para 32; Patel v National Director of Public Prosecutions and Others
- [2018] ZAKZDHC 17; 2018 (2) SACR 420 (KZD) at paras 22-24; Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others
- [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).
- [19] Amongst others because the NDPP requested it when considering the applicants representations.
- [20] Para 59 of the main judgment.
- [21]
- [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (“Zuma”) at para 24, citing National Lotteries Board v South African Education and Environment Project
- [2011] ZASCA 154; [2012] 1 All SA 451 (SCA); 2012 (4) SA 504 (SCA) at para 27.
- [22] S v Zonke and Others
- [2023] ZANWHC 31.

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