

SOUTH AFRICA / JUDGMENT

S v Zuma and Another (Reasons) (CCD30/2018) [2024] ZAKZPHC 80 (11 September 2024) [2024] ZAKZPHC 80

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Chili

CASE / FILE NUMBER

CCD30/2018

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: CCD30/2018

In the matter between:

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA

FIRST ACCUSED

THALES SOUTH AFRICA (PTY) LTD

SECOND ACCUSED

REASONS

FOR ORDER

Delivered on. 11/09/2024

Chili J:

- [1] I was requested to furnish reasons for the order which I made on 20 March 2024, dismissing Mr Zuma's application for the removal of Mr Downer as the Public Prosecutor in these proceedings, to enable Mr Zuma to bring an application for leave to appeal. The request was allowed and the reasons now follow.
- [2] In paragraph 100 of his founding affidavit, Mr Zuma premised his request for the removal of Mr Downer as a public prosecutor on four pillars namely:
- (a) The private prosecution of Mr Downer;
 - (b) The nature of the charges levelled against Mr Downer, described as the 'information leaking incident of 2021';
 - (c) The nature of the charges pertaining to the '2008 information leaking incident'; and
 - (d) Further and additional considerations, which also have the effect of disqualifying Mr Downer.
- [3] Most importantly, in paragraph 101 of his founding affidavit, Mr Zuma stated that any single one of the above mentioned grounds would be enough to justify the granting of the relief sought. He proceeded to state that cumulatively, all these grounds provide an insurmountable hurdle for Mr Downer's intended continuation in the role of lead prosecutor and/or prosecutor in the public prosecution.
- [4] I begin with pillar 1, the private prosecution of Mr Downer. Mr Zuma's request for the removal of Mr Downer as public prosecutor is anchored on the private prosecution of Mr Downer. It was argued that if Mr Downer were to prosecute Mr Zuma today, and then be prosecuted by Mr Zuma the next day, the society would make a mockery of our justice system. If that were the position, then I would not have hesitated to grant an order removing Mr Downer as a public prosecutor. But that is not the position. As things stand, there is no private prosecution. All attempts by Mr Zuma to prosecute Mr Downer have been unsuccessful. I might just add that, as at the date of the hearing of argument in the present application, the Supreme Court of Appeal had already made a factual finding that the attempt by Mr Zuma to prosecute Mr Downer amounted to an abuse of process.[1] The Supreme Court of Appeal held as follows:

'The facts demonstrate that the private prosecution of Mr Downer is an abuse of the process of the court, for multiple reasons: first, as the High Court found, it was instituted as a further step in a sustained attempt by Mr Zuma to obstruct, delay and prevent his criminal trial – this is an ulterior purpose, and the institution of the private prosecution was accordingly unlawful; second, it was instituted in order to have Mr Downer removed as the prosecutor in Mr Zuma's trial – this too is an ulterior purpose, which renders the private prosecution unlawful; and, third, the contemplated private prosecution is patently a hopeless case. It is obviously unsustainable. Mr Zuma has not made out any possible basis on which Mr Downer might be convicted, even on Mr Zuma's own version of the facts. This, too, renders the private prosecution an abuse of the process.'

[5] Pillar 2 relates to the alleged leaking of Mr Zuma's private and confidential information to Ms Maughan. It was argued on behalf of Mr Zuma that the fact that Mr Downer is facing a serious charge of disclosing the confidential or private medical information of Mr Zuma to Ms Maughan, in breach of s 41(6) of the National Prosecuting Authority Act 32 of 1998, disqualifies him as a prosecutor in the present matter. Firstly, Mr Downer denied having disclosed Mr Zuma's medical information to Ms Maughan, and secondly, the issue pertaining to the release of Mr Zuma's medical information to Ms Maughan was thoroughly canvassed by Koen J in a removal application brought by Mr Zuma in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977. In his judgment, Koen J found, as an undisputed fact, that Mr Downer made no such disclosure to Ms Maughan.[2] A similar finding was arrived at by the full court of this division.[3] This finding was again confirmed by the Supreme Court of Appeal.[4] It is important to note that every attempt to overturn Koen J's judgment has been unsuccessful. Findings made in the removal and private prosecution judgements are binding on this court.

[6] I now turn to deal with pillar 3, the alleged leaking of information to Mr Sam Sole. Again, the issue pertaining to the conversation between Mr Downer and Mr Sole has been dealt with several times at various litigation stages. Firstly, it formed part of the spy tapes which were utilised by Mr Zuma with the view of persuading the then Acting National Director of Public Prosecution, Mr Mpshe, to withdraw the charges against Mr Zuma during April 2009.[5] It again surfaced before Koen J. It was again dealt with by the full bench of this division, and ultimately the Supreme Court of Appeal. In his judgment, Koen J made a finding that Mr Zuma's accusations were 'based on speculation, unsupported by

admissible evidence'. [6] It is important to note that Mr Downer, in his answering affidavit, disputed having disclosed any information to Mr Sole relating to Mr Zuma's case. In paragraph 118.5 of his answering affidavit, he pointedly stated:

'I merely described in the abstract, the mechanisms by which the NPA obtain mutual legal assistance.'

It is worthy to be note that in response to the above, Mr Zuma merely stated in paragraph 97 of his replying affidavit:

'Here it was Mr Breytenbach who initiated the conversation, to achieve his own ends or those of the prosecution team. Mr Downer joined into the enterprise and wilfully associated himself with its criminal objective. In any event the remarks of Koen J relied upon were not directed at the matter involving Mr Sole.' (My emphasis.)

[7] Pillar 4 related inter alia, to Mr Downer's indispensability. In argument, Mr Mpofu submitted that Mr Downer is not indispensable and added that if he were to be removed as a prosecutor, the defence will be ready to instantly proceed with the trial. This argument is not supported by the evidence. In paragraph 159 of his founding affidavit, Mr Zuma stated:

‘It is, in my opinion, also very doubtful whether the current members of the prosecution team who have been inextricably involved in the current legal prosecution would qualify but that is not an issue which requires the adjudication of this court at the present moment.’

[8] In response, Mr Budlender argued that the question for determination is whether our system allows an accused person to abuse the process by electing the prosecutor of his/her choice. He proceeded to say that if such a process were to be allowed, that would become a standard tool in the toolbox for well-resourced accused persons to abuse the process. He further expressed the view that our law does not tolerate such a process. There is merit in this argument.

[9] Mr Downer advanced numerous practical reasons why he should be retained as a public prosecutor, including the complexity of the matter, preparation for trial, availability of suitably qualified prosecutors, and the financial prejudice to the State.[7] It is worth mentioning that except for reiterating that Mr Downer is not indispensable, Mr Zuma did not deal with any of the above

reasons

in his replying affidavit.[8]

[10] To conclude, I am satisfied that there is merit in the submission that the grounds advanced by Mr Zuma were sufficiently dealt with in previous litigation. In his own words, Mr Zuma stated in paragraph 160 of his founding affidavit that he is aware that some of his ‘atmospheric issues had already been dealt with in previous litigation’, albeit in pursuit of different causes of action. He concluded by stating

‘whichever way they may have been construed in such previous litigation, they are now invoked merely to demonstrate that the overall atmosphere is sufficiently poisoned and too toxic to permit for any fair trial if Mr Downer is or remains a prosecutor in the public prosecution brought against me.’

[11] Having considered all the grounds relied upon by Mr Zuma, both individually and cumulatively, I was unable to conclude that Mr Zuma’s right to a fair trial would be violated if Mr Downer remained the prosecutor in this matter. Those are the reasons for the order I granted on 20 March 2024.

CHILI J

[1] Zuma v Downer and another [2023] ZASCA 132; [2023] 4 All SA 644 (SCA) para 11 (‘SCA judgment’).

[2] S v Zuma and another

[2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) (‘Removal judgment’).

[3] Maughan v Zuma and others [2023] ZAKZPHC 59; [2023] 3 All SA 484 (KZP) ('Private prosecution judgment') and Maughan v Zuma and another; Downer v Zuma and another

[2023] ZAKZPHC 75.

[4] SCA judgment para 12,

[5] Private Prosecution judgment 110.

[6] Removal judgment para 233.

[7] See Mr Downer's answering affidavit paras 82-93.

[8] See Mr Zuma's replying affidavit paras 75-79.

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