

SOUTH AFRICA / JUDGMENT

S v Moussa (SS90/2008) [2021] ZAGPJHC 61; [2021] 3 All SA 599 (GJ); 2021 (2) SACR 378 (GJ) (19 May 2021) [2021] ZAGPJHC 61

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

SS90/2008

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGES: YES/NO

(3)

REVISED: YES/NO

CASE NO: SS90/2008

In the matter

between:

THE
STATE
and
MOUSSA
SYLLA
Accused/Applicant

JUDGMENT

STRYDOM J:

[1] This is a criminal matter in which Mr Sylla Moussa (hereinafter referred to as “the accused”) has been arraigned on 16 counts of fraud, a further three counts of fraud, alternatively theft, and on a count of money laundering in contravention of section 40(b)(i) of the Prevention of Organised Crime Act 121 of 1998. (“POCA”)

[2] These counts related to bank accounts conducted in the name of legal entities run by the accused. Generally speaking, the allegations against the accused are that he caused, over a period, the withdrawal of monies against uncleared deposits which ultimately resulted in a loss for Absa Bank.

[3] When the counts were put to the accused he pleaded not guilty to all counts but also pleaded in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977 (“CPA”) which provides:

“(1) When an accused pleads to a charge he may plead –

...

(h) that the prosecutor has no title to prosecute; or”

[4] Prior to the plea, the accused gave notice in terms of section 106(2) of the CPA of his intended plea in this regard. In this notice, the grounds for the plea was stated thus:

“1. The accused submits that the prosecutor has no title to prosecute him on the grounds that the prosecution constitutes an abuse of the court’s process.

2. The accused submits that the continuation of his prosecution in the circumstances of this case brings the administration of justice into disrepute.

3. The accused further submits that a written agreement was made between the accused and the prosecution that on his making payment of the amount of R1,000,000 (one million) to the attorneys of the complainant in the matter, Absa Bank, and on receipt of confirmation from Absa Bank that such payment had been made, the prosecution of the accused would be reconsidered and stopped.”

[5] In this notice it was further stated as follows:

“4. The state represented by the National Prosecuting Authority and in particular, Adv Nerisha Naidoo, on 13 June 2017 entered into a written agreement with the accused, the essential terms of which were as follows:

4.1 That the accused agrees to pay an amount of R1 million to Absa as per arrangement with Absa Bank for legal fees incurred by Absa in recovering money due and payable to it by the accused.

4.2 That the state will deliberate on the matter and provide a final response to Mr Sylla and the court regarding the withdrawal of charges in the matter on 5 September 2017 after confirming with Absa that the agreed amount was paid timeously. It being

contemplated that the charge would be withdrawn on payment of the agreed amount to Absa.

4.3 That the accused did make the repayment timeously and Absa did confirm receipt of the payment.

4.4 That Absa further confirmed in writing that it did not object to the withdrawal of the charges against the accused.

4.5 That the prosecution reneged on the agreement and did not withdraw the charges as contemplated in the agreement between the accused and the prosecution.

5. It is submitted that the agreement made with the state was a binding agreement.

6. It is further submitted that it was contemplated and intended by the parties to the agreement that on

confirmation of receipt of payment of the amount of R1 million to Absa by the accused the charges before court against the accused

would be withdrawn by the state.

7. It is further submitted that in the event that the state represented by the NPA disputes the agreement as understood by the accused, that the agreement and continuing prosecution is an abuse of the court's process.

8. That in such circumstances the prosecution has been compromised and weaponised to act as an extortionist or collecting agent for Absa Bank against the accused.

9. That in such circumstances the accused will not receive a fair trial.

10. That in the circumstances the administration of justice has been brought into disrepute to such an extent that the integrity of the administration of justice can only be redeemed by opponent's stay of the prosecution against the accused."

[6] In this instance the plea does not relate strictly to the title of the prosecutor, but, it has been found that section 106(1)(h) is also of application where the accused contends that the prosecution constitutes an abuse of the court process.

[7] In *Singh v Minister of Justice and Constitutional Development*[1], albeit within the context of a private prosecution, it was found with reference to the ambit of section 106 (1)(h) as follows:

"The provisions of s 106(1) of the Act do not in my view help Mr Blomkamp's contention as s 106(1)(h) of the Act is also of application when it is contended by an accused that the prosecution constitutes an abuse of the court's process. Roper J in Solomon v Magistrate, Pretoria & Another 1950

(3) SA 603 (W) dealt with this point as follows at 607F-H:

‘The process of the Court, provided for a particular purpose, would be used not for that purpose, but for the achievement of a totally

different object, namely for the oppression of an adversary. The Court has an inherent power to prevent abuse of its process by

frivolous or vexatious proceedings (*Western Assurance Co. v Caldwell's Trustee* (1918, AD 262); *Corderoy v Union Government* (1918, AD 512 at 517); *Hudson v Hudson & Another* (1927 AD 259 at 267)), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated,

therefore, this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it.’

This principle was confirmed in the judgment of Hoexter JA in *Phillips v Botha* 1999(2) SA 555 (SCA) where after referring to extracts from the judgment of Roper J in *Solomon v Magistrate, Pretoria & Another* (*supra*) the learned judge of appeal remarked as follows at 565G-I:

‘Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case. (See *Hudson v Hudson & Another* (*supra*) at 268).

The question is whether the private prosecution of the respondent was either instituted or thereafter conducted by the appellant for some collateral and improper purpose, such as the extortion of money, rather than with the object of having criminal justice done to an offender.”

[8] In this matter the court is not dealing with a private prosecution but a prosecution instituted by the Deputy Director of Public Prosecutions (“DDPP”). When the prosecution was instituted many years ago it could not have been argued or suggested that the prosecution was instituted to achieve an ulterior, collateral or improper purpose. Therefore when the prosecution was instituted there could not have been an allegation of abuse of process. The complaint of the accused against the title of the prosecutor is rather underpinned by what transpired some 10 years after being charged. The accused’s complaint is levelled

against the continuation of the prosecution after the prosecutor Adv Naidoo, according to the accused, abused her position to the

detriment of the accused. What the accused's case entails, in my view, is that the prosecutor and the prosecuting authority no longer have "clean hands" for the reasons proffered in the section 106(2) notice and further elaborated through evidence. What was argued is that if a prosecutor abuses his or her position before the accused has pleaded, to the prejudice and detriment of an accused, it will affect the "title" of the prosecution in the broad sense and the accused would be entitled to invoke the section 106(1)(h) plea. The same should apply

if an abuse is committed or condoned by the prosecuting authority.

[9] The applicability and ambit of section 106(1)(h) came under scrutiny by the Appellate Division in *Ndluli v Wilken NO en Andere*.^[2] In this matter the appellant entered into an agreement with the state that he would not be prosecuted on condition that he provided certain information to the state which he did. He was nevertheless prosecuted. The appellant raised the section 106(1)(h) plea that the prosecutor had no title to prosecute as the state breached the agreement not to prosecute.

[10] The court in *Ndluli*^[3] expressed its dismay with the state not honouring the agreement to withdraw the matter in no uncertain terms but did not uphold the section 106(1)(h) plea.

[11] The court looked into the origin of this section and could find no guideline how it should be applied except for in academic writing. The court then interpreted the section to mean that the reference to "prosecutor" is a reference to the prosecutor that appears in court and not to the "State".^[4] In essence the court drew a distinction between the prosecutor in court and the state. This despite the fact that the prosecutor

represents the state and puts charges to an accused not necessarily formulated by the individual appearing in court but by the

prosecuting authority.

[12] In this matter the complaints are levelled against the prosecutor, Adv. Naidoo who appeared in court previously and not when the charges were put to the accused. The complaint is further levelled against the DDPP, Adv Roberts SC (Adv Roberts) who became aware of the agreement entered into between the accused and Adv Naidoo, handed into court as exhibit "X", but, despite his conclusion that the agreement was unlawful, failed to prevent it from being further enforced against the accused.

[13] The complaint against Adv Roberts is a complaint aimed at the prosecuting authority and not against the court prosecutor. Following the ratio of *Ndluli* I am bound to conclude that such complaint against the prosecuting authority or the "state" is not covered by section 106(1)(h). The complaint against Adv Naidoo, who was the court prosecutor at the time of the alleged abuse,

however, is not excluded from the ambit of the section as envisaged in *Ndluli*.

- [14] In our courts prosecutors change regularly, even during trials. In Ndluli the reference to the prosecutor, in my view, is not limited to the prosecutor or prosecutors who appear in court on the day when the charges were put to the accused but rather to any prosecutor who appeared or appears in the matter. To argue differently will mean that any previous abuse of process by a prosecutor could merely be ignored by replacing the court prosecutor. On the day when accused pleaded three prosecutors represented the state, to wit, Mr Pansegrouw, Mr Serepo and Mr Ndou. The aim of the plea was not to attack their “title” to prosecute but rather aimed against Adv Naidoo who appeared when the alleged abuses took place and against the prosecuting authority.
- [15] What the reference to “title” in this section means was not decided in Ndluli as the court focused and decided the case on the meaning of “prosecutor”. In S v Chao[5] a plea in terms of section 106 (1) (h) was also raised. In Chao the court was dealing with an authorization which was required in terms of section 2(4) of POCA before 19 accused were charged in terms of this act. The court followed Ndluli and found that in the normal cause of events section 106(1)(h) of the CPA applies to the title of the prosecutor appearing before the court. The court went further to decide as follows: “In this matter the court is dealing with an authorisation to institute proceedings, which is to be distinguished from the prosecutor’s locus standi and/or his decision to prosecute.” The court made no decision on the meaning of the “title” of the prosecutor and whether such title can be compromised if an abuse of process have been found.
- [16] In Phillips v Botha[6] the court was also dealing with a private prosecution where the private prosecutor obtained a, nolle prosequi certificate and instituted a prosecution against the respondent. The matter was decided on the basis that the requirements of section 7(1) of the CPA Act, dealing with the required interest a private prosecutor must have to obtain locus standi, was not met. This matter had nothing to do with section 106(1)(h) but the court considered what would amount to an abuse of process. The court found as follows:
- “A terse but useful definition of abuse of civil process is to be found in the judgment of Isaac J in the Australian High Court case of Varawa v Howard Smith Co Ltd [1911] HCA 46; (1911) 13 CLR 35 at 91*
- ‘... (T)he term “abuse of process” connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose...’*
- [17] Considering the authorities mentioned hereinabove the title of a prosecutor could be challenged by the accused on the basis that the prosecution constitute an abuse of process. These cases, however, relate to private prosecutors. If a private prosecutor has an ulterior motive with the prosecution, or lacks an interest, or where the injury which was suffered by the private prosecutor was in connection with an illegal and unenforceable contract[7] then the “title” of the prosecutor is lacking. The question remains if this could also apply to a state prosecutor. The reference to “title” in section 106(1)(h) clearly goes beyond the formal

appointment of a person acting as a prosecutor.

[18] What needs to be considered in this matter is whether the prosecutor, Adv Naidoo abused her position during the course of her dealings with the accused and, if so, whether this amounted to an abuse of the court's process. If in the affirmative, whether the behaviour of Adv Naidoo resulted in the prosecutorial authority to loose "title" to prosecute as contemplated in section 106(1)(h). The abuses complained of in this instance transpired after accused appeared in court, long before he pleaded to any counts, during extra curial interactions between the accused and the previous prosecutor, Adv Naidoo and further as to what was said in court by Adv Naidoo during court applications.

[19] Section 108 of the CPA provides:

"If an accused pleads a plea other than a plea of guilty, he shall, subject to the provisions of section 115, 122 and 141(3), by such plea be deemed to demand that the issue raised by the plea be tried."

[20] After the plea was tendered by the accused, the court ordered that the plea should be dealt with separately and upfront germane to a so-called "trial within a trial".

[21] The parties were ad idem that the accused bore the civil onus to prove, on a balance of probabilities, the existence of jurisdictional facts to vest a special plea.

[22] The court will now consider the evidence.

[23] The accused testified and called his erstwhile attorney as a witness. The state called two witnesses, to wit, Ms Alex Wright ("Ms Wright") and Adv Roberts.

[24] The accused testified that on 13 June 2017, he was approached at court by Adv Naidoo, the prosecutor in the matter at the time, who proposed that he pays an amount of R1 million to Absa in respect of legal fees which Absa had incurred in the litigation against him. Adv Naidoo told him that on payment of this amount the "case will go away". He later testified that this meant that the state would withdraw the charges against him. After being informed as such, the accused was advised by his erstwhile attorney, Mr Ratau, to accept the proposal. Mr Ratau and Adv Naidoo then went to Adv Naidoo's chambers and an agreement, exhibit "X", was drafted, which was presented to him.

[25] Exhibit "X" was an agreement between "The State" and Sylla Moussa dated 13 June 2017 and provided as follows:

"1 The accused agrees to pay an amount of R 1 000 000.00 to ABSA Bank as per arrangement with ABSA Bank represented by Ms Alex Wright and the accused."

The accused undertakes to pay the agreed amount as follows:

1 July 2017 an amount of R333 333.33

1 August 2017 an amount of R333 333. 33

1 September an amount of R333 333.33

2 The State will deliberate on the matter further and provide a final response to Mr Sylla and the above Honourable Court regarding the charges in this matter on 5 September 2017 and after confirming with ABSA that the said amounts were timeously paid.

3 The accused also undertakes to finalize any outstanding issues regarding his legal representation before 5 September 2017.

4 A trial date is arranged by arrangement with the respective parties to 16 April 2018. This date is to be marked final for trial by the Court.

5 The accused acknowledges that no further excuses regarding legal representation will be entertained by the above Honourable Court and should the accused not have legal representation to proceed with the trial on 16 April 2018, he undertakes to conduct his trial with all charges proffered against him in person.”

[26] He enquired why it was not specifically stated that the matter would be withdrawn and he was informed that the phrase “the State will deliberate” implied that the charges would be withdrawn. He signed the agreement. Adv Naidoo and Mr Ratau also signed. He testified that there was no doubt between himself and Adv Naidoo that upon payment of the R1 million to Absa, the matter will be withdrawn against him.

[27] He further testified that the he then paid the R1 million in two tranches of R500 000 on 25 May 2018 and 25 August 2018, respectively, albeit not in terms of the time periods set in the agreement for payment. The matter did not proceed on the date stipulated in the agreement and was postponed from time to time to provide him with an opportunity to pay off the full amount.

[28] After his first payment on or about 25 May 2018 he appeared in court seeking permission to travel abroad for business purposes. This application was opposed by Adv Naidoo on the basis that there was still an amount of R500,000 outstanding to Absa and this caused the court to dismiss his application to be allowed to travel to Geneva. He made second payment on 28 May 2018 and expected now that the matter against him will be withdrawn.

[29] The accused further testified that at his next appearance in court Adv Naidoo approached him in tears and advised him that her superiors had refused that the charges against him be withdrawn. She then invited him to make further representations for the withdrawal of the charges which representations were submitted and also refused. According to the accused the state has reneged from the oral and written agreements by not withdrawing the matter. He further testified that he was led to believe that once he paid the R1 million the matter would be withdrawn and as this did not happen, the state had acted as a collecting agent or debt collector for Absa, and Adv Naidoo thereby abused her position as a prosecutor. He was told to make further representations for the withdrawal of the matter. These further representations were also unsuccessful.

- [30] He testified that he previously settled the claim Absa had against his legal entities and himself personally. Exhibits “W1” and “W2” were handed in. In terms of “W1”, dated 14 July 2010, the liquidator would pay Absa R23,5 million. Once this happened Absa would inform the senior prosecutor in the criminal proceedings, instituted as a result of the complaint, that Absa had settled the matter and should the state withdraw the criminal matter, Absa would not object thereto. The agreement “W2”, dated 15 December 2011, cancelled the previous agreement. It stipulated that the amount of R23, 5 million was in fact paid to Absa.
- [31] In terms of exhibit “W2”, the accused would have paid Absa a further R2 million in full and final settlement of Absa’s claim against him personally. It was also stated that upon payment of this amount, Absa would not object to the withdrawal of the criminal charges. The accused testified that the sum of R23.5 million was paid but that the R2 million was left outstanding. Eventually, Absa decided not to pursue the R2 million payment.
- [32] Years later, Absa wanted payment of its legal costs incurred in the amount of R1 million from the accused personally. This R1 million was the amount he was prepared to pay Absa if this would mean that the criminal case was withdrawn. He testified that he would not have paid the amount if the case was not going to be withdrawn by the state.
- [33] In a further letter, Exhibit “Y” Absa confirmed in writing to Adv Naidoo that it would not proceed with further litigation against the accused once it received the payment of the R1 million. Ms Wright, the attorney for Absa, eventually confirmed in writing that the funds had been paid and that Absa would not pursue further litigation against the accused.
- [34] Under cross examination, he was extensively asked about the terms of the written agreement, exhibit “X”, which only referred to “deliberate on the matter further” after payment was made in full. He testified that he understood the word “deliberate” to mean that a discussion would take place but that the matter would have been withdrawn. He emphasised that he would not have paid the R1 million under his difficult financial circumstances if the withdrawal of the matter was only going to be considered. He testified that if the intention was not to withdraw the matter, the state extorted money from him to pay a third party and thereby acted as a debt collector for Absa Bank. He testified that the matter was postponed on several occasions to afford him the opportunity to pay the R1 million. It was told to court that the agreement was made an order of court which was never the position. He stressed that it was not him but the state that initiated the process that led to the agreement which was entered into.
- [35] Reference was also made to two letters, exhibits “Z1” and “Z2” attached to the notice in terms of section 106(1)(h). In these letter the attorney for Absa Mr Wright informed Adv Naidoo and the accused that once the R1 million was paid, Absa would not have continued with any further litigation against accused.
- [36] When asked whether his attorney Mr Ratau objected to the use of the word “deliberate”, he said Adv Naidoo came with the contract and she told him in the presence of Mr Ratau that the case will be withdrawn. This, Mr Ratau also told him despite the wording of the

agreement. He denied that it was him that approached Adv Naidoo and not the other way round. He was adamant that she approached him. It was put to him that Adv Naidoo did not approach him in tears informing him that the matter would not be withdrawn. He reiterated that this was what happened.

- [37] Mr Ratau then testified. He is the erstwhile attorney for the accused and on 13 June 2017, while at court with the accused he was informed by him that he was approached by the prosecutor, Adv Naidoo with a proposal in terms of which he had to pay an amount of R1 million for the legal costs of Absa. He then engaged with Adv Naidoo who confirmed to him that as soon as the accused paid the amount the charges may be withdrawn. He was informed that the prosecutor engaged with Absa and that they will not oppose the withdrawal of the matter. He was also a signatory to the agreement exhibit "X". He confirmed that Adv Naidoo was the draftsperson of the agreement. He just read it and signed it. He stated that if you read the contents of exhibits "W1" and "W2" (the agreements with Absa) the state will deliberate with Absa and he was convinced that Absa will not oppose the withdrawal. He said that although the word "deliberate" was used, there was no reason to doubt that the matter would have been withdrawn upon payment of the amount of R1 million. He said that he understood the agreement to mean that the state, after payment was made, would come back to the accused regarding the withdrawal of the charges.
- [38] During cross examination he said there was no reason to doubt the authority of Adv Naidoo as she worked for the National Prosecuting Authority. He said that he got the impression that she was also acting on behalf of Absa Bank because she continually said she would talk to the bank and would revert back to the accused.
- [39] He confirmed that the accused informed him that he was told by Adv Naidoo that if the payment was made, the matter against the accused would be withdrawn. There was however no assurance about the withdrawal made in his presence. When pressed to agree that his version and that of the accused was different and that the accused was lying when he stated that it was said in his presence that the matter would be withdrawn, Mr Ratau said that it might have been the impression of the accused that this would have been the outcome if he paid the R1 million. He said it might have been the layman's impression of the situation. He said that what Adv Naidoo said in his presence was that if the R1 million was paid the state would consult with Absa and then it would be considered to withdraw the charges.
- [40] Mr Ratau testified that the other clauses in the agreement relating to the continuation of the trial was what would have transpired if the R1 million was not paid. He testified that the intention of the parties when entering into the contract was to secure the freedom of his client. He said that the reference to the word "deliberate" in the contract was to deliberate with Absa Bank. He said that he and the accused believed that upon payment, the case would be withdrawn. He testified that if the National Prosecuting Authority was not involved in this agreement, his client would not have paid Absa the R1 million. He testified that the National Prosecuting Authority was not a debt collector.

- [41] This concluded the case on behalf of the accused on his section 106(1)(h) plea.
- [42] The state then called Ms Alex Wright, the attorney who represented the complainant, Absa, in the civil litigation.
- [43] She testified that the civil claims instituted against the accused's companies became settled on 13 December 2010 when the bank accepted the dividend in the amount of R23,500,000 in full and final settlement of the claims which the bank had against the companies.
- [44] She testified about the two agreements exhibits "W1" and "W2". In these agreements dated 14 July 2010 and 15 December 2011 respectively, it was stipulated that once Absa received payment it would not object to criminal charges being withdrawn against accused.
- [45] She stated that the bank had been very careful not to get involved in the decision to prosecute the accused but had agreed to not object to the withdrawal of the charges against the accused should the state decide to do so. She stated that the bank had two outstanding costs orders against the accused but denied that she had anything to do with an agreement between the accused and the state whereby the accused undertook to pay Absa R1 million. She however conceded that she had been contacted telephonically by Adv Naidoo on 23 February 2016 during which she had confirmed an undertaking not to proceed with litigation against the accused once the amount of R1 million, as agreed, was paid by him to Absa. She confirmed having received an email from Adv Naidoo

which was handed in as Exhibit "V20". In this email Adv Naidoo sought an undertaking that Absa would not proceed with litigation against the accused once the R1 million was paid to Absa by the accused. In this letter Adv Naidoo wrote as follows:

"Kindly be assured that your written confirmation is solely for the purpose of putting forth the facts to the Director of Public Prosecutions, Gauteng Local Division, Johannesburg in order to decide on the way forward in respect of the representations made on behalf of Mr Sylla and to facilitate payment to ABSA if the representations is decided in favour of Sylla".

- [46] Ms Wright responded to this request and confirmed that Absa would not proceed with further litigation.
- [47] When challenged during cross examination that this payment of R1 million was linked to a withdrawal of the matter against the accused, Ms Wright was not willing to concede that the payment was tied to the withdrawal of the charges. She testified that during 2017 when the agreement, exhibit "X", was entered into she had no correspondence with Adv Naidoo. She never asked Adv Naidoo to assist her or Absa to get the R1 million from the accused.
- [48] The next witness for the state was Adv Roberts. He testified that he was the Deputy Director of Public Prosecutions ("DDPP") in the Johannesburg office of the National Prosecuting Authority ("NPA") and was tasked with overseeing the prosecution of the accused. He testified that a DDPP is responsible to decide to prosecute an accused and also to stop a prosecution. Adv Naidoo never had such authority. He testified about previous

representations which were unsuccessfully made by the accused which he considered. It was never the intention of the NPA to withdraw the charges against the accused.

[49] When Adv Naidoo approached him with the signed agreement, exhibit “X”, he was shocked that she entered into such an agreement. In his 40 years of practice as a prosecutor in the NPA he had never seen such an agreement signed by a prosecutor. He stated that as far as he was concerned, the agreement was unlawful and did not fall within the authority of the NPA and was done without his consent or knowledge. At that stage he decided not to instruct Adv Naidoo to withdraw the agreement as he thought that the agreement was not prejudicial to the NPA and allowed the agreement to stand. He stated that Adv Naidoo did

not have the requisite authority in the hierarchy of the prosecuting authority to sign agreements on behalf of the NPA.

[50] Despite the fact that he considered the agreement to be unlawful, he claimed in an affidavit, exhibit “S”, that the state had fulfilled its obligations in terms of the unlawful contract by deliberating on the charges and communicating the outcome

of such deliberations to the accused. He stated that the accused did not fulfil his obligations in terms of the agreement.

[51] Adv Roberts signed the letter dated 17 September 2018 addressed to the accused, Exhibit “U34”, in his official capacity as DDPP in terms of which he informed the accused that his representations were not successful and that the prosecution would continue. This was on a date after the final R500 000 was paid by accused.

[52] After the evidence of Adv Roberts was concluded, the matter stood down to 22 February 2011 for the evidence of Adv Naidoo. Adv Naidoo failed to appear and it was suggested by the court that a virtual link should be set up to receive her evidence. The court stood down for this purpose. It was then placed on record by Mr Pansegrouw on behalf of the state that Adv Naidoo remained reluctant to testify and the state then decided to apply for her evidence to be accepted by way of affidavit in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 instead of calling Adv Naidoo.

[53] The court considered the application to accept an affidavit of Adv Naidoo as evidence in this matter, but ruled the affidavit to be inadmissible evidence. A separate judgment was delivered in this regard and nothing further needs to be said in this judgment concerning this.

[54] After the court ruled that the affidavit of Adv Naidoo would not be admitted as evidence, the state called no further witnesses.

[55] Mr Brown, acting for the accused, handed in the record of previous proceedings in this matter. During the evidence of the accused, reference was made regarding what was said at the previous hearings of the matter by Adv Naidoo to the court. Adv Brown indicated that he wanted to take it up with Adv Naidoo when she testified. When the state did not call her, he

applied for the record of proceedings to be accepted as evidence. The court considered the application and provisionally allowed the record of proceedings, which included judgments in this matter, to be accepted as evidence. The court indicated that it would later rule on its admissibility.

[56] During argument, both parties referred to what was stated in the record of proceedings which included an affidavit of Adv Naidoo.

[57] Section 235 of the CPA provides as follows:

“(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copies shall be prima facie proof that any matter purporting to be recorded thereon was correctly recorded.”

[58] The record of the transcriptions contain transcriber’s certificates and that portion of the bundle handed to court as exhibit “P” will be received as evidence in terms of section 235 of the CPA. The transcriptions will only serve as prima facie proof of what is contained in the record.

[59] Also part of the record is a written judgment by Keightley J which the court will be entitled to refer to as this is a matter of public record.

[60] The other documents, which mostly consist of applications and affidavits and annexes thereto contained in exhibit “P” from p138 to p201, the court will not admit as evidence in this application as same remains hearsay evidence. This includes an affidavit of Adv Naidoo which was made in the application for her removal as prosecutor. Moreover, the probative value of her evidence contained in an affidavit is minimal and does not advance the case for the state.

[61] On a perusal of the record of previous proceedings in this matter the following becomes evident:

61.1 It was stated by Adv Naidoo on behalf of the state in court that exhibit “X”, the agreement entered into between the state and the accused was made an order of court.

61.2 It was stated by Adv Naidoo that the amount of R1 million was in respect of legal fees owing to Absa.

61.3 It was stated by Adv Naidoo that the payment of the outstanding R500 000 was delaying a deliberation on the withdrawal of the matter against the accused.

61.4 It was stated by Adv Naidoo that the complainant obtained a civil judgment against the accused for the payment of R1 million and that the accused must still pay the remaining R500 000.

61.5 It was stated by Adv Naidoo that because the accused had not paid the full amount of R1 million stipulated in exhibit “X” that the prosecution was unable to consult with Absa or its legal representatives in order to obtain their view on representations which had been made by the accused regarding the withdrawal of the charges.

61.6 That Adv Naidoo was made aware by Judge Mokgoathleng that the agreement the state was relying on to coerce the accused into paying Absa an amount of R1 million was an illegal contract.

61.7 The state opposed the accused’s application to get permission from court to travel to Geneva on the basis that he has still not paid the outstanding R500 000 in terms of the agreement.

[62] On a consideration of all the evidence in this matter, the majority of the issues are in fact common cause.

62.1 It is common cause that the state, represented by Adv Naidoo, on 13 June 2017, entered into a written agreement with the accused in terms of which the accused agreed to pay an amount of R1 million to Absa as per an arrangement with Absa represented by Ms Alex Wright, in three equal instalments of R333 333.33 on 1 July 2017, 1 August 2017 and 1 September 2017 and that the state will deliberate on the matter further and provide a final response to the accused and the court regarding the charges in the matter on 5 September 2017 and after confirming with Absa that the agreed amount was paid timeously.

62.2 That the accused did make the agreed payment, although not timeously as per the agreed dates.

62.3 That Absa confirmed receipt of the full payment.

62.4 That Absa further confirmed in writing that it would not continue with any litigation against the accused.

62.5 That Adv Naidoo informed a previous court that this agreement was made an order of court whilst this was not the situation.

62.6 That when the accused applied for permission to travel abroad, the outstanding payment of R500 000 was used against him in opposing that application.

62.7 That the state advised the accused on 17 September 2018 by letter as follows:

“After careful consideration of your representations dated 29 May 2018 and confirmation that Absa Bank will not proceed against you with further litigation, it has been decided that the prosecution must proceed.”

[63] What is not common cause between the parties is that Adv Naidoo informed the accused prior to the signing of the written agreement, exhibit “X”, that should he pay the R1 million the matter against him will be withdrawn.

- [64] The evidence of the accused that he was approached by Adv Naidoo to enter into this agreement remains uncontested as well as his evidence that Adv Naidoo, in tears, informed him of the decision of the Director of National Prosecutions that the matter would not be withdrawn.
- [65] Whether Adv Naidoo informed the accused that the matter would be withdrawn if he pays the R1 million should be considered in light of the acceptable evidence and the probabilities. In my view the accused's evidence was credible and although he was not always clear in his presentation of his version, it cannot be rejected as false. His version of what transpired between him and Adv Naidoo when she approached him with the suggestion to pay Absa stands uncontested. It was not countered by any other admissible evidence. Despite this, the court will have to consider whether it is probable that Adv Naidoo would have told the accused that the matter will be withdrawn if the payment was made. The probability which favours the accused's version is that he would not have committed to pay, and in fact paid, R1 million merely for the state to deliberate further on the matter whether the case should be withdrawn.
- [66] From the state's perspective, the version that there was no undertaking to withdraw the matter is supported by the contents of the written agreement which only referred to further deliberation on the matter once payment was made. Adv Naidoo must have realised that she did not have the authority to withdraw the matter. On the other hand, she might have been so confident that this would happen that she could have told the accused that the matter will be withdrawn. It will further explain why she did not pertinently mention in the agreement that the matter will be withdrawn. That Adv Naidoo was confident that the matter was going to be withdrawn is further underpinned by her insistence to delay the matter to afford the accused the opportunity to make full payment despite him not meeting the original deadline stipulated in the agreement. Moreover, the court is mindful that the written agreement may not provide a true reflection of the prior arrangement between the parties but this is not the issue before court.
- [67] I am of the view that the version of the accused is more probable than that of the state which, without the evidence of Adv Naidoo, was totally reliant on the terms of the agreement. It seems highly improbable that the accused would have paid the R1 million, under his difficult financial circumstances, if he did not firmly believe that the matter would have been withdrawn against him once payment was made. This belief could only have been created by what Adv Naidoo told the accused. Add to that, the fact that Adv Naidoo approached the accused with the proposal and later approached him in tears when the matter was not withdrawn. This

is indicative of a conclusion that she told him that the case would be withdrawn. From Absa's perspective, it had already agreed a long time ago during 2010 / 2011 that if payment of the original debt was made it would not object to the withdrawal of the matter by the state.

[68] Mainly this matter does not concern the authority of Adv Naidoo to enter into this agreement with the accused, nor whether evidence would be permissible to indicate what true the intention of the parties was when the agreement was entered into nor the lawfulness of the agreement at the time it was entered into. The question is rather what the effect of the agreement is in relation to the accused's plea in terms of section 106(1)(h). Did it constitute an abuse of prosecutorial powers which brought the administration of justice into disrepute and if so, would this constitute an abuse of the court process? If so, whether the title of the prosecutorial authority has been tarnished to the extent that the section 106(1)(h) plea should be upheld as the integrity of the administration of justice can only be redeemed by a permanent stay of the prosecution against the accused.

[69] The accused's case on a consideration of the evidence is premised on the following grounds:

69.1 Adv Naidoo informed the accused that the matter will be withdrawn once he paid the R1 million which later did not happen.

69.2 That Adv Naidoo on behalf of the state entered into an agreement with the accused which had no foundation in the CPA or any other legislative authority. It was an agreement in favour of the complainant Absa.

69.3 That the agreement moved the accused to pay R1 million to Absa which he would not have done within the context of his continuing criminal case.

69.4 That on the state's own version payment by accused of the R1 million in terms of the agreement prevented the state from considering the representations of the accused.

69.5 That the fact that he at some stage had still not paid the full outstanding amount was used against accused to oppose his application to travel abroad. Adv Naidoo misled the court by informing the court that the agreement was made an order of court. As such she failed to act in good faith.

69.6 That even after Adv Roberts concluded that the agreement was unauthorised and unlawful Adv Naidoo continue to force compliance to its terms and did nothing to prevent payment to be made to a third party in terms of the agreement. She rather insisted that payment should be made.

[70] Before evaluating the matter it should be stated what is expected of a prosecutor when performing his or her functions.

[71] Section 179(4) of the Constitution of the Republic of South Africa, 1996 provides that: "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[72] The national legislation concerned is the National Prosecuting Authority Act 32 of 1998 ("the NPA Act") of which two sections are relevant for present purposes, namely section 32 and section 22(6). Section 32 provides as follows:

“(1)(a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law”. (My underlining)

- [73] The oath and affirmation prescribed in subsection 2(a) of the same section also contain the words “enforce the law of the Republic of South Africa without fear, favour or prejudice”. Section 22(6) of the NPA Act requires the National Director of Public Prosecutions to frame a code of conduct, and provides that such code shall be complied with by the prosecuting authority which in terms of section 4 of the NPA Act, comprises the National Director, Deputy National Directors, Directors, Deputy Directors and Prosecutors.
- [74] The Code of Conduct for Members of the National Prosecuting Authority which was framed by the NDPP in terms of section 22(6)(a) of the NPA Act, and is binding on all members of the Prosecuting Authority[8] contains provisions pertaining to independence and impartiality. In relation to the latter, it provides that prosecutors should perform their duties without fear, favour or prejudice. In particular, they should-
- 74.1 Carry out their functions impartially and not become personally, as opposed to professionally, involved in any matter;
- 74.2 Avoid taking decisions or involving themselves in matters where a conflict of interest exists or might possibly exist;
- 74.3 Avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;
- [75] The Code of Conduct also provides that “prosecutors must - be individuals of integrity whose conduct should be honest and sincere; respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution...and strive to be and be seen to be consistent, independent and impartial...”
- [76] It is important to note that there is a constitutional imperative to carry out the prosecution policy and directives as the Constitution uses the peremptory ‘must’ in stipulating those duties of the prosecution authority.
- [77] A prosecutor should act within the prescribed legislative framework when dealing with the prosecution of an accused. An act of a prosecutor exceeding a statutory power is invalid under the Constitution according to the doctrine of legality.[9]
- [78] It was argued on behalf of the accused that what had transpired should move the court to find that it offends the court’s sense of justice and propriety. This finding should be made in our constitutional dispensation in order to prevent the criminal processes from being used for purposes alien to the administration of justice under law and suffused with the principles of our Constitution. It was argued that Adv Naidoo entered into this agreement and persisted in its performance thereby the court

processes were being employed for ulterior purposes or in such a way to cause improper vexation and oppression. She has taken a deliberate and conscious decision to facilitate the payment to Absa because she explicitly stated as such in her email exhibit “V20”.

[79] It was submitted that the discretion conferred on the prosecuting authority are not unfettered as prosecutors must exercise their discretion and powers in good faith so as to promote the statutory purpose for which they are given. This was not done by Adv Naidoo.

[80] Further it was argued that the constitutional principle of legality requires that a decision maker exercise the powers conferred on her lawfully, rationally and in good faith.

[81] It was argued that the real focus is on the misuse of the court’s processes by those responsible for the fair and just administration of the law. To continue with the prosecution would be so inconsistent with recognised purposes of the administration of criminal justice that should the prosecution continue on its merits it would tarnish the court’s own integrity or offend the court’s sense of justice and propriety.

[82] On behalf of the state it was argued that in terms of section 179(2) of the Constitution –

“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.”

[83] It was argued that the NPA exercised its discretion to institute proceedings against the accused and to continue therewith.

[84] It was argued that the accused’s evidence cannot be accepted and that he failed to discharge the onus to present credible evidence that indicates any abuse on the part of the NPA. The prosecution has never been wrongful as it has never been brought for an improper purpose, the prosecution being a constitutional duty and prerogative, and also whereas reasonable and probable grounds for prosecuting are present, as evidenced by the indictment, the existence of which is undisputed.

[85] It was argued that there is no evidence that the state had an ulterior motive in instituting or continuing the prosecution against the accused and that what transpired between Adv Naidoo and the accused did not alter the position. It was then submitted that there are no objective grounds for a finding of any abuse of the court’s processes in this matter.

[86] In the alternative it was argued that even if the court should find that what Adv Naidoo did by entering into the agreement with the accused amounted to an abuse of process, such would not warrant an intervention by the court in the form of putting an end to the constitutionally mandated prosecution.

Evaluation

[87] The court has found on the facts that Adv Naidoo informed the accused that upon payment of the amount of R1 million the matter against him will be withdrawn.

- [88] The accused in this matter did not bring an application to this court to enforce the agreement to withdraw the matter but elected to rely of section 106(1)(h).
- [89] In *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)*[10] Uijs AJ, in a matter where the state reneged on a prior agreement to withdraw the matter against the accused upheld that agreement. The court acknowledged that the Director of Public Prosecutions remained possessed of a discretion and remained clothed with the authority to decline to prosecute an accused but found as follows:
- “I am accordingly of the view that it would be appropriate for me to interfere in the decision-making of respondent in the instant matter if justice dictates that it should do so.”*[11]
- [90] In the *North Western Dense Concrete CC* the court ultimately ordered a permanent stay of prosecution on the basis that this prior agreement existed between the accused and the prosecutor to withdraw the matter. The matter of accused is different as reliance was placed on section 106(1)(h).
- [91] In my view Adv Naidoo must have been aware that she did not have the authority to withdraw the matter against the accused. Despite this she created the impression with the accused that upon payment of R 1 million to the complainant the matter would be withdrawn. She abused her position by informing the accused as such. She created an expectation that the matter will be withdrawn.
- [92] Even on the state’s version, that no undertaking was given by Adv Naidoo that the matter would be withdrawn, she should not have entered into an agreement with the accused that only after payment of R1 million to Absa the state would deliberate on the withdrawal of the matter. She had no authority to enter into agreements on behalf of the state and must have been aware of it. Adv Naidoo acted as a facilitator on behalf of a third party, Absa, for the payment of R1 million for incurred legal costs.
- [93] The most serious abuse in my mind came about when Adv Naidoo informed the court that the agreement, exhibit “X”, was made an order of court whilst this was not the position. By informing the court as such she did not act in good faith, alternatively, made a mistake, but unfortunately she did not come to court to explain herself. When she opposed the accused’s application to travel aboard she persisted that payment should be made in terms of an unlawful agreement. She did this to the detriment of the accused.
- [94] The principle underpinning the concept of an abuse of process doctrine is the maintenance of public confidence in the administration of justice described thus in jurisdictions outside of the Republic of South Africa:

“It is essential to keep in mind that it is the “process of law”, to use Lord Devlin’s phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase “abuse of process” by itself does not give sufficient emphasis to the principle

that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general.”[12]

- [95] It is in this context that the actions of the prosecution in this matter, through the agency of Adv Naidoo, must be examined.
- [96] The mandate and functions of the National Prosecuting Authority is carefully and clearly circumscribed by section 179 of the Constitution and the NPA Act.
- [97] Such mandate and functions do not include the facilitation of payments of legal fees between litigants in civil disputes by using the immense coercive powers of the right and discretion to institute and withdraw prosecutions.
- [98] I am in agreement with the submission on behalf of the accused that a prosecutor should act within the constitutional framework and legislation created to circumscribe the powers, obligations and duties of prosecutors, read with the Code of Conduct for Members of the National Prosecuting Authority. Adv Naidoo got personally involved in this matter and provided wrong information to court. Through her actions, even if it was inadvertently done, she favoured the complainant at the detriment of the accused.
- [99] The accused, on a balance of probabilities, has proven that Adv Naidoo abused her position as prosecutor. It can, however, not be found that the institution or continuation of the prosecution would constitute an abuse of the court processes. The accused has not shown that the prosecution is conducted for an ulterior motive or is vexatious or is frivolous or designed to oppress the accused.
- [100] Moreover, the question remains whether the abuses of Adv Naidoo affected the title to prosecute as contemplated in section 106(1)(h).
- [101] To decide this the court must consider who is vested with the decision or title to prosecute. The indictment in this matter was signed by a DDPP. The court prosecutor or prosecutors, including Adv Naidoo, are not vested with title to prosecute beyond the right to represent the prosecuting authority in court. Adv Roberts explained in evidence that it was the Director of Public Prosecutions (“DPP”) or the DDPP’s prerogative to institute or stop a prosecution. In Ndluli, supra, the court found that the reference to prosecutor in the relevant section relates to the prosecutor who appeared in court. In ordinary criminal proceedings there is not the same nexus between the prosecutor and the person who holds the title to prosecute as one will find in a private prosecution. A private prosecutor is the person who meets the requirements of section 7(1) of the CPA and continue with such prosecution. Such person will have title to institute a prosecution. If such a person institute a prosecution for an ulterior purpose that will constitute an abuse of process

which will affect the title of the private prosecutor within the meaning of section 106(1)(h). The same would apply to a private

prosecutor that never complied with the criteria of section 7 in the first place. In the case of accused the court prosecutor and title to prosecute are not connected as such. The abuses of the court prosecutor did not affect the title to prosecute, which vest in the prosecutorial authority as represented by the DPP or DDPP. The accused has failed to show that what

transpired in this matter with reference to what Adv Naidoo did falls within the ambit of section 106(1)(h).

[102] Consequently, the accused's plea in terms of section 106(1)(h) of the CPA cannot be upheld.

[103] The following order is made:

The accused's plea in terms of section 106(1)(h) of the CPA is not upheld.

R STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing: 15 March 2021

Date of judgment: 19 May 2021

Appearances:

On behalf of the applicant: Adv. Brown

Instructed by Mr T.P Phalane

On behalf of the State: Adv. Pansegrouw

Adv. Serepo

Adv. Ndou

[1] 2009 (1) SACR 87 at 92I – 93A-C.

[2]

[1990] ZASCA 107; 1991 (1) SA 297 AD.

[3] “Die appellant se beweringe staan dus onbetwis en onverduidelik. As hulle waar is, is dit ‘n ontstellende kommentaar op die regspleging in hierdie saak, wat nie goed te keur is nie. Die integriteit van die Prukureur-generaal en van sy aanklaers in die uitoefening van hul pligte moet altyd bo verdenking staan” (page 302 H-I)

- [4] See Ndluli, *supra*, at 306C where the court found as follows:” Na my mening dus verwys die woord die ‘aanklaer’ in art 106(1)(h) by ‘n vervolging van Staatswee nie na die Staat nie, maar na die persoon wat in die hof as aanklaer optree. Die beswaar wat so ‘n pleit inhou is ‘n beswaar teen die reg of bevoegdheid van daardie persoon om as aanklaer in die saak op te tree.”
- [5] 2009 (2) SA 595 CPD at 616 E-H to 617 A-C
- [6]
- [1998] ZASCA 105; 1999 (2) SA 555 SCA
- [7] See Singh *supra*. See also Phillips v Botha 1995
- (2) SACR 228 (W); S v Delport & others 2015 (1) SACR 620 (SCA) at para [17].
- [8] GG 33907 of 29 December 2010.
- [9] See: Pharmaceutical Manufacturers Association of South Africa and others: In re Ex Parte president of the Republic of South Africa and others 2000(2) SA 674 (CC) at para [50]
- [10] 1999 (2) SACR 669 (CPD).
- [11] North Western Dense Concrete CC, *supra* at 681G.
- [12] Moevao v Department of Labour [1980] 1 NZLR 464 (CA)

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